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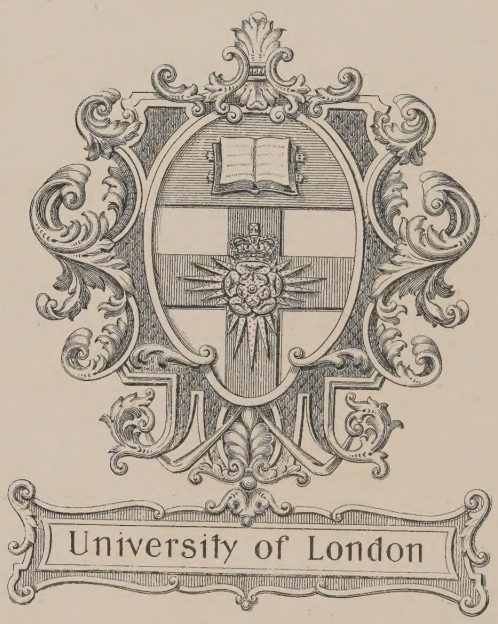

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FIRST REPORT

FROM

HIS MAJESTY'S COMMISSIONERS

ON

CRIMINAL LAW.

DATED 24 *June* 1834.

Ordered, by The House of Commons, *to be Printed,*
30 *July* 1834.

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COMMISSION.

WILLIAM THE FOURTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland King, Defender of the Faith: To our trusty and well-beloved *Thomas Starkie*, *Henry Bellenden Ker*, *William Wightman*, *Andrew Amos* and *John Austin*, Esquires, Greeting: WHEREAS We have thought it expedient, for divers good causes and considerations, that a Commission should forthwith issue for the purpose of digesting into one Statute all the Statutes and Enactments touching Crimes, and the trial and punishment thereof, and also of digesting into one other Statute all the provisions of the common or unwritten Law touching the same, and for inquiring and reporting how far it may be expedient to combine both those Statutes into one body of the Criminal Law, repealing all other statutory provisions, or how far it may be expedient to pass into a law the first-mentioned only of the said Statutes, and generally for inquiring and reporting how far it may be expedient to consolidate the other branches of the existing Statute Law, or any of them; KNOW YE, That We, reposing great trust and confidence in your zeal, ability and discretion, have authorized and appointed, and by these presents do authorize and appoint you the said *Thomas Starkie*, *Henry Bellenden Ker*, *William Wightman*, *Andrew Amos* and *John Austin*, or any Three or more of you, to digest into one Statute all the Statutes and enactments touching Crimes, and the trial and punishment thereof, and also to digest into one other Statute all the provisions of the common or unwritten Law touching the same, and to inquire and report how far it may be expedient to combine both those Statutes into one body of the Criminal Law, repealing all other statutory provisions, or how far it may be expedient to pass into a law the first-mentioned only of the said Statutes, and generally to inquire and report how far it may be expedient to consolidate the other branches of the existing Statute Law, or any of them: AND, for the better effecting the purposes of this Our Commission, We do by these presents give and grant to you, or any Three or more of you, full power and authority to call before you, or any Three or more of you, such Persons as you shall judge necessary, by whom you may be the better informed on the subject of this Our Commission, and every matter connected therewith; and also to call for, have access to, and examine all such official Books, Documents, Papers and Records, as may afford the fullest information on the subject, and to inquire of and concerning the premises by all other lawful ways and means whatsoever: And We do hereby give and grant to you, or any Three or more of you, full power and authority, when the same shall appear to be requisite, to administer an Oath or Oaths to any Person or Persons whatsoever to be examined before you, or any Three or more of you, touching or concerning the premises. And Our further will and pleasure is, that you, or any Three or more of you, do and shall, within the space of one year after the date of this Our Commission, or sooner, if the same can reasonably be, certify to Us in Our Court of Chancery, on parchment, under your hands and seals respectively, your several proceedings in this matter, as the same shall be respectively completed and perfected, particularly how far it may be expedient to combine both

both the Statutes so digested into one body of the Criminal Laws, repealing all other statutory provisions, or how far it may be expedient to pass into a Law the first-mentioned only of the said Statutes; and generally how far it may be expedient to consolidate the other branches of the existing Statute Law, or any of them. And We will and command, and by these presents ordain, that this Our Commission shall continue in full force and virtue, and that you Our said Commissioners, or any Three or more of you, may from time to time proceed in the execution thereof, and of every matter and thing therein contained, although the same be not continued from time to time by adjournment. And We do hereby direct and appoint that you, or any Three or more of you, may have liberty to certify your several proceedings from time to time to Us in Our said Court of Chancery, as the same shall be respectively completed and perfected. And We hereby command all and singular our Justices of the Peace, Sheriffs, Mayors, Bailiffs, Constables, Officers, Ministers, and all other Our loving Subjects whatsoever, as well within liberties as without, that they be assistant to you and each of you in the execution of these Presents: And for your assistance in the due execution of this Our Commission, We have made choice of Our trusty and well-beloved *James Lonsdale*, Gentleman, to be Secretary to this Our Commission, whose service and assistance We require you to use from time to time, as occasion shall require. In witness whereof, We have caused these Our Letters to be made Patent. Witness Ourself at Westminster, the Twenty-third day of July, in the Fourth Year of Our Reign.

By Writ of Privy Seal.

BATHURST.

FIRST REPORT.

TO THE KING'S MOST EXCELLENT MAJESTY, IN HIS HIGH COURT OF CHANCERY.

WE, Your Majesty's Commissioners, appointed by Your Majesty's Commission, bearing date the Twenty-third day of July in the Fourth year of Your Majesty's reign, whose hands are hereunto set, Do humbly certify to Your Majesty, That, in obedience to Your Majesty's commands, we have proceeded in the execution of the several matters included in Your Majesty's Commission.

We propose to confine our present Report to the consideration of the following particulars, embraced by the Commission:—

1. The digesting into one Statute the Statutes touching crimes, and the trial and punishment thereof.
2. The digesting into one other Statute all the provisions of the common or unwritten Law touching the same.
3. The expediency of combining both these Statutes into one body of the Criminal Law, repealing all other statutory Provisions, or of passing into a law the first-mentioned only of such Statutes.

In obedience to Your Majesty's injunctions, we propose to digest the Criminal Statute Law, and also the Criminal unwritten Law, under the following heads:—

I. The defining of Offences and Punishments.

II. The prevention of Offences, or of the continuance of Offences by summary coercive means.

III. Proceedings against Offenders (otherwise than before Magistrates exercising summary jurisdiction), and herein of—

1. Indictments and other criminal Charges.
2. Process against Offenders.
3. Pleadings.
4. Jury Process.
5. The course and order of Trial, including Evidence.
6. Proceedings in stay or bar of execution.
7. Judgment.
8. Execution.
9. Attainder, Forfeiture, and other general incidents to Conviction and Judgment.

IV. Proceedings by Attachment, and other summary proceedings of the Superior Courts.

V. Summary proceedings before inferior Magistrates.

We have, in the discharge of our duty as regards the first of the above heads, viz. that of the defining of Offences and Punishments, made considerable progress in digesting the Statute and Common Law relative to the offences and punishments of homicide, theft, robbery, burglary, house-breaking and forgery, and are proceeding in the further execution of this branch of our labours.

We deem it, however, to be our duty, at this stage of our proceedings, to make some observations concerning the nature of the task upon which we have been engaged;—and to offer some suggestions, the adoption of which might, we think, tend greatly to facilitate and expedite its completion;—and to state our conclusion as to the expediency of combining the digest of the unwritten law with the digest of the Statute Law.

The process of digesting the unwritten Criminal Law involves two distinct operations. The first of which is, the collecting and arranging the widely dispersed materials which constitute the law itself, or which, perhaps, may with greater propriety be said to constitute the evidence of what is termed the unwritten law, from which Your Majesty's Courts extract the rules of Criminal Law; the second branch of the process, is that of extracting from the collected and arranged materials such general rules of law as they appear to warrant.

The collection and arrangement of materials relating to the Criminal Law is attended with difficulties which may require some explanation. These materials consist of the decisions of the Courts, and the principles collected from the text writers. The decisions relating to the Common Law of crimes are dispersed through the Reports, reaching up to the earliest period of our judicial annals. They are not confined to collections of Crown Cases, or the Reports of cases of the King's Bench, or of Nisi Prius decisions, but they are even occasionally to be met with in the Reports of cases in the Courts of Chancery. And although the modern text books serve as a tolerable index to the printed decisions, yet they are, in many respects, imperfect. For example, a great number of rulings upon points of Criminal Law are to be found in private manuscripts only.

It was one of the most valuable services which Sir E. H. East rendered to the profession and the public, that he made known many decisions, the notes of which had been accumulating for a length of time in private repositories. And it is remarkable, that until within a very late period, the publication of decisions upon Crown Cases was, by many great authorities, deemed to be inexpedient. The Irish decisions, also, both those in print and in manuscript, which are entitled to weight as judicial authority in this country, are very imperfectly known to English lawyers, even through the medium of their text books. With regard, indeed, to the decisions of Courts of Quarter Sessions, it is a singular circumstance, that although the greater part of the criminal justice of the country is administered by these courts, it is not usual to adduce their authority upon points of law, even in arguments addressed to the same species of tribunal.

Even the decisions which it is thus difficult to collect, do not always clearly indicate the result of the opinions of the Judges; this is frequently left to be inferred from the ambiguous fact of a pardon having been granted. Where a conviction of a prisoner at the assizes is afterwards set aside by the Judges in town, the record, which remains unaltered, indicates the reverse of what has been the actual result of the investigation. Sometimes the omission of particular facts in a report leads to mistakes as to the effect of decisions; and sometimes a variance in the statement of different reports renders their grounds ambiguous; both which consequences, we may observe, are illustrated by some striking instances pointed out by Sir M. Foster in his Discourses. In doubtful cases, and especially where there is a conflict of judicial opinion, the weight attributed to decisions is not subjected to any certain test, but is dependent on the number and the professional reputation of the Judges, and the estimation in which particular reporters are held.

With respect to the text writers, it is not unusual, in legal arguments, to refer to a great many old as well as modern authors upon Criminal Law. Many of the ancient writers, as, for example, Bracton, Lambard, Staundeforde, Dalton, Pulton, Crompton, Fitzherbert, and Broke, are not in general use with the profession, and may be said to be inaccessible to the public. And although the authority of such writers is considerable in cases where the modern decisions are silent or conflicting, the greater part of their works, from the changes which have occurred in the law, has become obsolete. With regard to modern text writers, though some of them enjoy a considerable reputation, it is obvious that great caution is requisite in relying on their works as authentic evidence of the Common Law.

Besides this explanation with regard to the collection of materials for the Digest, we feel it particularly incumbent upon us to state those difficulties which we have

have experienced in the other branch of the process of digesting the Common Law, viz. that of extracting—plain definite general rules;—for it is in this part of our labours we have chiefly found the want of any certain authorities on which we could implicitly rely. The difficulties thus experienced in stating general rules and principles are, for the most part, to be referred to the following causes:—

1. That the reported judgments, and text books of authority, are defective in the statement of general rules. It is remarkable, that very few principles are stated in the judgments of the Courts upon Criminal Cases; a circumstance which probably arises from those judgments being often formed without any previous arguments of counsel, and from their not being delivered in public. And with regard to the assistance, in the statement of general principles, to be derived from the text books, it is observable, that, however valuable such works are found to be in collecting together widely dispersed decisions, and pointing out their distinctions, they do not afford many precise rules fitted for general application. This observation particularly holds in regard to those treatises in which the paucity of general principles is attended with the greatest inconvenience, as the Third Institute, and the History of the Pleas of the Crown. Although these were posthumous works, and probably were not published in a state which would have been sanctioned by their distinguished authors, yet from the great want of some kind of digest of Criminal Law, and the high reputation of Sir Edward Coke and Sir Matthew Hale, they have been recognized by the Courts as possessing an authority scarcely inferior to that of the Legislature. As an example of this deficiency it may be mentioned, that Sir Matthew Hale, after stating, that a taking, in order to amount to theft, must be *felonicè* and *animo furandi*, puts five cases under the peculiar circumstances of which the taking was adjudged to be felony, and he then concludes the subject by observing, "that in cases of larciny the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to prescribe all the circumstances evidencing a felonious intention, or the contrary; but the same must be left to the due and attentive consideration of the Judge and Jury, wherein the best rule is *in dubiis* to incline rather to acquit than convict." This passage is adopted by Sir William Blackstone, in that part of his Commentaries in which he treats of the offence of theft. It will, however, as we humbly conceive, appear, from the Digest which we have prepared, that some general rules, having, to a certain degree, the effect of defining the felonious intention, or *animus furandi* may, at least in the present day, be collected from the decided cases. Upon the subject of the imperfect and often erroneous lights afforded by the text writers and reporters upon Criminal Law, we beg leave to refer to Sir M. Foster's Preface to his Discourses, and Serjeant Hawkins's Preface to his Treatise on Crown Law.*

The want of general principles and rules defining and limiting the nature of offences would be the subject of more repeated complaint than it is, were it not that Magistrates, and indeed the Profession, are, in ordinary practice, accustomed to rely upon the principles stated in the works of some learned and able modern authors, which, however, are not binding on Courts of Justice, and in the case where the authors are living, are not admitted to be authority upon legal arguments. But even if the rules collected from such sources were always found to be adequate for the occasion, and consistent with each other, and if they were never doubtfully expressed or insufficiently supported, still their utility must be greatly diminished, from their liability to be impugned as not sanctioned by the stamp of legislative or judicial authority.

2. That considerable discrepancies are to be met with in books of authority;—As to which we may observe, that Sir E. H. East, whose work upon the Criminal Law has, in practice, been very much used as a substitute for a Digest, in numerous instances regards the law as uncertain and undefined in consequence of conflicting decisions, and in such cases, to use his own expressions, he has done no more than "to suggest doubts," and occasionally to "hint a solution of them."

3. The existence of contradictory principles in the Common Law;—As to which it is to be observed, that the Common Law is composed, in a great measure, of rules growing

* *See* Appendix.

growing out of ancient policy and manners, which rules have been from time to time modified and restricted by exceptions founded on different and often contrary principles; so that the old reasons of the law are neither wholly retained nor wholly abolished, and its general purposes adapted to different periods of society, are often at variance with each other.

4. The occurrence of isolated decisions, which cannot be referred to any general rules or principles.

5. The great fluctuations which the Criminal Law has undergone during the lapse of many centuries, and the adoption, at different periods, of some subtle, refined and useless distinctions.—Much of the difficulty and uncertainty attending the reduction of the unwritten law to a written form has arisen from the practice, which obtained during so many centuries, of altering the Common Law in order to suit the existing state of things. This indirect mode of supplying the defects of our early jurisprudence has rendered some branches of the Common Law extremely technical and complicated. And as innovations upon the ancient law of crimes, by the means of a constructive enlargement of its definitions, have usually been made in order to reach some case of peculiar aggravation, they have seldom been acted upon with consistency, and their extent has not been accurately defined.

In dealing with these difficulties incidental to the process of digesting the unwritten criminal law, we have, in all doubtful cases, stated that which we considered to be the better opinion, conceiving it to be the principal object of a Digest, by prescribing a certain and plain rule, to do away with the necessity of balancing legal authorities. We have laid down general rules, as well in those cases where we found them expressed in the judgments of the Courts, as where we thought that they were deducible from the decisions, especially if such rules were sanctioned by text writers of authority. But although we conceived that the law might be rendered more simple and efficacious by rejecting many anomalous authorities, imperfect and uncertain rules, and some subtle and useless distinctions, we did not consider ourselves warranted in omitting to digest, so far as it is capable of being digested, the whole of the law as it now exists, or in making any alteration in the statement of principles at present recognized by the Courts. We have however, in the course of our Report, deemed it to be our duty to point out such defects as we have observed, and also to suggest the substitution of more plain and certain rules.

In order practically to illustrate our remarks, we have extracted from the unwritten law relating to the offence of *Theft*, such general rules as appeared to be warranted by authority, and have inserted them in our present Report. We have made choice of this subject, because we think that no other branch of the Criminal Law exhibits, in so remarkable a degree, the changes which the unwritten law has undergone, in consequence of its having been originally framed to meet less complicated circumstances, and having been afterwards adapted to the growing exigencies of society.

Another reason which has induced us to select this branch of the Criminal Law, is, that it is in more common use than any other; not merely in the superior Courts of Criminal Jurisdiction, but also, by Magistrates, in the inferior Courts, and upon questions of commitment or bail. For which reasons it is conceived, that this subject has been properly selected to show the practical inconveniences arising from the want of certain, precise, and intelligible rules, accurately and distinctly defining the existing law.

We are of opinion that the Digest of the law relating to the offence of Theft, will, in particular, illustrate those difficulties which result from the mere *want of certain rules* for defining offences. It is true that many general definitions, as well ancient as modern, of particular offences, are to be found in the books: those definitions, however, frequently tend to throw into controversy, rather than to fix the limits of the offences which they profess to define. In the notes to our Digest, we have referred to numerous *definitions* of the offence of Theft or Larciny which not only contain various technical terms, the meaning of which is *no where accurately settled*, but differ in important respects, from each other. For instance, none of these definitions supplies any plain test by which the crime of Theft may be distinguished from a bare trespass. Most of them, indeed, state, that, in order to constitute theft, the taking must be *felonious;* but the term felonious which is made use of to *define* the offence of Theft, imports, in fact, only that the taking must be of such a nature as will *constitute* the offence of Theft; or, strictly speaking, such

as

as will subject the taker to certain penalties and forfeitures; and the term felonious is no where so defined as to explain, in an adequate manner, what mode of taking shall be deemed essential to constitute a Theft.

It is true, that there are many specific instances not expressly coming within the received definitions, in which, under the special circumstances, a *taking* has been held to be felonious. Yet the assistance to be derived from these cases, coupled with the definitions, have not afforded us sufficient means for confidently laying down what, under all circumstances, are the boundaries between theft and trespass; more especially as it has been decided by the highest authorities, that the taking without a pretence of right is not of necessity felonious.

With regard to the *discrepancies* between the definitions of offences, it will be seen, by reference to the Digest of the Law of Theft, that some of the definitions, agreeably to the Civil Law, make the *lucri causâ*, or the intention of the thief to derive a profit from his crime, an essential part of the offence of theft; whilst others omit this, regarding an intention to deprive the owner of his property, to be sufficient evidence of the crime. In some cases, where the Courts have been anxious to reconcile the terms of ancient definitions with the more modern authorities, they have considered those terms to be satisfied by annexing a very vague and indefinite meaning to the term *lucrum*. A striking instance of this will be found in the case of The King *v.* Morfit, reported in Russel and Ryan's Cases on Criminal Law, 307, where it was held to be Larciny in a servant clandestinely to take his master's corn to give to his master's horses; and in which some of the Judges stated it to be the ground of their opinion, that the additional quantity of corn would diminish the work of the men who had to look after the horses; so that the *lucri causâ*, viz., to *give themselves ease*, was an ingredient in the case.

And it will appear, from the Digest of the Law of Theft, that, in various instances, the statement of a rule, in the general terms used by the authorities, would be of little practical use, in consequence of the *uncertain application* of those *terms*. Thus distinctions with regard to the subjects of theft, between animals fit for food or kept for pleasure, or of a noble or base nature, and animals *feræ naturæ*, or reclaimed and *domitæ naturæ*, are repeated by most writers upon criminal law, but the particular cases to which these distinctions apply are left in much uncertainty. For instance, it cannot be clearly collected from the authorities, what considerations exempt an animal from being regarded as of a base nature; whether it depend on the circumstance of being fit for the food of man, or being used for draught, or for any and what domestic purposes. In some instances, the application of the terms noble and base nature would appear to be altogether arbitrary, if reference were not made to ancient manners. Thus the reason assigned by Sir E. Coke and Sir M. Hale, for considering hawks and falcons as of a noble and not of a base nature, and therefore as being the subjects of larciny, is on account of their serving "*ob vitæ solatium*" of princes and noble and generous persons, thereby rendering them fitter for great employments. Neither do the precedents furnish any precise rule as to the degree or extent to which an animal originally *feræ naturæ* must have been tamed, in order to be deemed in law as *domitæ naturæ*, and consequently the subject of theft. As to the young and the produce of animals, and the skin, plumage or other parts of dead animals, the general rules to be found in the authorities are of a still more vague and unsatisfactory nature.

With respect to the *subjects of theft*, a rule was originally expressed in plain terms, that whatever was of *determinate value* might be stolen. The application of those terms was, however, made in an age when the notions of society respecting the value of particular chattels were very different from those which obtain at the present day; and therefore the rule is not to be intrepreted according to its present import: nor yet is it to be wholly understood according to its import when first framed, on account of the attempts which have been successively made to liberate it from the narrow construction attaching to it from its antiquity. Thus, although it is no longer law that diamonds or rubies not set in gold, or other valuable casing, are not the subjects of theft, "because they are not of price with all men, though some do hold them dear and precious;" yet securities for money, and animals not fit for food, however valuable some of them may be in common estimation, and the skeletons, skins or plumage of such animals, are not, in general, regarded as the subjects of theft by the common law.

The Digest of the Law of Theft also illustrates, in a particular manner, those difficulties experienced in digesting the common law relating to crimes which result from *contradictory principles and authorities.* The great mass of authorities belonging to this branch of the law evinces the anxiety of the Courts to make the principles of ancient jurisprudence bend to the views which are founded on the increased wants and enlarged experience of modern times. Thus new doctrines have been advanced with regard to the stealing of property *found,* waifs, estrays and treasure trove, which are irreconcilable with the notions of early times, when the ideas of property and occupation were almost inseparably united; and most of the enlargements by construction, by means of which the Law of Theft has been extended to include cases not originally within its scope, have proceeded upon principles contrary, in their spirit and objects, to those upon which the old law was founded. And with regard to the *discrepancy of authorities,* nearly every page of the Digest will afford examples of points concerning which there are conflicting decisions; but of which it will be sufficient in this place to mention the instances relating to the *lucri causâ*; to theft of animals reduced into possession, and of the young and the produce of animals, and of waifs and estrays, and property found; to the distinction between thefts and false pretences; to that between misappropriations by bailees and persons having the bare charge of property; to the determination of bailments and implied trusts; and to the special ownership of goods.

The same Digest will also illustrate the difficulty experienced in digesting the criminal law arising from *isolated decisions.* Thus it has been held that a person taking goods was guilty of theft, although he left goods of equal value in exchange; yet one leaving the *price* of goods behind him under similar circumstances has been held not guilty of theft. In some Treatises upon the Criminal Law, both these decisions have been regarded as establishing general rules. We have not, however, thought ourselves warranted in drawing any general inferences from them; though we have thought ourselves justified in laying down a general rule respecting the ownership of goods in the custody of the law in consequence of a decision relating to the ownership of goods seized under a *fieri facias.* It is, however, to be observed, that extreme caution is requisite in the deduction of principles, where the decisions from which they are extracted are not both numerous and uniform in their tenor. For besides the inferior obligatory force upon the discretion of subsequent Judges, in cases where the precedents are few or are conflicting, less reliance can be placed on the use of principles, where they are not firmly established, in criminal than in civil proceedings; the construction of law in the former being *in favorem vitæ,* and being in stricter conformity with all the details of former precedents.

The Digest also illustrates the difficulties in the statement of the existing common law relating to crimes which result from the *fluctuations of the common law, and the adoption of subtle distinctions.*

It is probable that, originally, the offence of theft was confined to the taking of property from the actual possession of the owner, and that it did not extend to any case where he had voluntarily parted with the possession. But at an early period, the possession of a servant came to be deemed the actual possession of the master. This rule was, in course of time, applied not merely in cases where domestic or other servants had the custody or charge of goods under the superintendence of the master, or upon his premises, but even where the servant was entrusted with the chattel to apply it, according to special directions, beyond the scope of the master's superintendence. It has been since extended to cases of persons having the custody of goods, but not being in the regular employ of the owner; between which persons so employed and bailees a distinction, that in some instances, is almost imperceptible, has been drawn. Notwithstanding this apparently general rule, that the possession of a servant is to be regarded as the possession of the master, it has been held, that where the master has no possession, except by delivery to the servant, the latter cannot be guilty of theft in stealing the goods. This subtle and apparently unreasonable distinction between goods delivered by the master himself to a servant, and goods delivered to the servant by a third person, has given rise to many questions, whether the property so delivered to a servant has not previously to such delivery vested in the master, or has not subsequently to the delivery been transferred into his possession by some act of the servant. The extreme nicety of these questions, and the contradictory conclusions which have been arrived at in determining these points under circumstances scarcely distinguishable,

throw great difficulties in the way of reducing the authorities upon the subject under precise general rules.

It may be material to mention, in this place, some other instances of *constructive enlargement* which occur in the law of theft, that are analogous to those which occur in many other branches of the criminal law, and which occasion similar difficulties. They show what a considerable portion of the law relative to a particular offence may be wholly composed of such refinements. By the doctrine of constructive possession many cases have been brought within the scope of the offence of theft where the actual possession of the property had been parted with, under some contract of bailment, to the party charged with the theft; as in the instances of carriers, and hirers of horses or goods. In such cases, although the owner voluntarily relinquishes the possession of the property, yet, if the prisoner, in technical language, determines the bailment, by *breaking bulk*, before the property is misappropriated, he may afterwards be deemed guilty of theft in stealing the goods. Whereas a misappropriation of the property, without such previous determination of the bailment, would only amount to a trespass or breach of trust. The occasion of this subtle doctrine was, that the offence of theft, in its origin, always included a trespass; it could not therefore be committed by one to whom the owner had voluntarily delivered the possession. To get rid of the difficulty it was held, that if the carrier broke open the package and then stole part of the contents, he was in so doing guilty of theft. It has occasioned much discussion to ascertain on what precise ground this distinction could be supported. According to some authorities, it has been asserted that the breaking open the package was evidence to show that the carrier, in the first instance, obtained possession of the package with a felonious intent, a presumption which could not possibly be supported, directly opposed as it might be to the real truth of the case. The more plausible ground was, that, by the act of breaking open the parcel, the contract was determined, and that, upon this determination, a constructive possession again vested in the owner; and that, the owner being thus, in legal construction, repossessed of the chattel, the party in actual possession might be considered to take it from the constructive possession of the owner. The reasoning which was resorted to in support of this doctrine is very remarkable. The carrier, it was argued, was entrusted with the whole package, but not with any particular part; and therefore, notwithstanding the settled rule, that he could not be guilty of felony in stealing the whole, yet that he might be guilty by stealing a particular part. Thus it has happened, that the anxiety of the courts to subject, by means of judicial constructions, bailees of various descriptions to the penalties of theft, where they embezzled property entrusted to them, has produced the singular anomaly, that if a carrier steal the *whole* package entrusted to him he is guilty of no offence; but if he break open the package and steal *part*, he is guilty of felony.

This constructive enlargement of the common law rule seems to have been confined within very narrow limits, and to have been applied only to cases of breaking bulk, as they are technically termed. Yet there are numerous other cases which ought to be comprehended within the principle, if it be a just one. As for instance, where a carrier employed to carry goods from London to York takes them to Chester with intent to defraud the owner, and at Chester sells the package, there seems to be no good reason why the bailment should not be considered to be just as much determined by taking away the goods from the line of passage prescribed by the contract as by the breaking open the package. It is indeed to be observed, that in furtherance of the object of rendering bailees subject to the law of theft for misappropriating goods entrusted to them, it has been held, according to several authorities, that they might be so subject after the bailment had been determined *according to the terms of the contract*, as by the performance of a journey for which a horse or carriage had been hired. But it will be seen that the extent and even the existence of the rule upon the subject which had been extracted from the authorities by several eminent text writers, have been rendered doubtful by a recent decision. And this circumstance may serve as an example of the uncertainty which attends such enlargements by construction, not only as regards the probability of their principles being consistently pursued and applied in cases varying in circumstances, but fully within the scope of the principle; but even of their being adhered to, when the same case again occurs.

Again, supposing that under a joint contract two separate parcels are entrusted to a carrier, and he sells one of them, there seems to be no good reason why that should

should not amount to a determination of the bailment just as much as if two had been united in one parcel, and the carrier had separated the one from the other.

This enlargement of the Law of Theft by construction, in cases where there is a breaking of bulk, becomes more obscure in its application where the bailment is of a different kind from that of carrying for hire. And it has given rise to several nice distinctions which it is very difficult to reduce to precise rules, in cases not of bailment, but of implied trust, as where property has been left by accident in coaches, or where it has been found. Thus, although a person to whom a letter containing money is delivered, and which was directed to another of the same name, will not be guilty of theft in purloining the money, although he knows that it was not intended for himself, because the original taking of it was not felonious; yet a hackney coachman, in whose coach a box is left by accident, and who, at the time when the possession of the property was thrown upon him by the negligence of the owner, could have had no felonious intention existing in his mind, may become guilty of theft, by uncording the box with intent to embezzle the contents.

Another instance of enlargement of the Common Law of Larciny by construction is exhibited in the case, where possession which would otherwise constitute a possession distinct from that of the owner and reduce the appropiation of the chattel to a mere breach of trust, is said to be defeated by a *previous felonious intent* existing in the mind of the prisoner to steal the property. Thus if a party, with intent to steal a horse, hire it for a particular time, or for a particular journey, and then sell, or otherwise embezzle it, he is guilty of theft. This doctrine, however irreconcilable it may be with the Common Law rule of Larciny, is founded upon the consideration, that, by reason of the fraud, there is no bailment or lawful delivery of which the prisoner can avail himself by way of defence. The construction by which the ancient definition of theft has been enlarged, in such cases, partakes of much refinement, particularly as, in addition to the inquiry into the intentions of the thief, it involves several nice distinctions which are of questionable expediency with regard to the intentions of the owner of the property, and the authority of the person delivering, to part with it. But the complexity which has thus been introduced into the law is further increased by the circumstance, that the principle upon which this construction is founded has not been extended to the case where the owner has been induced to part not with a mere *temporary interest* but with his *whole property* in a chattel. It would seem, that if, by reason of fraud, a temporary interest would not pass, no sufficient reason can be assigned why the entire interest should pass. It is singular, that, whilst a man who, under pretence of hiring a chattel for any term, steals it, is deemed to be a felon, another, who under an equally false pretence, induces the owner to part with his whole interest is not guilty of felony. This distinction is the more remarkable in reference to the law as to the right of property; for, in neither case, whether the owner intended to part with the temporary possession only, or with his whole interest in the chattel, would any right of property pass to the party guilty of the fraud.

These questions relating to the enlargement of the law of theft by construction, have been rendered more perplexing, in consequence of their having arisen at a period, when the doctrine of bailments had been but imperfectly developed by the decisions of our courts. For it was not before the time of Lord Holt that this subject had much engaged the attention of English lawyers, and it has received much illustration since that period from the work of Sir W. Jones and from modern decisions. It is a common doctrine, that theft may be committed by a person having the bare charge or special use of goods, though not by a bailee. But the numerous and often conflicting cases upon the application of these distinctions, indicate that precise notions have not always prevailed as to the nature of them. Again the owner of property may retain the constructive possession of it or not, according as it is in the hands of one or another kind of bailee; and no uniform principle can be stated which will solve all the questions that have been decided upon such points. This, it is presumed, would not have been the case, if a general view had been taken of the rights and obligations arising out of the contract of bailment.

If, in addition to such difficulties, as to questions whether the owner of property retains any constructive possession at all, a number of intricate points with regard to the owner having at the same time, and with respect to the same property, a constructive possession as against one party, but no possession as against another,

another, is considered, it must be admitted, that there are few branches of the law, in which the abstruseness and complexity of the subject present greater difficulties in the statement of precise, consistent and intelligible rules.

Another remarkable illustration of the useless refinements which tend to occasion difficulties in the way of digesting the criminal law is afforded by the rule stated in our Digest, according to which *theft* cannot be committed by taking any portion of the *realty*. The principle of this rule is founded upon a subtle and scholastic method of reasoning, from which, indeed, at a certain period in the history of this country, scarcely any branch of learning or of science wholly escaped, and which was not altogether excluded from courts of justice. Whether this rule proceeds on the notion that the severed portion of the realty, though removable, and actually removed, was, in legal construction, still adhering to the freehold, and therefore incapable of removal; or that the wrongdoer acquired some sort of property in the severed chattel,—or, as Sir W. Blackstone suggests, that it was never a chattel in the possession of the owner of the realty,—the inference in reason and legal analogy is equally untenable.

The existence, however, of the rule, occasions considerable embarrassments in digesting the common law relating to theft. For its application is attended with that species of ambiguity, which must of necessity adhere to any principle of law which is not founded in good sense. Accordingly, the authorities leave it in great doubt what interval must elapse between the severance and taking, in order to make the party who severs and takes guilty of theft. By some a *day* must elapse; according to others an *hour*; whilst others say, that the taking will amount to theft if the property be removed *afterwards*, or after it has been severed *any time*.

The like observations are applicable to another rule founded upon the preceding, that theft cannot be committed of any thing *savouring* of the realty. This rule has been held to extend to a box containing title deeds, on the ground, that *omne magis trahit ad se minus dignum*; and this extension of the rule has led to further distinctions as to the box being fastened or not.

The Digest of the Law of Theft affords another striking illustration of the refinements of the common law, in the instance of the doctrine of the *asportavit*. The cases to be found in the books upon this subject are remarkable for much subtlety: as, for example, the lifting up a bag from the bottom of the boot of a coach, is an *asportavit*, though the thief is detected before he gets it out of the boot. But the setting a package on its end in the place where it lay for the purpose of cutting open the side, in order to steal the contents, is not an *asportavit*. Such distinctions, with many others in regard to property remaining attached by a string, or where any impediment exists to the complete possession of the wrongdoer, are not easily reduced to that certainty and precision which is requisite in the statement of general rules. It may be observed, that, in the very able Digest of Criminal Law prepared for the State of Louisiana, by Mr. Livingstone, the offence of theft is made complete by the *taking* only, without a carrying away.

DIGEST of the COMMON LAW relating to the Offence of THEFT.

Definition of Theft

THEFT is the *felonious* taking and carrying away of the personal goods of another.[a]

[a] The definition in the text is that which is given by Sir W. Blackstone in the 4th vol. of his Commentaries, p. 229, and is selected not as being by any means adequate, but as being free from several controverted points involved in most of the other definitions. The definitions of theft to be found in the authorities are numerous. Those usually referred to are given in the Mirror, in Fleta, and by Bracton, Sir E. Coke, Lambard, Pulton, Dalton, Cowell, Ch. B. Eyre, Mr. J. Grose, Sir M. Hale, Serjeant Hawkins, and Sir E. H. East. The citing a few of these definitions will suffice to show their general nature.

Ch. B. Eyre: Larciny is the wrongful taking of goods, with intent to spoil the owner of them, "lucri causâ." R. *v.* Pear, East, P. C. c. 16, s. 2.

Mr. J. Grose, in delivering the opinion of the twelve Judges,—"The felonious taking the property of another without his consent and against his will, with intent to convert it to the use of the taker." Rex *v.* Hammon, Leach, 1089.

Pulton: "Larciny is a fraudulent taking away of another man's goods above the value of twelve pence, without the knowledge of him whose the goods be."

Lambard: "Larciny is the felonious and fraudulent taking of another man's personal goods (removed from his body or person) without his will, to the end to steal them."

Dalton: "Larciny is a fraudulent and felonious taking away another man's personal goods, removed from his body or person, in the absence of the owner, and without his knowledge."

It

It is remarkable that these definitions differ very materially from each other, as will be pointed out more particularly in the part of the Digest that treats of the "circumstances which render a taking felonious." And it appears, from the statement given of the principles comprised under the several branches of the law of theft, that the definitions all fail in giving any adequate idea of the kind of property which may be stolen, and of the nature of the criminal act of stealing. Who, for example, could collect from the definition given in the text that the personal goods spoken of must not *savour of the realty*, and must have been *valuable*, according to the ideas of a very remote age; that the words *carry away* were used in a very technical sense; that the expression, "personal goods of *another*," included cases where a party might be guilty of stealing his *own* goods in the custody of another; that by the word *felonious* many things were signified, both as to the manner of taking and the intent of the taker, which that word did neither according to its etymology, or in common parlance, import. In fact, the insertion of this word has the effect of rendering the thing to be defined a part of its own definition. It would scarcely be expected, from reading these definitions of the offence, or any other to be found in the books, that the crime of theft involved the distinction between actual and constructive possession, which has given rise to a host of perplexed and conflicting decisions.

The language of indictments, in which the prisoner is always charged with feloniously *stealing*, taking, and carrying away, is not perfectly reconcilable with any of the definitions, though it is more consistent with the one stated in the text than with others.

The term *theft* has been substituted for larciny throughout this digest, as being better suited to popular comprehension.

An additional reason for adhering to an English term, if any be necessary, is afforded by the consideration that the adoption of foreign phrases has contributed to further the introduction of many subtleties in the administration of this branch of Criminal Law, the application of which in practice is more frequent than of any other. The consequences which may have been promoted by the use of such phrases are more particularly adverted to in the notes of the digest, with reference to the terms *asportavit*, *lucri causâ*, *invito domino*, *animus furandi*.

It will be the object of the remaining part of the digest to explain the definition stated in the text according to the extensive latitude which must be given to some of its terms, and the numerous qualifications under which others must be received.]

Subjects of Theft.[b]

Subjects of Theft,

[[b] The statement of the rules of the common law with regard to the subjects of theft will show that they were framed to meet the wants and to correspond with the notions of society in an early state of civilization. The principle, for example, that whatever is annexed to or savours of the soil is not the subject of theft, though it be made a movable chattel by the act of the taker, originated in a state of manners and opinions different from those which prevail in the present day. And many of the rules with respect to particular things, and especially animals, being or not being the subjects of theft, would appear to be capricious and unaccountable, unless there be taken into consideration several notions respecting the value of different species of property which have very long ceased to be entertained.

The common law upon this head has undergone but little variation, owing to its not being so susceptible of constructive extension in this as in other cases. In one instance, however, that of the subtle distinction with respect to the interval between the severance and removal of annexations to the freehold, a striking example is afforded of the technicality and uncertainty which have been introduced into the definition of the offence of theft, from the attempts which have been made with a view to avoid the inconveniences which would result from a rigid adherence to the ancient provisions of the law.

In consequence, probably, of the subjects of theft not being, in their nature, capable of much extension by construction at common law, the Legislature has interfered, in numerous instances, to punish the taking of various species of property not before the subjects of theft. These statutory provisions, though now collected into one Act, were passed at different periods, and without much regard to uniformity with each other, whilst they present a very remarkable contrast in principle to the common law, which they have left in force upon analogous matters. It would seem, at all events, expedient, that it might be ascertained what were the subjects of theft, and what were not, by reference to one and the same statute, instead of the rules upon the subject, lying partly in the common law authorities and partly in the statutes.]

Chattels personal.

1. ALL personal goods, save as hereafter excepted, are the subjects of theft.[c]

[[c] It would seem that if the doctrines founded upon an ancient state of manners, with regard to property *savouring* of the realty, or annexed to it, were exploded; and if property were to be considered as a subject of larciny, according as it was valuable or not in the present day, without reference to the decisions as to its having been deemed valuable or not some centuries ago, the law of theft would be greatly simplified. Nearly all the rules in the text concerning the subjects of larciny would be superseded, or united into two or three general provisions; and numerous statutory regulations would become unnecessary.]

This rule includes money, plate, apparel, household stuff, stones dug out of quarries, grass in cocks, wood cut, plants rooted or dug up, fruits separated from the plants that produced them, and all movable goods, save as hereinafter excepted.

Parcel of freehold growing produce fixtures.

2. Theft cannot be committed by severing and immediately taking and carrying away any thing which is parcel of or annexed to the soil, or which is the *unsevered*

unsevered produce thereof, although it be severed by the wrongdoer with intent to despoil the owner.

This rule includes soil, earth, stones, minerals, and whatever else is an unsevered portion of the land or realty.

Also, all trees, bushes, shrubs, plants, fruit, flowers, corn, grain, grass, roots, and other vegetable productions whatsoever unsevered from the realty.

Also, all buildings and fixtures annexed to the realty.

All iron, copper, lead and other metals and materials whatsoever, annexed to any house or building, or otherwise fixed to the realty.

All rails, palings, hedges, fences, palisades, and other annexations to the realty whatsoever.[d]

[d By the 7 & 8 Geo. 4, c. 29, s. 37 to 44, various provisions are enacted for the protection of vegetable and mineral productions and fixtures, and those are partial innovations upon the common law principle. It may be a question for the consideration of the Legislature, whether some modification of the common law principle itself might not obviate the necessity of various distinct statutory provisions, and at the same time materially contribute to the general uniformity of the law. The common law principle has been ascribed to several different causes, as the discipline of feudal camps, or the light in which the freehold was anciently regarded by the law; and it appears to rest upon such foundations more than upon reasons applicable to the present state of society. It is at variance also with the principles of our civil jurisprudence.]

Interval between severance and removal.

3. Although a thing be parcel of the realty, or be any annexation to or unsevered produce of the realty, yet if any person sever it from the realty, and remove it with an intent to steal it, after an interval which so separates the acts of severance and removal that they cannot be considered as one continued act, the thing taken is a chattel the subject of theft, notwithstanding such previous connexion with the realty.[e]

[e The interval between the acts of severance and removal is variously stated by the authorities. According to some an *hour's* time is essential; according to others, a *day*. Other authorities lay down the rule with greater vagueness, stating that it is felony if the goods are removed *afterwards*, or after they are severed *any time*. And it does not appear to be settled, whether the thief must quit the premises before the removal.

Some advantage may be expected, if the rule be retained, by laying it down with precision, and obviating the inconvenience of conflicting authorities. Indeed great benefit may be expected to result from a mere digest, when properly matured and revised, even though it be deemed to be inexpedient to alter any of the existing principles of the law. Numerous instances of such moot points will be found to occur in the present specimen of the digest.]

4. If any parcel of the realty, or any annexation to or unsevered produce of the realty be severed otherwise than by one who afterwards removes the same, it is the subject of theft, notwithstanding it be stolen instantly[f] after such severance.

[f The doctrine contained in the above, and the preceding rule may perhaps be thought to require revision. It proceeds upon the subtlety, of which there are many similar instances in our early jurisprudence, that the property was not personalty when taken, because it was the very act of taking which converted it into personalty. Though the taking of the goods without an interval elapsing is only a trespass, it is called by Ch. J. Hyde a *rank* trespass. Several eminent authorities have expressed their astonishment at the distinction, and represented it as *exceedingly nice*; others have unequivocally disapproved of it. The doctrine in question has long been the subject of criticism upon our criminal jurisprudence, as appears from the following passage extracted from Hobbes's Dialogue between a Lawyer and a Philosopher:

"*Ph.* For suppose I go secretly by day or night into another man's field of wheat, ripe and standing, and loading my cart with it, I carry it away; is it theft or robbery?

"*La.* Neither, it is but trespass; but if you first lay down the wheat you have cut, and then throw it into your cart and carry it away, then it is felony.

"*Ph.* Why so?

"*La.* Sir Ed. Coke tells you the reason of it, 4 Inst. p. 107, for he defineth theft to be by the common law a felonious and fraudulent taking and carrying away by any man or woman of the mere personal goods of another, not from the person, nor by night in the house of the owner. From this definition he argues thus, p. 109: any kind of corn or grain growing upon the ground is a personal chattel, and the executors of the owner shall have them though they be not severed; but yet no larceny can be committed of them because they are annexed to the realty. So it is of grass standing on the ground, or of apples, or of any fruit upon the trees, &c. So it is of a box or chest of charters, no larciny can be committed of them because the charters concern the realty, and the box or chest, though it be of great value, yet shall it be of the same nature the charters are of, *omne magis dignum trahit ad se minus*.

"*Ph.* Is this definition drawn out of any statute, or is it in Bracton or Littleton, or any other writer upon the science of the laws?

"*La.* No, it is his own; and you may observe by the logick sentences dispersed through his works that he was a logician sufficient enough to make a definition.

"*Ph.* But if his definitions must be the rule of law what is there that he may not make felony or not felony at his pleasure? But seeing it is not statute law that he says, it must be very perfect reason or

or else no law at all; and to me it seems so far from reason as I think it ridiculous. But let us examine it. There can (says he) be no larceny of corn, grass or fruits that are growing, that is to say, they cannot be stolen; but why? Because they concern the realty, that is, because they concern the land. 'Tis true that the land cannot be stolen, nor the right of man's tenure; but corn, and trees and fruit, though growing, may be cut down, and carried away secretly and feloniously, in contempt and despite of the law. And are they not then stolen? and is there any act which is feloniously committed that is not more than trespass? can any man doubt of it that understands the English tongue? 'Tis true, that if a man pretend a right to the land, and on that pretence take the fruits thereof by way of taking possession of his own, it is no more than a trespass, unless he conceal the taking of them; for in that one case, he but puts the man that was in possession before to exhibit his complaint, which purpose is not felonious, but lawful; for nothing makes a distinction between felony and not felony but the purpose. I have heard that if a man slander another with stealing of a tree standing, there lies no action for it, and that upon this ground, viz. because to steal a standing tree is impossible, and that the cause of the impossibility is, that a man's freehold cannot be stolen; which is a very obvious fallacy; for freehold signifieth not only the tenement but also the tenure; and though it be true that a tenure cannot be stolen, yet every man sees the standing trees and corn may be easily stolen; and so far forth also they are personal goods; for whatsoever is freehold is inheritance, and descendeth to the heir, and nothing can descend to the executors but what is merely personal. And though a box or case of evidences are to descend to the heir, yet unless you can show me positive law to the contrary, they shall be taken into the executor's hands to be delivered to the heir. Besides how unconscionable a thing is it, that he that steals a shilling's worth of wood which the wind hath blown down, or which lieth rotten on the ground, should be hanged for it, and he that takes a tree worth 20 or 40 shillings should answer only for the damages?

"*La.* 'Tis somewhat hard, but it has been so practised time out of mind."]

Accessaries to realty: Charters.

5. Nothing which is accessary to or which savours of the realty, is the subject of theft at common law.

This rule comprehends all commissions relating to the realty and returns thereto, all charters, deeds, muniments and written assurances whatsoever concerning the realty; and all boxes in which any such writings that concern the realty are locked, sealed or otherwise fastened up.

Box of Charters.

This rule does not extend to heir-looms.[g]

[g The term "savouring of the realty," which is used in all the authorities, may seem not to be particularly well adapted to popular comprehension; and it would appear that the distinction between a box of charters fastened or unfastened, was an unnecessary refinement. It may deserve the attention of the Legislature, whether the common law principle as to the stealing of moveable chattels, which savour of the realty, ought not to be revised. And it is to be observed, that at present there is a want of uniformity in the law, in consequence of a partial innovation upon the common law principle by the statute 7 & 8 Geo. 4, c. 29, s. 22, 23. The strictness of the rule which excludes even the materials and stamps of writings relating to land, from being the subjects of theft, according to the legal maxim *omne magis dignum trahit ad se minus*, does not appear to be satisfactory.]

Choses in action.

5. Securities concerning choses in action, are not the subjects of theft.[h]

[h The common law principle of this rule, was founded on the crude notions of an early state of society respecting property. It can have but little operation in the present day, in consequence of the extensive provisions of the 7 & 8 Geo. 4, c. 29, s. 5, against stealing *valuable securities*. But the principle of the common law stands in direct contrast with that of the statute law in respect of any property in a written instrument not deemed to be a valuable security within the meaning of the statute. In a recent case, an indictment for stealing a bank-note was held to be bad because it did not conclude "*contra formam statuti*."]

Materials and stamps of written instruments.

6. The materials and stamps of any written instrument not relating to the realty, are the subjects of theft.[i]

[i In a recent decision upon the subject, it was held that the stealing of rolls of parchment, though they are the records of a Court of Justice, will be larciny, unless they concern the realty. On the subject of stamps, see R. v. Hart, 6 Carr & P. 106, & Cases, ib. Since the distinction between grand and petit larciny has been abolished, the rule in the text seems almost to supersede the preceding rule in cases of simple theft.]

Human body.

7. No human body living or dead, is the subject of theft.[k]

[k Our jurisprudence differs upon this point from that of several other nations. By 9 Geo. 4, c. 31, child-stealing is in certain cases made felony.]

Things of value.

8. Theft can be committed of such things only as are of some intrinsic value.[l]

[l This rule can have very little operation in the present day; but it expresses the general principle from which many of the rules respecting the subjects of theft were, probably, in ancient times derived. As for example, several species of minerals, and charters concerning land, negociable securities, and reclaimed animals not fit for food, were not deemed to be subjects of theft, according to some authorities, because they were not of any determinate or marketable value. And, indeed, it was held in an ancient case, that it was not felony to take a diamond or ruby (not set in gold or otherwise), "because they were not of price with all men, howsoever some do hold them both dear and precious."]

This

9. Theft may be committed of things valuable to the owner, though not of value to any one else, nor salable.[m]

[m It would seem, that if the principle of the former rule were regarded, and its early applications were superseded, most of the existing anomalies of the common law, with regard to the subjects of theft, would disappear, and many statutory provisions would be rendered unnecessary. For the principle of the common law rule was, that things of value should be deemed the subjects of theft. And if this principle had been applied, for the first time, within the last century, it would necessarily have been held to comprise a variety of subjects which have been legislated for separately, because they were not deemed to be of value in a remote age. The above exception to the rule is a departure, in modern times, from the ancient principles of the common law.]

Domestic animals.

1. All domestic animals which are fit for food, or which are not of a base nature, whether living or dead, and also all parts of such animals, their young and their eggs are the subjects of theft.

This rule includes horses, kine, sheep, swine, geese, hens, ducks, turkies and other animals whatsoever, which are tame and docile and used for domestic purposes, and not of a base nature.[n]

[n There is some perplexity in the authorities respecting the theft of such domestic animals as are not fit for food. In Lord Hale's Pleas of the Crown, vol. 1. p. 711, the above enumerated animals, including *horses*, are stated to be the subjects of theft, because they are under propriety, and serve for food. Sir W. Blackstone, 4 Comm. 234, states that all *valuable* domestic animals, as horses and beasts of *draught*, and all animals which serve for food, are the subjects of theft. Some authorities state that animals *used for domestic purposes* are the subjects of theft. But whatever designation is given to domestic animals not being fit for food, but which are nevertheless the subjects of theft, they are always contrasted with animals of a *base nature*; and yet none of the authorities define with precision in what consists the *base nature* of animals. Sir W. Blackstone, 4 Comm. 255, considers that the baseness of the nature of animals arises from their not being fit for food, on which ground the law, he says, considered them of no intrinsic value. But he had before stated that beasts of draught, though they might not serve for food, were the subjects of theft. Some authorities classify dogs and cats among animals *feræ naturæ* which are reclaimed.

The statute 7 & 8 Geo. 4, c. 29, s. 25, enacts, that it shall be felony to steal horses, cows, sheep, and certain other domestic animals.]

2. Domestic animals of a base nature and not fit for food, are not the subjects of theft.

This rule includes dogs and cats.[o]

[o The stealing of dogs is the subject of statutory provision in the 7 & 8 Geo. 4, c. 29, s. 31.]

Wild animals reduced into possession, and fit for food.

3. Animals of a wild nature which are fit for food, including deer, hares and conies; carp, tench, trout, eels and other fish; swans, pigeons, pheasants, and all other birds and beasts which are fit for food, are the subjects of theft, when they have been reduced into possession, so long as that possession continues.[p]

[p There is a conflict of authorities upon this subject, some laying down the rule that the restraint need only be sufficient to prevent the animals falling again into the common stock, whilst others affirm that the animals must be restrained of their liberty in such a manner as to imply an immediate intention to make use of them. It has been said that, although fish in a trunk or net, or deer in a stall, may be the subjects of theft, yet that fish in a pond, or deer in a park, cannot be stolen. Serjeant Hawkins, in his Pleas of the Crown, c. 33, s. 5, concludes that the rule, as stated in the text, is agreeable to the *more plausible opinion*.]

4. Animals are reduced into possession when they are restrained of their natural liberty, and confined in buildings, stalls, parks, paddocks, mews, nets, trunks, ponds or other inclosures, of such limited extent that they may be taken by the owner whenever he pleases.

Doves, being in a dovecote, are included within this rule.[q]

[q The authorities are not very precise upon the subject of stealing doves; some alleging that *young* doves in a dovecote may be stolen, and others, that old doves in a dovecote are the subjects of theft, if the dovecote be shut up. See Rex *v.* Brooks, 4 Carr. & P. 131.

The statute 7 & 8 Geo. 4, c. 29, s. 26 to 30, and 34, 35, provides against stealing deer, hares, conies, and fish, under various circumstances.]

Wild animals reclaimed, and fit for food.

5. Animals of a wild nature which are the subjects of theft when they are deprived of their natural liberty and reduced into possession, are also the subjects of theft if they be reclaimed, and known to be reclaimed, although they go abroad and return at their pleasure.[r]

[r The words "reclaimed," "tame," "domitæ naturæ," are often used promiscuously as applied to the subject-matter of the rule in the text; but it does not appear that the authorities furnish any precise rule as to the degree or manner in which an animal must have been divested of the wildness of its nature, in order to be deemed reclaimed for the purpose of theft.]

This rule includes deer and all other beasts, which having been wild by nature are reclaimed, and which from wearing a bell or collar, or from other notorious signs or circumstances are known to be reclaimed.

The rule also includes swans, peacocks, and other birds which are reclaimed and known to be so.[s]

[s The ancient authorities contain a number of distinctions respecting swans, which do not appear to be applicable in the present day.
The knowledge of the animal being reclaimed would appear to be properly a circumstance indicative of a felonious intention.]

Hawks, Falcons, Bees.

6. Reclaimed hawks and falcons, are the subjects of theft, although they are not fit for food.[t]

So also a stock of bees.

[t The ground assigned for the exception of hawks and falcons will scarcely be thought reasonable in the present day; it is "on account of their noble and generous nature and courage, and as serving *ob vitæ solatium* of princes, and noble and generous persons, and as making them fitter for great employments." 3 Inst. 109; 1 Hale, P. C. 512. It does not appear from the authorities, upon what principle bees are the subject of theft. Silk worms would seem to be equally fit subjects of larciny with bees.]

Young of wild animals which are the subjects of theft.

7. The young of such wild animals as are the subjects of theft when reduced into possession or reclaimed, are also the subjects of theft so long as they cannot run or fly and join the common stock, but remain in a house or several grounds, so that the owner of such house or grounds may take them at all times at his pleasure.[u]

[u The point whether the young of unreclaimed animals (but which, when reclaimed, are the subjects of theft), may be stolen, on the ground of being property *ratione impotentiæ*, is rendered very doubtful, in consequence of conflicting authorities. Young doves, usually stated as an example of this rule, are sometimes considered as belonging to the class of cases respecting "animals reduced into possession." With respect to the *eggs* of unreclaimed birds (but which, when reclaimed, are the subjects of theft), the authorities do not lay down any rule; but the taking of certain species of eggs is made punishable by statute. It would seem that where the eggs of birds, whether reclaimable or not, are reduced into possession, they ought to be the subjects of theft.]

This rule includes amongst others, young pigeons in a dove-house which cannot fly, young swans and cygnets which cannot fly, and are breeding in any parks or several grounds; young hawks or herons in the nest.

Produce of animals the subject of theft.

8. Where the animal itself is the subject of theft; the produce of the animal, if of any value, is also the subject of theft.

This rule extends to the taking of wool from the back of a sheep, milk from a cow, and all other cases whatsoever, where such produce is of value.[x]

[x There is considerable discrepancy among the authorities upon this subject, as to the point, whether, to constitute theft, the property stolen should be above the value of 12*d.*; when this is not the case, it has been said that the maxim "*de minimis non curat lex*" applies.]

Dead animals the subject of theft.

9. Wild animals which when living may be the subjects of theft, are, whether they have been actually reduced into possession or reclaimed, or not, the subjects of theft when dead.

This rules includes all parts of the bodies of such animals.

Wild animals not reduced or reclaimed, or reverting to a wild state.

10. Animals in a wild state are not the subjects of theft.[y]

[y Some of the examples usually given of this rule, as doves out of a dovehouse, may perhaps be thought to come more properly under the rule applicable to reclaimed animals, not known to be reclaimed.]

The rule includes deer, hares, conies, swans, pheasants, hawks, herons, pigeons,[z] and all other birds and beasts not reclaimed or reduced into possession.

[z The statute 7 & 8 Geo. 4, c. 29, s. 33, contains a provision against killing and taking pigeons, under such circumstances *as do not amount to larciny at common law.*]

The rule includes also wild animals, which after having been reclaimed or reduced into possession, have reverted to their wild state.

Wild animals not fit for food.

11. Animals of a wild nature which are not fit for food, are not the subject of larciny, although they be reduced into possession or reclaimed.

This rule includes bears, foxes, apes, monkies, pole-cats, cats and dogs, ferrets, thrushes, singing birds in general, parrots, squirrels and animals kept merely for pleasure. But not hawks or falcons, or bees as before specified.[a]

[a It would seem that the rule upon this subject arose from the circumstance that the animals above specified, being unfit for food, were not formerly marketable, and of a determinate value. But they are

are all now the subject of civil remedies for property, and would seem to require the same protection from the criminal law as reclaimed animals fit for food. In some authorities, the above-mentioned animals are said to be of a base nature, and therefore not the subjects of theft. There is some uncertainty in the law as to animals which are occasionally used for food, and sometimes for pleasure. For the simplicity of the ancient law does not appear to have contemplated the possibility of animals being kept for pleasure, which were *fit* for food. The use of animals, alive or dead, for the purposes of science, has not perhaps been sufficiently protected either by common law or statute.

The statute 7 & 8 Geo. 4, c. 29, s. 31, provides, but not as for a theft, against taking such beasts or birds as are ordinarily kept in a state of confinement, and their *skins* and *plumage* only.

The common law principle does not appear satisfactory in the present day; and a want of uniformity in the law is occasioned by the old principle being partially innovated upon by the statute.]

12. The young of wild animals which are not the subjects of theft, when reduced into possession or reclaimed, are not the subjects of theft, whether in the nest, kennel, den or otherwise.[b]

Young of wild animals not the subjects of theft.

[b The authorities do not lay it down in terms sufficiently clear and positive, whether the eggs produce, skeletons, carcases, skins, and plumage of wild animals, which cannot, though reclaimed, be the subjects of theft, may be stolen. Vide Art. 7, n. of Art. 8 & 9. Of this nature are ostrich and other valuable feathers, sable and other skins, skeletons, and the like. Such chattels are often extremely valuable articles of commerce, and of the highest importance to science. The circumstance of the animal, whilst living, having been fit for food is not a reasonable criterion of the value of its component parts after death. Property of this description is only very partially provided for by the statute 7 & 8 Geo. 4, c. 29, s. 31. It would seem to be more consistent with the principles of the common law, that these articles should not be deemed the subjects of theft, but such a rule would be contrary to the dictates of reason and convenience.]

Of the Acts of taking and carrying away.[c]

[c This branch of the law of theft is chiefly remarkable on account of the contrast which it presents between the ancient principle of a trespass *vi et armis*, on which the law of theft was founded, and the modern refinements by which the law has been made partially applicable to inchoate delinquencies in the present day. The use of the technical word "asportavit," like other technical words in the common definitions of theft, has facilitated the adoption of such refinements. It would appear that the law upon this subject is, at present, in some particulars objectionable, on account of distinctions which it involves not being well suited to common apprehension, nor always reasonable in themselves. Difficulties are continually arising, in practice, in consequence of doubts whether articles have been sufficiently removed to constitute the crime of theft. In Livingstone's American Code, the act of theft is made complete by the *taking*, without any *carrying away*.]

Taking and carrying away.

1. It is essential to the offence of theft, that the goods stolen be *taken* into the possession of the wrong-doer.

A taking requisite.

If by the cutting of a pocket or any other act done with intent to steal money or goods, such money or goods fall to the ground, but the wrong-doer does not pick them up, the taking into possession is not complete.[d]

[d There are numerous cases under the law of theft, respecting the stealing of goods by employment of innocent agents, by principals in the first or second degree, and accessaries; and, in practice, difficulties are often experienced in distinguishing between some of these classes, and receivers of stolen goods. It has been thought convenient to postpone the statement of the principles deducible from these cases, inasmuch, as in the event of a consolidation of the whole Criminal Law, it will, it is conceived, be found that they are, in a great measure, applicable to other offences in common with theft; and that the generalizing of them, may tend to abbreviate and simplify the entire system of our criminal jurisprudence.]

2. But, if possession be taken, the duration of the possession is immaterial; though it be momentary and be instantly relinquished, it is a sufficient possession.

Duration of wrongful possession.

3. A *carrying away* of goods is also essential, but any, the least removal of a chattel from the place which it occupied is a sufficient carrying away.

An *asportavit* necessary.

It is not necessary that the property should have been carried away without the knowledge of the owner, or removed out of his sight.

4. There is no sufficient carrying away, when any part of the chattel continues to occupy the same place which it occupied before.

5. There is no sufficient carrying away, where the goods, although moved remain attached by a string or otherwise to the place from which they were taken; or where any impediment whatsoever remains which in any mode or to any degree is an obstacle to complete possession by the wrong-doer.[e]

[e The cases to be found in the books illustrative of the doctrine of the "asportavit," partake of a subtlety, as inconvenient in practice as it may be thought objectionable in theory. Thus the removal of a package from the head to the tail of a waggon, is an *asportavit*, but not so the setting a package

a package on end in the place where it lay, for the purpose of cutting open the side of it to steal the contents. However, the lifting up of a bag from the bottom of the boot of a coach, is an *asportavit* though the thief be detected, before he gets it out of the boot, and it does not appear that the bag is entirely removed from the place it first occupied, but each part is removed from the space which each specific part had occupied.]

Of the circumstances which make a taking Felonious.[f]

[f This branch of the law of theft is remarkable on account of the obscurity which prevails in the authorities respecting the precise meaning of the terms *felonious*, *animus furandi*, and *lucri causâ*, as expressive of a criminal intention, and the difference of opinion that is found as to the materiality of the *lucri causâ*. The use of these technical terms, like the term *asportavit* before adverted to, will perhaps be thought to have been a principal cause of the want of precise and commonly intelligible definitions upon this subject. The doctrine of a deprivation of the temporary use of a chattel not amounting to felony, of a felonious intention existing at the time of taking, particularly as applicable to cases of finding, and other cases of constructive possession, and of the exculpation derived from the assent of the owner's wife, may perhaps be thought to require revision.]

Felonious taking and carrying away.

1. The taking and carrying away are felonious, where the goods are taken against the will of the owner either in his absence, or in a clandestine manner, or where possession is obtained by force or surprize, or by any trick, device or fraudulent expedient, the owner not voluntarily parting with his entire interest in the goods; and where the taker intends, in any such case, fraudulently to deprive the owner of his entire interest in the property against his will.[g]

[g This rule is laid down with great hesitation. For it is not a little singular, that among the great number of varying definitions of theft which have been given by eminent authorities, there are none which are explicit as to the *circumstances* which render a taking *felonious*; though it is clearly established that the taking must be felonious, in order to amount to theft. In fact, nothing has been done by way of generalizing the multitude of cases that have occurred respecting the nature of a taking which is essential to the offence of theft, than the stating that it must be committed with a mind bent on committing theft (*animo furandi*), or with a purpose deserving to be punished with forfeiture of goods and chattels, &c. (*felonious*); to which some authorities add, that it must be done for the sake of lucre (*lucri causâ*), which other authorities deny; whilst a third class of authorities state that *lucri causâ* may mean almost any cause whatever. The distinctions between a taking without the slightest colour of right, which may nevertheless be a trespass, and that which is a felony, and between a despoiling of the owner of the chattel altogether, and depriving him of the temporary use of it, and between cases where the owner intends to part with the property, or only with the possession of the chattel taken, are not pointed out by the terms of any of the definitions. It would seem expedient to define with precision both the *manner* of taking and the *intent* of the taker which render a taking *felonious*. But the authorities do not enable us to define the one or the other, in a way to enable us to state the rule in the text with confidence.]

This rule includes, amongst others, the cases hereafter mentioned, where the constructive possession remains in the owner, notwithstanding a voluntary parting with the actual possession, which has been obtained by some trick, device or fraudulent expedient; the entire interest of the owner not being voluntarily parted with.

Also those where a constructive possession remains vested in the owner, notwithstanding the actual possession has been voluntarily parted with, and no trick, device or fraudulent expedient has been practised to obtain possession; but the chattel is taken out of such constructive possession clandestinely or in the owner's absence.

Theft by owner.

2. Or, where the owner, in cases where he is himself the taker, takes the chattel in such manner with a design to despoil the person having lawful possession of it, of all his interest therein by reason of such possession; whether the consequence of despoiling the person having lawful possession, be to subject that person or any other person to damages, or to defraud the Crown.[h]

[h The case of Rex *v.* Wilkinson, Russel & Ryan's Crown Cases, 470, seems to go further than the preceding authorities, and, therefore, the law requires to be laid down so as to obviate doubts upon several branches of the rule as stated in the text.]

This rule includes, amongst others, cases where the owner steals from his own bailee, agent or servant, if either they or any other person would be liable to himself for the loss.

This rule does not include cases where a person takes property clandestinely from his joint-tenant or tenant in common.[i]

[i The rule respecting persons taking clandestinely from a joint-tenant or tenant in common, may appear to require revision, or at least some modification, according to the terms upon which the custody of the goods is held, as if one tenant in common be in the situation of a bailee to the others, and also, according to the consequences which would follow from the act of the wrong-doer.

The

The rule, that one tenant in common cannot steal from another, is sometimes referred to that branch of the definition of theft, which requires that the goods should be taken against the will of the owner, and sometimes to that which requires that the goods should be taken out of the possession of the owner. A number of rules relative to the law of theft may be referred, with equal propriety, to several of its branches; and the finding of them arranged under different heads in different treatises, occasions much perplexity to the student and the unprofessional reader.]

3. The ulterior motive by which the taker is influenced in despoiling the owner of his property altogether, whether it be to benefit himself or another, or to injure any one by the taking, is immaterial.[k] Ulterior motive.

[[k] The law upon this subject requires to be settled by a definite rule. According to some of the best authorities, the stealing "*lucri causâ*" stands as part of the definition of theft. Sir W. Blackstone says (4 Comm. 231), that the taking must be "*felonious*, that is, done *animo furandi*, or, as the civil law expresses it, *lucri causâ*." And several decisions have proceeded on the ground that a stealing has been "*lucri causâ*;" but that a very vague and almost ridiculously extensive meaning might be assigned to the term "*lucrum*." Thus, in one of the latest cases upon this subject, R. *v.* Morfit (R. & R. 307), where it was held to be larciny in a servant clandestinely taking his master's corn to give to his master's horses, though some of the Judges held that the purpose to which the prisoner intended to apply the corn did not vary the case, yet some alleged that the additional quantity of corn would diminish the work of the men who had to look after the horses, so that the *lucri causâ* to give themselves *ease* was an ingredient in the case. On the other hand, it has been held that the stealing a horse with intent to procure the acquittal of a prisoner charged with having stolen the same horse, and with the same intent throwing the horse into a coal-pit, amounted to larciny. It may be observed, that where the removal is merely nominal, and the motive is that of injury to the owner, and not of benefit to the taker, the offence is scarcely distinguishable from that of malicious mischief, which belongs to a different branch of criminal jurisprudence.]

4. Where the intention is merely to deprive the owner of the temporary possession and use of the chattel, it is not deemed to be felonious. Depriving of temporary possession.

This rule obtains whether the property be actually restored or abandoned by the taker without restoration; and whether the wrong-doer take the property with intent to make temporary use of it or for some purpose merely collateral. But restoration does not purge a felony once committed.[l]

[[l] Where a temporary use is made of property, taken clandestinely, and afterwards abandoned under such circumstances as are likely to occasion its loss to the owner, it may, perhaps, not appear satisfactory that the act should be regarded merely as a civil trespass. In the case of Rex *v.* Philips and another (2 East, P. C. 662), it was proved that the defendants took two horses out of the prosecutor's stable at night, without his leave, and having rode them about thirty miles, left them at an inn, saying, that they would return in about three hours. The defendants were taken the same day, at the distance of fourteen miles from the inn, walking in a direction from it. This was held to be no felony.]

5. The taking is without a felonious intent, wherever it results not from any intention to defraud or injure, but from *mistake*; whether such mistake be occasioned by misapprehension, as to the owner's consent or otherwise, inadvertence, carelessness or accident, or from an honest intent to enforce a supposed right or authority, although none such in fact exist. Excusable taking.

6. No pretence of enforcing any claim of right, or of acting under legal or other process whatsoever, where such process is fraudulently obtained and prosecuted, will negative or disprove the existence of a felonious intention, if it appear that such claim or process is used only as a colour for effectuating a fraudulent design.[m] Pretence of right. Colour of law.

[[m] If the criminal law be consolidated generally, this rule might probably be omitted as peculiar to the offence of theft, and a rule of a more general nature, and applicable to other offences as well as theft might conveniently be substituted.]

7. Extreme necessity does not negative a felonious intention.[n] Necessity.

[[n] There is a conflict of authority respecting this rule which it is desirable to obviate]

8. The inference of a felonious intention is not necessarily excluded by the circumstance that property of equal value has been left in exchange for that taken.[o] Exchange.

[[o] It seems to be requisite to lay down a rule upon this subject, which might seem more properly to be a question of evidence; for, in the present state of the authorities, it is somewhat doubtful, whether there be not some *legal* presumption of guilt, when goods are taken without consent of the owner, but goods of equal value left, and of innocence, where the *price* of goods is left.]

9. It is essential, that the felonious intention should exist at the time of the taking.[p] Intention at time of taking.

[[p] The propriety of this rule, which is founded on the old doctrine of taking from the possession, may be questioned. See R. *v.* Mucklow, R. & M., C. C. 160; R. *v.* Holloway, 5 Car. & Payne, 524. In

In the latter case, a poacher who took a gun by force from a gamekeeper, under an impression that it might be used against him, and afterwards sold it, was held not to be guilty of theft. And the rule is attended with considerable subtlety in its application, in those cases (hereafter to be noticed) where there are *two* takings; the first lawful, in consequence of a bailment, or trust expressed or implied; and second unlawful, where the bailment or trust has been determined. The second taking is, in such cases, a constructive taking from the constructive possession of another, the actual possession remaining before and after the taking in the wrong-doer. The rule in the text is, therefore, calculated to mislead a person unacquainted with the technicalities of the law of theft.]

Intent in cases of property found.

10. The intention of a person taking property by *finding*, will be felonious or not, according as his conduct in omitting to use due diligence to discover the owner, or in concealing the property, or in other circumstances, shows that in the taking he had or had not a design to deprive the owner altogether of his property.[q]

[q The authorities with regard to this rule are not very clear or precise, and many of them cannot be reconciled. The ancient authorities seem to have regarded a taking by finding as not felonious, wherever the finder might reasonably be supposed to have considered that the property was lost. But the later cases have cast on the finder the duty of using due diligence to discover the owner, particularly where the property has any marks which might be expected to lead to a discovery of such owner. And yet the conduct of the taker, *after* the taking, has in such cases, professedly at least, been treated as only material so far as it indicates the intention at *the time* of taking. The effect of the ancient cases is still more narrowed in those instances (hereafter to be noticed) where there is a second taking, after the determination of the implied trust with which a finder is deemed to be invested, by *breaking bulk*. The frequency of a defence on the ground that goods, with the taking of which a prisoner is charged, have been *found*, renders it important to lay down a precise rule upon this subject.]

Taking against the will of the owner.

11. A chattel is taken against the will of the owner, although he *permits* the property to be taken, or affords facilities to the taking of it with a view to bring parties engaged in a felonious design of stealing it to justice.

Facilities afforded by owner.

12. But if the owner *procure* the chattel to be taken, it is not a taking against the will of the owner.

Assent of owner's wife.

13. If the wife take a chattel of which the husband is the sole or joint owner, the taking is not theft, because they are in law as one person, and she has a kind of interest in the goods.[r]

[r It would seem that general policy was a sufficient ground for the rule in the text, without an indefinite *kind* of interest of the wife in the goods of her husband being alleged as the foundation of it. According to the Code Napoleon, the crime of theft cannot be committed in respect of the goods of persons standing in various degrees of relationship, besides that of husband and wife.]

Theft by Adulterer.

14. A stranger cannot commit theft by taking the goods of the husband by the delivery of the wife, *unless* he be her adulterer.[s]

[s It does not seem to be very satisfactory to make the question of felony depend on the fact of *adultery*, where the party knows that the property is taken against the will of the husband. But, if it be thought desirable to maintain the rule, it is necessary to re-establish it, as it may be thought to be shaken by an authority which will be referred to in the next note.]

15. If the wife and a stranger jointly steal the goods of the husband, the stranger is guilty of theft.[t]

[t Tolfree's case, 1 R. & M. C. C. 243. It seems to be difficult to reconcile this decision with the preceding rule upon any satisfactory principle. Where no adultery is committed, the distinction appears to be narrow between the case where a wife takes her husband's goods against his will and delivers them to a person who knows the circumstances, and that where the wife and the person jointly take from the husband. The argument in Tolfree's case affords an illustration, among many which might be adduced, of the abstruse learning upon which the decisions of questions of criminal law often depend. The following books of authority were referred to by the Counsel and the Court: Hale's P. C., Hawkins's P. C., Dalton, Fitzherbert, Broke, Staundforde, Lord Coke's 3 Institute, the Year books, the Statute of Westminster, East's Pleas of the Crown, and Leach's Crown Cases; several of which books are very little known by the profession, and from the quantity of obsolete and discarded law which is to be found in them, they would often mislead the unprofessional reader. The comparative weight of credit of these authorities, where they conflict, is a matter of professional science, which is not regulated by any determinate rules.]

Of the Ownership of Property stolen.[u]

[u This branch of the law of theft is attended with some uncertainty, in consequence of its not being clear to what extent some principles of the ancient law have been exploded or modified, which were founded on the intimate connexion which existed in early times between property and occupation. And it is to be observed, that no settled principle has been adopted for determining ownership in cases of theft; such as the right to immediate possession, or the like; the consequence of which has been a want of uniformity in the rules that have been established, and an unnecessary multiplication of them.

If

If, according to Rule 2, in the last division, it be not an essential ingredient in the crime of theft, that the taker should intend to defraud the *owner*, it seems to be inconsistent to require a statement of the ownership in an indictment. This, however, is, according to the authorities, an indispensable averment. It will appear from the following rules, that the statement of the ownership may be often a source of great perplexity; but this, it is submitted, might be avoided, by making it sufficient to state, in indictments, the name of any person intended to be defrauded.]

1. THE owner of goods is either the general owner; or the special owner, having a lawful possession of the goods distinct from that of the general owner. General and special owner.

This rule, as to special ownership, includes all cases of possession by bailees, whether they be or be not responsible to the owner in case of loss, by sheriffs and other ministers of justice, under any writ or other legal authority, and by finders of goods, and all persons having an actual possession of property distinct from that of the owner, save as hereinafter excepted.

This rule does not include persons who have only the bare charge, custody, or special use of goods,[x] or persons who have let goods to hire, or are otherwise incapacitated from resuming the possession at pleasure, or on payment of a lien, except as hereinafter mentioned.

[[x] A definitive rule upon this subject is required, for there is some conflict of authority as to the point, whether the property may not be laid in persons having a bare charge, or special use, particularly where servants or others are entrusted with the custody of goods off the premises, and out of the sight of their employers. In such cases, it will be seen, upon the statement of the rules respecting possession, that great confusion exists in the criminal law with regard to bare charges and bailments.]

2. The ownership of property, so far as regards the offence of theft, may be in an individual, a corporation, or any number of persons.

3. A person is deemed to be the owner of a chattel, although it be taken from him by authority of law, whilst it remains in the custody of the law[y]. Owner, whilst goods in custody of law.

[[y] This rule obtains in regard to goods seized under a *fieri facias*; but it would conduce to the certainty of the law to lay down a more general rule, which now depends mainly on inference. The principle of the rule appears to militate with the rule relating to goods let to hire, as the possession of the goods is not resumable from the sheriff at pleasure.]

4. A person is deemed to be the owner of a chattel, although it has, previously to the theft, been stolen or taken from his possession by fraud.[z] Owner, whilst goods removed by tort.

[[z] The rule, as regards *fraud*, is not very clearly laid down in the authorities, and it seems to be questionable whether a person acquiring goods by felony or fraud can be deemed to be the owner as against strangers.]

This rule includes, amongst others, cases where one person steals from another who has himself stolen the chattel from the owner.

5. Every chattel which is the subject of theft, is presumed to have an owner, though such owner cannot be ascertained.[a] Owner unknown.

[[a] Some definite rules require to be laid down with respect to waifs, estrays and treasure trove. The ancient authorities are strong to show that property of these descriptions is not the subject of theft, and cannot be laid, in an indictment, as the goods of a "person unknown." Goods *lost* were considered in the same light; but in consequence of cases of this description being frequently brought before the courts in modern times, it has been settled that the taking of them feloniously will amount to theft. Wreck was another species of property in the same predicament; but it has been made the subject of statutory provision, which might have been unnecessary, had it not been an excepted case at common law. According to the views of an early state of society the idea of property was scarcely conceivable as distinct from occupation, and the traces of such uncivilized notions still remain deeply impressed on the jurisprudence of this country. Cases of stealing waifs, estrays and treasure trove not having been often brought before the courts, it has not happened that the opinions of modern times have gained such an ascendancy over the ancient authorities that it can be laid down with certainty, that waifs, estrays and treasure trove are not an exception to the rule in the text.]

6. The ownership of some particular descriptions of property is as follows:— Particular cases of ownership.

Grave-clothes, in the personal representatives of the deceased, or in the person who was the owner when the corpse was buried, if they can be found.

Children's clothes, either in the parents or the children, according to circumstances and the general rules regarding property.[b]

[[b] There are numerous authorities upon this point, which are not perfectly reconcilable.]

Goods of church or chapel in vacation, in the church.

Goods of an intestate before administration granted, in the ordinary.

Of taking from the Possession of the Owner.

[c This branch of the law of theft is perhaps one of the most technical heads of English jurisprudence, a circumstance which, considering its very great practical importance, is extremely to be regretted. According to the simplicity of the ancient law, the offence of theft was made to consist in a felonious taking *from the possession*; but, in process of time, it was found that it was expedient to punish criminally several species of injuries to property, where the motive was fraud, and not malice, but where the possession had been voluntarily parted with by the owner. Such, for example, were many breaches of trust. It may perhaps be thought that it might have been more expedient to have legislated for offences of this description without reference to the circumstance of any violence committed in respect of the possession. Little attention, however, was paid by the legislature to the subject of criminal jurisprudence in early times; and the injuries in question could only be rendered the subjects of penal visitation by means of the decisions of the Courts, which proceeded, at first, with much vacillation, having regard only to the facts of particular cases. In this manner, and with this object, were several kinds of *constructive possession*, with reference to the offence of theft, gradually established. For it would have been too glaring a departure from ancient principles for the courts to have sanctioned any criminal punishment of a breach of trust, for example, except as it might be deemed to have squared with the definition of a theft. It is not surprising that these *constructions* of law should sometimes have been founded on reasonings not altogether satisfactory, especially when the scholastic subtlety of the age when they were invented is considered, or that they should have given rise to many contradictory decisions; or that they should have rendered the law very difficult to be comprehended, or even collected. But they have been attended with this further inconvenience, that owing to the irregular nature of their origin, and a just apprehension of extending penal laws, which came to be more generally felt in later times, the principles on which the constructions in question were framed, have not been acted upon to their full extent. And thus the common law of theft has been charged with much capriciousness as to the delinquencies which it includes or excludes. This defect it has been attempted to remedy by several modern statutes; but the remedy is only partial; and the contrast which the principles of these statutes exhibit, when viewed together with those of the existing common law of theft upon analogous subjects, tends very much to the disparagement of the uniformity of our criminal jurisprudence.

It would seem, that the doctrines of constructive possession, which are objectionable on so many accounts, might all be rendered unnecessary, if, where the owner's consent was obtained to parting with a chattel, the taker might be punished as for a fraud, on account of the unfair means whereby the owner's consent was obtained; or on account of a breach of his confidence, by abuse of a trust imposed. In the present state of the law, where goods are taken with the owner's consent, but are fraudulenty converted, the taker is sometimes reached by the doctrines of constructive theft, and sometimes by the statutory provisions respecting embezzlement, false pretences and breaches of trust, and he frequently escapes altogether. It would seem that the statutory provisions alluded to might be so enlarged as to render it unnecessary to resort, in any instance, to the doctrine of constructive theft; or that the common law definition of theft might be so extended as to embrace, without any violence of construction, cases of fraud and breach of trust.

Scotch Law.

In the event of its being deemed expedient to make any change in the principles of the law upon these subjects, it may be useful to refer to the provisions of the Scotch law, which, in several respects, appear to be preferable, in these particular matters, to our own, without departing too widely from the general character of our jurisprudence. The Scotch common law, for example, by its general rules with regard to the offence of *breach of trust*, supplies the place of several distinct provisions in the English Statutes, and obviates the necessity for a portion of the subtleties adopted by the English Common Law.

Code Napoleon.

The Code Napoleon, under a head of *abus de confiance*, provides against a variety of offences which, in our law, have been drawn, by forced construction, within our narrow definition of theft.

American Law.

Livingstone, in his American Code, has taken great pains to get rid of the technicalities of the law of theft by enlarging the boundaries of the offences of *breach of trust* and *false pretences*.]

Taking from owner's possession.

1. Every theft includes a trespass, and is an injury to the actual or constructive possession of the owner.[d]

[d It will be seen by some of the following rules, that although by means of the doctrine of a constructive possession, the analogy to the civil remedy of *trespass* is nominally preserved, yet that in substance the analogy to the remedy of *trover* is often followed, but that the law is not consistent in adhering to either analogy. Where that of trover is adopted, it has been in consequence of innovations upon the law, which have seldom been pushed to the full extent of the principle on which they were founded.]

Actual possession, though another has a bare charge or special use.

2. The owner is deemed to have the actual possession in all cases, where another has but a bare charge or special use of the chattel.

This rule includes, amongst others, all cases where money, household furniture, utensils and other chattels whatsoever, are kept within the house or upon the lands of the owner, of such he is deemed to have the actual possession, although domestic or other servants, journeymen or other workmen, clerks, foremen, bookkeepers, or persons employed in such capacities, have the custody and charge, or guests have the use of such goods and chattels.

Also, all cases where persons are entrusted in such capacities with the custody of money or goods to be returned in specie to the owner, or to be otherwise specifically applied according to his direction.

This

This rule also includes all cases where masters of ships, seamen, sorters of letters in the Post Office, and sheriffs' officers are entrusted with the custody of goods by their employers.[e]

[e It is often a matter of great practical difficulty to distinguish between the cases of persons having a bare charge, and bailees, where the persons entrusted with goods are not in the regular employment of the owner, and where persons who are so employed are entrusted with goods off the premises and out of the sight of the owner. In one of the latest cases upon this subject, M'Namees' case, Moody's C. C. 368, a drover was held guilty of felony in stealing sheep which he was employed to drive to London for the common allowance given to drovers, though it was found that the prisoner did not intend to steal the sheep at the time he took them into his possession; and that he was not the regular servant of the prosecutor. It was after much conflict of authority that persons having the bare charge, or special use of goods, were, about the reign of Henry the Seventh, deemed to be guilty of felony in stealing them; the offence of theft being in its nature originally inconsistent with the idea that the stolen property had been delivered by the owner to the taker for any purpose whatsoever. When the courts, in administering to the wants of society, introduced the innovation, they endeavoured to give it the appearance of clashing as little as possible with the principles of the old law, by holding that the actual possession continued. Whereas it would seem that the possession is in fact in such cases constructive, especially where the person having the custody of goods carries them, in pursuance of directions received, off the premises and out of the sight of the owner. After it had become established that servants and persons in the like capacity might be guilty of stealing goods of which they had the charge, the doctrine was extended so as to trench very frequently upon cases of bailments; and this is the less surprising when it is considered at how late a period the law of bailments attained any degree of certainty or precision in this country. It is remarkable that a statute was passed in the reign of Henry the Eighth, to make it felony for servants to steal their master's goods in certain cases; but that this statute was superseded by subsequent declarations of the common law, which were more extensive in their operation than the statute itself. By 7 & 8 Geo. 4, c. 29, a particular punishment is provided against clerks and servants stealing property of their masters.

A question has been raised in the Scotch courts whether a servant had the possession, or only a bare charge of his livery.]

No possession in owner, where goods are received on his account.

3. This rule is subject to the exception, that if goods be delivered to any one not by the owner, but by some other person for the owner, and the owner has neither property in, nor possession of the goods previous to such delivery, the owner has not any possession of such goods as against the person receiving the same for and on account of the owner,[f] provided no act has been done by the person receiving the same to determine his own possession, by delivery to the owner.

[f Where the property is received by a servant, or person in the like capacity, by virtue of his employment, it seems to be inconsistent with the rules which preserve a constructive possession in cases of bare charge, that he might not, by law, be guilty of stealing it, especially since it is determined that the owner in such cases has a constructive possession of it against a wrong-doer. But when it is considered that the doctrine of felony in cases of bare charge was itself an innovation upon the old law, it is more similar to the course of decisions in analogous instances, that they should not have carried the innovation to the full extent of the principle of it. The defect has been to a partial extent, though not wholly supplied by the statutory provisions respecting *embezzlement*, 7 & 8 Geo. 4, c. 29, s. 42. The distinction, however, between embezzlement and theft has given rise to many subtle questions, and the interpretation of the law of embezzlement has occasioned numerous decisions. It may be thought that an alteration or modification of the rule in the text would tend to the simplicity and uniformity of the law, and a change in this respect would not be without sanction from the jurisprudence of foreign countries.

One of the latest decisions upon the subject of embezzlement, may serve as an example to show the inadequacy of the statute to supply all the defects of the law of theft, and the nicety of the distinction between misappropriations of money which are criminal, and those which are not so. In R. *v.* Barton, R. & M. Cr. C. 237, it was held that a person employed to collect sacrament money from communicants was not punishable for embezzlement, as not being the servant either of the minister, the churchwardens or the poor. In another case on the question whether the prisoner was a servant within the meaning of the statute of embezzlement, a learned Judge expressly over-ruled a former decision, as being one of which he never approved, but which had been decided by five Judges against three, Lord Tenterden, Mr. J. Holroyd and B. Garrow, constituting the minority. Crow's case, Sir G. Lewin's Cr. C. 89. That the former decision had been thus weakened would, perhaps, never have been known except by two or three individuals, though the latter case occurred in 1823, had not Sir G. Lewin published his Crown Reports in the present year. It would, perhaps, be found that a considerable portion of the common law respecting crimes is to be met with in private manuscripts, in a dormant state. The Irish decisions are also numerous, and would be entitled to weight as authorities; but they are very little known in this country.

Property vested before delivery.

4. But wherever the right of possession in a chattel has vested in the owner, by purchase or otherwise, previous to such delivery, the owner is deemed to have the possession, and the person receiving the same on his behalf, if he be his servant, or act in that capacity, has a bare charge.[g]

[g This rule is founded on two or three modern authorities, in which the goods were taken by servants after the right of possession had vested in their masters by sale; the servants having in fact been sent by the masters to receive goods from the vendors. It is left uncertain, whether the principle of the rule would extend to numerous cases which might be suggested as falling within it; where the right of property and not the right of possession is vested, as in the case of sales for ready money, before payment of the price, and where the person taking the goods is not in the capacity of a servant. And it seems particularly to require some decision whether the rule would not extend to *clerks*, by analogy to the law of embezzlement.]

 5. The

Delivery, without intent to part with possession.

5. The actual possession is deemed to continue in all cases where it has not been changed by a delivery with intent to part with the possession.

This rule includes all cases of money staked at play, which is feloniously taken before the event is decided; and all cases of goods feloniously taken by an expected purchaser, where it was not intended by the owner that he should take them without payment in ready money.

And all other cases where a chattel is feloniously taken without performance of the condition on which the owner intended to part with the possession.[h]

[h This rule appears to be the result of numerous decisions, in which the questions have been, whether the owner intended to part unconditionally with any interest in the property at the time it was stolen; and whether the taker, before and at the moment he obtained possession, entertained a felonious design. Although it is said, in these cases, that the possession is not parted with, yet it would seem that in many instances this was only by inference of law, there having been, in fact, a manual delivery to the thief. The doctrine seems to be an extension of the old law of theft; but an attempt has been made to preserve an appearance of consistency with ancient principles, which required a taking from the possession, and supposed a trespass *vi et armis*. It would seem that as the possession is in law not deemed to be parted with, the intention of the thief at the time of *first* receiving the goods was immaterial; it has however always been deemed a material part of the inquiry in such cases. It may perhaps also be considered an anomaly to make the owner's *intention* at the time of the transaction a material ingredient in the offence.

Some writers have thought, that wherever property remains under the inspection of the owner, the possession remains with him; and they have considered that this doctrine would apply even to bailments. The doubt whether this be a recognized principle or not adds to the uncertainties attending the law of theft.]

Owner has constructive possession as against a wrong-doer.

6. Constructive possession is sufficient as against a mere wrong-doer.[i]

[i It may perhaps be thought that the numerous subtle distinctions which follow, upon the subject of *constructive possession*, especially as to the cases where the owner has a constructive possession against one person, and not against another, and where the person in actual possession may or may not be guilty of stealing the owner's goods, are much too technical for convenient use or the general comprehension of the community.]

This rule includes all cases where the owner by bailment, or by loss of a chattel, or by any other means being out of the actual possession of such chattel, but having a right to immediate possession, it is feloniously taken by a mere wrong-doer.

And cases where the owner has a right to immediate possession upon payment of a lien, as in the case of possession by a carrier.

And cases where the owner's goods are in the custody of the law, as where they are taken by the sheriff under a writ of *fieri facias*.

And cases where the owner's servant receives goods on his account, the right to which is not previously vested in the owner.

The rule does not include the case of goods let to hire by the owner.[k]

[k It will be observed that the rule is not very uniform in its application, sometimes following and sometimes deviating from the analogy of the action of trover. The law, with reference to the examples in the text, will be found to be stated in the books very vaguely as to bailments, owing probably to the nature of bailments not having been very accurately considered by the ancient authorities, particularly before the time of Lord Holt.]

Not against a person having a subsisting lawful possession.

7. The owner has no constructive possession against one who has an actual possession, distinct from that of the owner, legal in its beginning, and remaining undetermined.[l]

[l This rule expresses what remains of the ancient rule of the common law, according to which a trespass *vi et armis* was necessary to constitute theft; but which, it has been seen, is greatly narrowed by the doctrines relating to a bare charge, special use, and conditional delivery. From some of the rules about to be stated, it will be observed that the rule in the text has been frittered down by further constructions of law. It seems to have been the general course of our jurisprudence rarely to change the principles of the common law, but to accommodate them to the altered circumstances of society by fiction and construction, having often the effect in reality, though not in form, of completely undermining and subverting them. This process has rendered the common law of theft very difficult to be understood even by lawyers. The legislature, as in other instances, has supplied a partial remedy for the inconveniences resulting from the rule in the text, by 7 & 8 Geo. 4, c. 29, s 49, 51, in the instance of certain agents and factors, which provisions appear to have been suggested by the circumstances which transpired in the course of a particular trial, and not by a general view of the defects of the common law.]

One who is not the owner may have actual legal possession distinct from the owner, by consent of the owner, by authority of law, or by finding.

8. The

8. The owner has not a constructive possession against any person who has a distinct lawful possession of a chattel, by delivery under any bailment or contract, and the party having such possession does not commit theft by any taking or embezzlement of such chattel.[m] Owner has not a constructive possession against a bailee.

[m Different opinions have been entertained by jurists concerning the expediency of this rule. Some have thought that persons who have the custody of goods which they are to return or deliver in *specie*, and are not merely liable *in account*, ought to be punishable as for a theft, in purloining them. Others have considered that a distinction ought to exist in regard to different kinds of bailment, as of hiring, pawning and carrying. Several foreign codes treat misappropriations by bailees of property entrusted to them as thefts. Owing to the great obscurity which existed upon the subject of bailments in the early periods of the common law, the books abound with authorities that are totally irreconcileable on the subject of theft by bailees; and the older cases are often a stumbling block in the way of the unprofessional reader. It will be seen that the inconvenience of the rule in the text, as it affected carriers, was felt at an early period, and was in some cases got rid of by a construction of law, founded on the *breaking of bulk*. Depredations by tenants and lodgers are provided against by 7 & 8 Geo. 4, c. 29, s. 45.]

This rule comprehends all cases where goods are delivered to any banker, factor, carrier, whether a common carrier or otherwise, wharfinger, taylor, hirer of the goods, or other bailee whatsoever.

9. But the owner has a constructive possession, notwithstanding such delivery upon a bailment or contract in three cases, viz: Constructive possession, as against bailee.

1. Where a person obtains the possession of a chattel by fraud, intending, at the time that he obtains such possession, to steal it, and the owner's consent is not obtained to a transfer of his entire interest in the property.[n] In Cases of fraud.

[n This rule was an innovation upon the ancient principles of the common law, to which deference was nevertheless paid by the doctrine of a constructive possession. The ground of the rule appears to be, that there can be no contract where one of the parties designs nothing but a fraud. It will be seen, that, as in the case of other innovations, the courts have not been consistent in carrying the principle of the rule to its full extent, as in the instance of contracts of sale; otherwise there would have been no occasion for the statute of *false pretences*. It is commonly said, that in the cases to which the rule in the text applies, the *property* is not intended to be parted with, but only the *possession*, or an interim custody. But in some cases of bailment, at least as of *hiring*, there is a transfer of property, and not of possession merely; but an inferior title to property only is conveyed, and the bailor does not intend to part with his entire interest.]

10. It is indifferent whether the possession be so obtained by fraud from the owner, or his servant or agent, or from his wife or bailee.

11. The intention on the part of the wife, servant or bailee, in delivering the property, whether such wife, servant or bailee, intended to part with the entire property or not, is immaterial, unless such wife, servant or bailee had authority to dispose of the entire property.[o]

[o It may, perhaps, appear anomalous, that the guilt of a party should depend on the kind of authority given by another to the individual from whom he obtains the property. If, for example, an individual, supposing that he has a general agency, intends to sell goods to another who designs a fraud, and parts with the goods accordingly. This will not be felony unless it turn out that the agency was a special agency, and did not warrant the sale. And although the nature of the agency be so material to the conclusion of guilt, the thief may have believed all the time that he was dealing with a principal and not with an agent.]

This rule includes cases where goods are obtained by the offender from a tradesman's servant, whilst such servant is carrying them according to his master's orders, under pretence of being the person entitled to receive them.[p]

[p On this point there have been conflicting cases, requiring to be settled by a positive rule. It may be observed, in general, with reference to the numerous points stated in this digest, concerning which there are conflicting cases, that decisions have often a character and credit according to the particular Judges who delivered or concurred in them, especially as the reasons for the decisions in Crown cases are seldom given. Consequently the unprofessional reader cannot be expected to form a competent judgment respecting the weight which is likely to be attached to a particular case. The character of the reporter is likewise a matter of professional knowledge.]

12. Where the possession is obtained under the pretence of hiring, or other bailment of a chattel, it is not necessary that the agreement should be for any definite time.[q] Fraudulent hiring.

[q The cases which have occurred relate principally to the contract of hiring. It may be thought desirable that a general rule should be laid down for all contracts of bailment. Considerable uncertainty as to the law of theft, arises from the circumstance that it is to be collected, on several important points, from a few particular cases, which, although they appear to establish a principle more general than that which was necessary for their determination, leave the existence of the principle in great doubt. This happens more especially in criminal law, where, *in favorem vitæ*, a strict adherence to precedent is required.]

Nor is an actual conversion essential.

The fact that the party used the chattel for the pretended purpose is not material.

Nor is it material that the first offer was made by the owner.

The existence of a previous felonious intention is in all cases a question of fact for the decision of the jury.

Owner has not a constructive possession where he parts with his entire interest.

13. The owner has not a constructive possession, where he intends to part with his property in a chattel, and suffers it to be taken accordingly; and although the possession of goods be obtained with a felonious intent, the taking will not amount to theft if the owner intend to part with his entire interest in the goods, or if the money is not to be returned in specie.[r]

[r It may be thought, that upon the same principle on which bailments and other contracts for the temporary use of a chattel, which are used as a cloak for a felonious design, do not, in law, divest the possession of the owner, the possession ought not to be divested by a fraudulent contract or representation, in consequence of which the owner delivers up a chattel, intending to part with his entire interest in it. And it is to be observed, that in such cases the owner is not divested of his right to the immediate possession of the property as against the taker at least, but may enforce it by the civil remedy of trover. In this point of view, the present rule may be regarded as an *exception* to the principle involved in the preceding rule. But, in a different point of view the two rules may be reconciled, inasmuch as where a partial interest only in a chattel is parted with, and some interest is reserved, the total abstraction or conversion of the chattel is to the extent of the interest reserved, an act done against the will of the owner. For the owner has not, *pro tanto*, been deluded into parting with his rights. This reasoning, however, may perhaps be thought too refined to constitute the basis of a rule of criminal jurisprudence. And the difference between an intention to part with a very extensive interest and the owner's entire interest in a chattel may be merely nominal, especially in cases where the person parting with the chattel has himself only a very limited interest in it.

The defect in our criminal jurisprudence, arising from the operation of this rule, has been partially supplied by the statutory enactments respecting *false pretences*. But the distinctions between the offence of obtaining property under false pretences, and cases of theft from the constructive possession is often extremely nice, and has given rise to a multitude of decisions, many of which are incapable of being reconciled with each other. The difficulty of distinguishing between the nature of the two offences is the more inconvenient, in consequence of one being a felony and the other a misdemeanor, which involves the important consideration of *admitting to bail*, the law with regard to which, it must be recollected, is under the peculiar administration of justices of the peace. And, it is to be observed, that whilst the nature of the two offences is so much alike, and whilst the punishment for each is, in general, nearly the same, the mode of trial should be so substantially different as that which exists between trials of felonies and misdemeanors. The statute 7 & 8 Geo. 4, c. 29, s. 53, contains a singular admission of the extreme difficulty of distinguishing between thefts which are felonies, and misdemeanors by obtaining goods or money through false pretences; whilst it evinces an extraordinary indifference as to the form of trial in one case or the other. It enacts, that if upon the trial of a person indicted for a misdemeanor, in obtaining goods under false pretences, it appears that he was guilty of theft or felony, he shall, nevertheless, not be acquitted of the misdemeanor.

Another partial remedy for the defect has been applied by 7 & 8 Geo. 4, c. 29, s. 49 to 52. But considerable doubts remain as to the cases of persons not expressly included within those provisions, where the entire interest in a chattel is intended to be parted with, but not to the *taker*.]

This rule includes all cases of sales where credit is given, all cases where the property as well as the possession is meant to be parted with, and is obtained by false pretences, and all cases where money is parted with by way of loan, and not by way of deposit.

Bailment determined.

14. (2.) Where a bailment has been determined by breaking open a parcel committed to the trust of the bailee, contrary to the terms of the bailment, and the bailee steals the *whole* or *part*.

This rule includes carriers or other bailees who break bulk, and then appropriate the whole or part of the entire package, or the contents of any such box or the like; millers or others who appropriate part of the corn, or of other articles received by them, though not in any package or envelope.

The rule does not extend to the converting the whole of any parcel, or several distinct parcels.[s]

[s A consequence of this very singular rule, that it is not felony to steal the whole of a parcel, but that it is felony to steal a part, affords a strong ground for impeachment of the law on this particular subject. The rule appears to have originated from a desire to remove the inconvenience which the strict principles of the common law occasioned where goods were entrusted to carriers and some other bailees; for, in such cases, the bailees could not be guilty of a trespass *vi et armis*. By the expedient which is the subject of the rule in the text, the bailee was made punishable, as for a theft, and the integrity of the old principle was, nevertheless, in outward appearance, preserved. The various reasons assigned by the courts in support of the rule, will, perhaps, in general, appear to be equally applicable to the case where the whole subject of the bailment is wrongfully disposed of. And some of the more ancient opinions on the point partake of that scholastic subtlety which is strongly impressed on the common law, as declared during a considerable period in the history of our jurisprudence. One of the earliest foundations suggested for the rule, and on which it not improbably was built, is, that although a *whole* package might be bailed, yet that the *parts* of it, as distinct from the whole, were not bailed. It is observable, that the principle of the rule has not been carried to its full extent in various cases where the bailment is as much determined.

mined as by breaking bulk. And the distinction between purloining part of a package and one or more packages out of a greater number does not appear reasonable. Had the principle of a criminal responsibility for breaches of trust been introduced at an early period into our jurisprudence, any occasion for such derogatory refinements as that which is the subject of the rule in the text, would have been avoided. The rule in the text has been disapproved of by eminent English law writers, as "savouring a little of contradiction, and standing more upon positive law than sound reasoning." By the Scotch law, the carrier is punishable without having recourse to such a legal artifice.]

15. (3.) Where the bailment has been determined according to the terms of the contract. Contract of bailment expired.

This rule includes cases where the bailment has been determined, by performance of the terms of the contract, as by the carriage of goods to the place appointed, by effluxion of time, by the performance of a journey, for which a horse or carriage has been hired.[t]

[t A definite authoritative rule upon this subject is very much required; for great doubt is entertained as to the extent, and even the existence, of the rule in the text, in consequence of the modern decision of R. *v.* Banks. There an owner parted with the possession of goods on bailment for a special purpose, and the bailee, *when that purpose was executed*, neglected to return them, and afterwards disposed of them; and it was held that if he had not a felonious intention when he originally took them, his subsequent withholding and disposing of them would not constitute a felonious taking. And the Judges, upon consultation, were of opinion, that the doctrine laid down on this subject, in 2 East, P. C. 690 & 694, and 2 Russell, 1089 and 1090, was not correct. Previous to that decision, the tendency of the authorities had been to render bailees punishable for theft, wherever it could be done by narrowing the ancient principles of the law, without expressly violating them. These authorities afford another example, in addition to the many which have been above noticed, of the bulk which has been added to the common law, and the intricacies in which it has been entangled, owing to the indirect attempts which have been made to elude the force of old established rules which were framed with reference to the wants and manners of an early state of society.

The consideration that the principles deduced from the cases in the works of Sir E. H. East and Mr. Russell have been decided by the Judges to be incorrect, affords an illustration, among many which might be adduced, of the uncertainty which attaches to the *principles* of the criminal law. It is very rare that any *principles* are laid down by the Judges in the decision of Crown cases, and indeed the decision itself is often to be collected only from the ambiguous fact of a pardon having been granted. And whilst the cases themselves are too numerous and too nicely distinguished to be a practical guide, at least for magistrates unprepared by legal education and habits for such duties, the *principles* deduced from those cases by private text writers, not being based on judicial or legislative sanction, cannot be confidently relied upon.]

16. A lawful possession by finding, is determined, by the finder breaking an entire parcel found, contrary to the implied trust in the finder. Lawful possession by finding, determined.

As by opening a box found, with intent to embezzle part or the whole of the contents.[u]

[u This mode of rendering the finder of property punishable, as for a theft, may be thought to be too subtle and refined for a rule of criminal law. It was invented, in very modern times, to meet the cases of hackney-coachmen and others where the circumstances under which they obtained the property negatived the inference that, at the first moment of taking it, they had a design to steal it. The doctrine of a *second taking* from the constructive possession of the owner was therefore thought of. And the analogy of bailments suggested the method of creating this constructive possession by means of an implied trust which was to be put an end to, as in the case of bailments, by breaking bulk; though it would not be determined by purloining or disposing of the whole package.]

II. After our observations upon the process of digesting the common law relating to crimes, and which have been practically illustrated by our attempt to extract the rules which define and limit the offence of theft, it seems almost unnecessary to remark, that the common or unwritten law, as a system of penal law, is in various respects defective.

However convenient the common or unwritten law may, in the opinion of some persons be, in its quality of flexibility and easy adaptation to all the varying exigencies of justice, so far as concerns mere civil rights, yet with respect to the criminal branch of the law, those very qualities constitute an objection to the system. So long as a large proportion of the penal law is merely oral, and dependent on the examination and construction of precedents, it must be, to the mass of society, inaccessible, and unintelligible in its rules and boundaries.

Where the law is to be extracted, as the unwritten or oral law must be, from a mass of precedents, it cannot possess the efficacy of written and certain rules and specific penalties in deterring men from the commission of crimes. For the law cannot be said to be promulgated till after the offence committed, where, previously, it cannot be known even to the most experienced lawyers, except by laborious research, and the aid of legal reasoning and analogy. We conceive that it will

 appear,

appear, from the Digest and Notes which we have given upon the subject of the Law of Theft, that, with regard to that offence at least, this inconvenience is, at present, very often practically felt.

And as the common law can, in many cases, only be known by the difficult and fallible process of extracting principles from precedents, and determining on the comparative weight of authorities where they conflict, so it will be collected from our preceding remarks, that the materials to which this process must be applied are but imperfectly known to the profession, and are, in a great measure, inaccessible to the public.

Considerations of this description are entitled to still greater weight, when it is recollected that the administration of the greater part of the penal laws is exercised by magistrates, either acting alone, as upon questions of commitment, or at sessions, and in other inferior courts of criminal jurisdiction. And it is obvious, from the complicated and technical nature of the common law regarding crimes, that it must often happen, that such magistrates, however fitted they may be by natural endowments, for the situations they fill, although they act with the pures intentions and use the most laudable exertions, may nevertheless not possess that knowledge and experience which legal education and habits alone can give, and which are requisite for the due application of the oral law. It is reasonable to suppose, that a magistrate who would be able to apply a written law with great propriety, might be embarrassed when suddenly called upon to deduce such a law, from a number of decisions differing, in several of their circumstances, from the case before him, and often conflicting with each other.

We may here remark, although it be in anticipation of some observations which the digesting of the law respecting criminal procedure will require to be made with greater particularity, that courts of inferior jurisdiction are very defective in the means by which their proceedings may be superintended, and the errors into which they may fall may be corrected on appeal.

It has been thought, by great authority, that the practice even of the superior courts of criminal jurisdiction, such as the Courts of Oyer and Terminer and Gaol Delivery at the Assizes, is not entirely free from objection in this respect, although in these superior courts difficult questions are much more likely to be determined satisfactorily, and when they occur, admit of being remedied by the ordinary practice of reserving questions for future discussion and consideration by the Judges. The courts of inferior jurisdiction, as the Courts of Quarter Sessions, for instance, possess no such resources; and thus it happens, that whilst in a mere question as to a pauper's settlement, the opinion of Your Majesty's Court of King's Bench may be obtained, whenever any case of doubt or difficulty arises, yet, that in cases far more important which concern the commission of offences of great magnitude, and are visited by almost every penal consequence short of capital punishment, no mode is usually left open for the correction even of manifest errors, but by petition to Your Majesty. It is well known, that applications for the redress of such errors, are frequently made through the medium of Your Majesty's Secretary of State, and that those applications are received with a degree of attention and vigilance, which the well known imperfect constitution of such inferior courts in this respect, is calculated to excite.

Such a course of proceeding, although it be frequently necessary for the purpose of preventing injustice, is still but a means of palliating a great defect in the constitution of Your Majesty's Criminal Courts of inferior jurisdiction; and we cannot but observe that this is a defect which is grown into one of great importance from change of circumstances, and particularly by reason of the increased extent to which the criminal business of the country is now transacted in the Courts of Quarter Sessions. Those courts which in former times seldom exercised jurisdiction as to higher offences than petit larciny, are now in the habit of trying nearly every species of offence, including even cases where the court has no discretion as to the punishment, but is bound on conviction to pass sentence of transportation for life.

All the difficulties which we have pointed out as presenting themselves to the reduction of the common law to a more plain and certain form, afford arguments in favour of that reduction. The same difficulties which occur in framing consistent

consistent rules from the mass of authorities, are experienced in the practical administration of the law, and frequently on occasions where there is little time for reflection in coming to a decision, few opportunities for revising it if erroneous, and no sufficient means of redressing the consequences of error.

The inconveniences arising from the administration of the oral law have, in particular instances, prevailed to such an extent as to make recourse to legislative aid absolutely necessary; and thus considerable portions of the common law have from time to time been *declared*, and the *doubts* occasioned by conflicting cases have been removed by the statute law, through the means of what are termed *declaratory Acts*. Whatever advantages have resulted where such interference has become necessary, will, it is apprehended, be experienced from the application of a similar remedy, in numerous instances, where it has not hitherto been applied.

The practice of enlarging the law by constructions, which no doubt has been frequently done with the most pure and laudable intentions, and with an earnest desire to punish the guilty, and to protect the interests of society, has probably so far operated to check a pressing evil as to cause it to be supposed that legislative interposition was unnecessary. And thus, whilst constructive enlargements have only mitigated, and have been inadequate to cure the mischief against which they were directed, they have excluded the more effectual remedy which might have been administered by the legislature.

It has appeared to us that even a very strict, and, if we may use the expression, servile Digest of the existing Criminal Law would be attended with important advantages, as, for example, in the framing of authentic general rules, in the solution of doubtful points, in the bringing together from quarters widely dispersed inconsistent provisions, so as almost necessarily to lead to a redress of the inconvenience, in the placing the whole of the system within the scope of the framer of each new statute, thus enabling him adequately to consider the consequences of change, and in the promulgation of law in a cheap and accessible form. But we have also thought, and humbly submit to Your Majesty's consideration, that the labour of completing a Digest of the Criminal Law would be much abridged, and its practical utility would be much increased, whilst the main purposes of criminal jurisprudence in this country would be better effectuated, by removing some distinctions, the retaining of which is not compensated by any adequate advantage, and repealing certain statutory provisions which, from a variety of causes, have become inconvenient in their application. We request permission to notice some instances of this kind which have occurred to us in the progress of our work, and which we have felt to be difficulties in the way of accomplishing it in a satisfactory manner.

In the first place, we have to suggest that the *boundaries* assigned to *offences* should, in some particular instances, be reconsidered. A particular offence at common law is sometimes found to include a variety of criminal acts which, in their nature, may be more properly referred to an offence of a different description. This has arisen from the circumstance that one offence has been made the subject of penal visitation at an earlier period than another, and has been extended, by construction, to include injuries to society which, at the period when such construction was adopted, would otherwise have gone unpunished. Hence it becomes extremely difficult to ascertain the boundaries of various offences, whilst the legal grounds for including certain acts within one or another class, are often very technical or obscure, and sometimes very unreasonable. Thus it appears, by the specimen which we have given of the Common Law of Theft, and the notes appended, that the offence of theft was, in its origin, limited to the simple case of taking property from the actual possession of the owner by means of a trespass. But, by the doctrine of constructive possession, many cases have been brought within the scope of this offence where the actual possession has been obtained by a wrong doer, through the means of some trick or artifice; or where the actual possession has been obtained *bonâ fide*, but the property has been subsequently mis-appropriated. And hence very great difficulty is experienced, in practice, when it is necessary to distinguish thefts from criminal acts of embezzlement, or of obtaining property under false pretences. And the law has been much complained of on account of its complex and technical character, occasioned by the forced constructions by which, in the absence of appropriate penalties, such delinquencies have been subjected to the punishment inflicted upon thefts; examples illustrative of these remarks occur in the

instances, already adverted to for another purpose, of thefts committed by carriers of property, and where the possession of goods is voluntarily delivered by the owner but, is said to be defeated by a previous felonious intent existing in the mind of the person receiving the property from the owner, to steal it.

The technical character given to the law is not the only inconvenience which the doctrine of construction occasions. It will be collected from several instances supplied in our Digest and Notes, that where a breach of trust, embezzlement or fraud, has, by construction, been rendered a theft, such construction has never been carried to the full extent of the principle on which it has been founded. The consequence of which has been, that the Legislature has, in most cases, partially supplied the defect of the common law, and has treated various acts, which, upon the principles of construction adopted at common law, might properly be regarded in the light of thefts, as ranging under a totally different head of offences. For example, in the instance of obtaining property under pretence of a contract of hiring with a preconcerted design of misappropriating it, the principle, it would seem, according to which this offence has been treated as a theft, might be fairly extended to cases where, with a similar preconcerted design, a bargain had been made, not for the temporary use merely, but for the whole property in a chattel. Here, however, the common law stops short, and the defect is only partially supplied by the Statute of False Pretences. The consequence has been, that offences closely resembling each other in their character, are in one case treated as felonies, and in another as misdemeanors only. And a multiplicity of distinctions has been made, and cases have been accumulated, which render the boundary between the offences of theft, and obtaining money or goods under false pretences, a matter of great perplexity even to lawyers.

Similar examples might be adduced in regard to misappropriation by agents and factors, and also by clerks, servants and other persons, entrusted with property on account of their masters; and, in particular, with regard to those distinctions which have so little foundation in reason, between cases where the owner has parted merely with the custody of his property to a clerk, servant or other person, and where goods have been received on his account, and have been purloined before he has obtained actual possession of them. These examples are fully illustrated in the Digest and Notes. It is submitted, that a few simple enactments, which should settle the boundaries of offences according to their real character, and without the aid of any technical constructions, would tend, in a material degree, to render the criminal law more uniform, more compendious, and more intelligible.

It is to be remarked, that the constructions by which the ancient boundaries of the criminal law have been altered without the substitution of any definite limits, and without sufficient regard to consistency or the character of offences, are by no means confined to the crime of theft. Upon this it may be sufficient, on the present occasion, to refer to the manner in which the law of burglary has been extended by the doctrine of a *constructive breaking*, and that in which the law of robbery has been extended by the doctrine of *constructive violence*.

Another difficulty which has occurred to Your Commissioners to be in the way of compiling a convenient and consistent Digest of the Criminal Law, occurs in cases where the *definitions* of offences, though they might be conveniently applied to the present state of society, have received a *restrictive signification*, in consequence of decisions of ancient date, founded on the manners and modes of thinking prevalent in an earlier state of society.

For example, it will appear from the Digest and the Notes, that a multitude of distinctions exist as to what personal chattels are or are not the subjects of theft. The origin of such distinctions is to be found in the different notions entertained respecting the *value* of property in one age and in another. And the amendment which, it is suggested, might be advantageously made in respect of this branch of the law is, that property *which is of determinate value in the present day* should be the subject of theft, although, at a former period, it may not have been regarded as having any determinate value, and, on that account, was not held to be the subject of theft. No further alteration would be required in cases of this nature, than to give to the definitions of offences such meaning as they would obtain, if construed for the first time, in the present day. By such means, many anomalous rules, detached statutory provisions, and obscure and subtle distinctions, would be superseded.

Impediments to the formation of an uniform and consistent system of criminal statute law sometimes result from the retention of *doctrines founded upon ancient notions*, which are totally incongruous with the general principles of our jurisprudence. An instance occurs in the law of homicide, according to which a felonious purpose, though it be wholly unconnected with any design to occasion death, is made, in conjunction with an accidental killing, to constitute the crime of wilful murder. Thus, if a party shooting at a domestic fowl with an intention to steal it, by pure accident kill a person not known by him to be near, the felonious intent in shooting at the fowl, when coupled with the fact of a man being so killed, makes the party liable to suffer death as a murderer. In such a case it is very likely that the prisoner would have shrunk from the commission of the act, if it had been at all probable that the prosecution of it would have been attended with personal injury to any one. And in this respect the case differs from that in which it was decided, that a smuggler firing at a revenue officer and killing himself was guilty of suicide. It has appeared to us, that, in the first of such cases, life is sacrificed without a corresponding benefit to society by way of example. For as the offender cannot be reasonably supposed to have contemplated the crime for which he suffers, so it is scarcely to be expected that the example of his punishment will have any sensible effect in deterring others from acts, which, according to common experience, are never likely to lead to the same fatal determination. The rule of the common law to which we have adverted, is, we believe, peculiar to the jurisprudence of this country. Its introduction has been attributed to a mistake made by Sir E. Coke, in the interpretation of a passage cited by him from Bracton.

Other instances of objectionable common law rules are furnished by our Digest and Notes. We may refer to those ancient notions, whereby the connexion between property and possession was considered as almost inseparable, from which so much perplexity has arisen with regard to the law of wreck, waifs, estrays and goods found; and to the rule of law which excepts from being subjects of theft whatever is attached to or savours of the realty; and that whereby the offence of *theft* in taking goods from a husband is made to depend on the fact of *adultery* with the wife.

It has also appeared to us that a Digest would be rendered more compendious, consistent and intelligible, if some alterations were made in the existing law, in order to maintain *an uniformity of principle and language*, where a deviation from such uniformity appears not to have been made by the Legislature designedly. The defects of the common law have pressed themselves slowly and successively upon the attention of the Legislature; and the statutory corrections and supplements which it has received have usually been made with reference to the exigencies of particular occasions. Thus it has happened that the enactments respecting a particular offence often lie dispersed in numerous statutes, and in places where it is not easy to find them. An instance of this sort occurs in the statute law of forgery, in the digesting of which we have made considerable progress. In the 6th of King George the 4th, c. 78, a statute made for the regulation of the performance of quarantine, is contained a clause rendering it felony to forge certain certificates; and in the 2d & 3d of King Will. IV. c. 125. a statute made for advancing Exchequer Bills to assist certain islands in the West Indies, is contained a clause making it a capital felony to forge the certificate of the Commissioners, or the receipt of the cashier of the Bank; and many more apposite instances might be adduced.

The consequence of the want of a regular Digest of the Law upon the subject of particular offences has been, that, in making new statutes, the principles and language of the former statutes, and the antecedent state of the common law is often overlooked. Thus with regard to the same offence of forgery, the 2 & 3 of King Will. IV. c. 123, abolished the punishment of death in all the cases in which it was inflicted by the 11th of King George 4th, and the 1st of King Will. IV. c. 66, except in cases of forgery of wills, or powers of attorney to transfer stock or receive dividends. In the intermediate time, however, between the 11th of King George 4th, and the 1st of King Will. IV. c. 66, and the 2 & 3 King Will. IV. c. 123, a statute was passed to enable the Commissioners for the Reduction of the National Debt to grant life annuities, in which is a clause making it a capital felony to forge the name of any person to a transfer of an annuity, or to a power of attorney authorizing the transfer. There does not, however, appear to be any sufficient reason for inflicting a higher punishment upon forging a transfer of a life annuity than upon the forging of the transfer of a perpetual annuity; but it is possible that in

in framing the 2 & 3 King Will. IV. c. 123, the isolated clause in the 2 & 3 King Will. IV. c. 59, was not adverted to; and it was not observed, that it would remain in force though the capital punishments inflicted by the 11th King George 4th and 1st King Will. IV. were abolished. It may also be remarked, that it is not very easy to discover why the forgery of the certificate of the Exchequer Bill Commissioners, or the receipt of the cashier of the Bank should be made capital felonies by the 2 & 3 King Will. IV. c. 125, when the forgery of the Exchequer Bill itself is by the 2 & 3 King Will. IV. c. 123, only punishable with transportation for life. By the second section of the 11th King Geo. 4th and 1 King Will. IV. c. 66, the forgery of the royal seals and sign manual is made high treason, and punishable with death. And, as before observed, by the 2 & 3 King Will. IV. c. 123, the penalty of death is taken away in all the cases mentioned in the 11th King Geo. 4th and 1 King Will. IV. c. 66, except in the two cases of wills and powers of attorney to transfer stock. But the quality of the offences enumerated in the 11th King Geo. 4th and 1 King Will. IV. is left without alteration. The forgery of the royal seals and sign manual would therefore appear to be *high treason without the penalty of death.* It is not unlikely that for want of a connected system of law relating to offences and punishments these inconsistencies may have been overlooked.

To show the want of uniformity in the *language* of statutes, arising from the same cause, we may adduce examples derived from the same offence; though there are few offences which would not amply illustrate the subject. Thus the words, "utter, dispose of or put off," are used in the 11th King George 4th and 1st King William IV. c. 66, with reference to forged Exchequer Bills, bank notes, or any warrant or order for the payment of money; but the word "publish" is used in the 3 & 4 King Will. IV. c. 51, s. 27, with reference to a forged draft of the Receiver General of the Customs. The words "utter, dispose of, or put off," are not however equivalent to the word "publish;" at least it may admit of a doubt whether they are so, and yet there seems no sufficient reason why words of the same force and meaning should not be used in the one case as in the other.

We think that it will appear from these instances that a Digest of the existing Law, though it would undoubtedly be attended with eminent benefits, would still labour under many of the defects which are at present complained of; and, in particular, that it would sometimes be *inconsistent in its spirit and language* relative to the same offence, and would be *voluminous* without any adequate reason.

It has also appeared to Your Commissioners that the proposed Digest of the Criminal Law would be disincumbered of many technicalities and relieved from much objectionable matter if the rules of the common law were revised which regard *principals* and *accessaries.* In the older authorities, the legal distinctions respecting the particular share which an offender contributed towards the completion of an offence were multiplied to an extraordinary extent; no fewer than nine being made in the Mirror. At present they consist of accessaries before the fact, principals present at the commission of the offence, who are either principals in the first or second degree, and accessaries after the fact. These distinctions have given rise to many subtle points of legal learning, and have been productive of much delay and great uncertainty in the administration of justice. And, in particular, with regard to the distinction between accessaries *before the fact* and principals, numerous questions have arisen,* and may still arise, as to the trial of the accessary before the conviction, or after the acquittal of the principal, and as to the admissibility of a verdict against the principal on the trial of the accessary, and as to the propriety of charging the prisoner in the same indictment as an accessary before the fact, and as a principal in the second degree. It may be observed, that the distinction between principals and accessaries is often so nice, that although there may be no doubt a prisoner is guilty in one capacity or other, it is very possible that on separate charges he may escape altogether. It may deserve inquiry whether there be any adequate foundation for the rule in which such questions originate, in many cases at least where that rule is applied. If *A.* procure *B.* to set fire to a stack of corn, and *B.* is a mere child or person without legal discretion, *A.* would be a principal; but if it turned out that *B.* had legal discretion to distinguish between right and wrong, *A.* would be only an accessary before the fact. In analogous civil cases the maxim would be applied, "Qui facit per alium, facit per se." And even if in criminal cases there be

* The difficulties on this subject are only *partially* removed by the Statute 7 Geo. 4. c. 64, s. 9, 10, 11, &c.

be any reason for the establishment of a different rule, the law would still be chargeable with this inconsistency, that in treasons and misdemeanors the distinction between principals and accessaries is altogether discarded.

We may further observe upon this subject, that the law of theft is by no means consistently and systematically applied in relation to the distinction between principals and receivers. In some instances, offenders have been considered as falling within the latter class, although their offence included all the essentials of theft; viz. a taking and carrying away of property with a felonious intent.

But we think that the most objectionable circumstance relating to the distinctions under consideration, is the manner in which the law regards an accessary *after* the *fact*. The law upon this subject probably had its origin in ancient and barbarous times, when the relatives or adherents of a murderer, by protecting him against the payment of the *were*, in defiance of the vengeance of the kinsmen of the person murdered, protracted a sanguinary feud. We think, however, that it is repugnant to sound and humane policy that the offence of an accessary after the fact, who may possibly have been stimulated to relieve an offender from a motive of reclaiming him, should be visited with the punishment and disabilities incident to a judgment of felony. So rigid nevertheless is the common law in punishing accessaries after the fact, that it is felony in a man to harbour even his own wife after she has committed a felony. And as every accessary after the fact to a felony becomes a felon, it is felony to harbour a man who has harboured his wife after she has committed a felony. We much doubt whether the insertion of such rules as these in our Digest would conduce to the honour of our national jurisprudence.

With the same views, Your Commissioners conceive it to be their duty to represent, that the work upon which they are engaged must be defective, to a considerable degree, in uniform and precise arrangement, and, perhaps, also in the statement of reasonable distinctions as to the punishment of offences and forms of procedure, unless some modifications be adopted of the present classification of crimes, whereby they are designated, as *treasons*, *felonies* and *misdemeanors*. The consequence of the existing classification in this respect is, in many instances, to separate and subject to *punishments* widely disproportionate, and to *forms of procedure* widely dissimilar, offences which are in their nature undistinguishable. Parties charged with the commission of misdemeanors are, in general, entitled to be bailed; but the law is otherwise in the cases of charges for felony; parties charged with felonies have no right of traverse, or to a copy of the indictment, they cannot challenge more than twenty jurors without cause shown; they have no right to a full defence by counsel, or to a trial by a special jury, and cannot have a new trial. The process as regards persons charged with misdemeanors, is widely different in all these respects. And as regards the subject of *punishment*, convictions and attainders in case of felony, affecting as they do the competency* of witnesses, and occasioning the penalties of *forfeiture*, make a very striking difference between the punishment of offences of this class, and that of misdemeanors.

But notwithstanding this wide difference between the punishments and procedure, as regards felonies and misdemeanors, we may refer to our Digest and Notes for evidence that the offences themselves which are so unequally dealt with may be of a very kindred nature. For it will thence be collected that many cases of theft are undistinguishable, in their real character, from cases of obtaining property under false pretences, and that the line between them is very far from being at all clearly drawn by the authorities; and that even the Legislature itself has expressly provided, that upon a charge as for a misdemeanor in obtaining property under false pretences, if the offence, upon the trial, shall turn out to be a felony, the prisoner shall nevertheless be convicted and punished as for a misdemeanor, and shall not afterwards be prosecuted for a theft and felony upon the same facts. It may be observed, that in cases within the operation of this statute, the very same offence may be prosecuted either as a felony or misdemeanor, at the mere option of a private prosecutor, who has thus the power of determining whether the party accused shall be subject to the disadvantages incident to a charge of felony, and in particular whether the prisoner's counsel shall address the jury or not.

Without

* In some few instances not well defined, a conviction for a *misdemeanor*, renders the offender incompetent. *See* our Observations, p. 33.

Without detailing at length numerous examples to the like effect, it may be allowable to add another instance from the law regarding attempts at committing felony. If *A.* were to strike *B.* with a bludgeon, with intent to take away his life, he would, unless he inflicted a wound, be guilty of a misdemeanor only; but if he were to do the very same act, with intent to take away his purse, he would be guilty of felony.

It is moreover a consequence of the classification of crimes into felonies and misdemeanors, that charges for felony and misdemeanor cannot be joined in the same indictment. But it often happens that, upon prosecutions for felony, the prisoner is entitled to his acquittal on account of the failure of precise proof of some fact, which is, technically speaking, essential to the completion of the crime, but which without affecting the moral guilt of the party, reduces the legal quality of the offence from felony to misdemeanor; in such cases it is usual to charge the prisoner upon a fresh indictment for a misdemeanor. The preparing a second bill is however always attended with additional delay, trouble and expense. And frequently the grand jury is discharged before the prisoner is acquitted of the felony, in which case the prosecution for the misdemeanor must be postponed till the next assizes, or, as more commonly happens, dropped altogether. Our Digest will supply several instances in which a transaction of the nature suggested is likely to occur, and particularly those cases in which there has been a *taking* of property, but no *carrying away*. The decision of this point, it will be seen by the Digest and Notes, may turn upon the nicest distinctions; as, for example, whether all the parts of the article taken have changed their place, or whether some one part may not have have remained *in statu quo*. In all such cases, if the jury, upon the acquittal of a prisoner, by reason of failure of proof as to his having completed the commission of any offence, might find him guilty, on a second count, for an *attempt* to commit it, whenever the evidence warranted such conviction, one and the same inquiry would suffice for both charges, and, it is conceived, no injustice would be done; but the inconveniences which have been adverted to as resulting from a second indictment would be obviated. We have pointed out these inconveniences, amongst many others which might be mentioned, as resulting from the classification of offences into treasons, felonies and misdemeanors, because we conceive, that if some alteration in respect of the classing of offences were adopted in reference to these distinctions, the Digest would present a better system of criminal jurisprudence than if it were a mere transcript of the existing law.

We should, we are aware, transgress the limits of the province assigned to us, were we to offer any suggestions upon the subject of *punishments*, otherwise than as it is immediately connected with the duty of digesting the Criminal Law; but, confining ourselves within the sphere of this duty, we may remark, that a mere Digest of the existing law would be very imperfect as to its definitions of punishments. For the legal definitions of offences are frequently of so large a description, and the criminal acts they include differ so widely in the mischief they occasion to society, that, without a definite scale, marking different degrees of criminality, appropriate punishments cannot be previously defined. Thus, in the instance of the offence of burglary, the punishment of death is applicable, without distinction, to a numerous class of offences, the extremes of which have little resemblance, in point of moral guilt, or the injury sustained, to each other. The consequence of which imperfection in the law is, great uncertainty in the application of punishment, whereby the motive to abstain from the commission of offences is weakened. And this imperfection can only be diminished by defining the different degrees and aggravations of offences, and annexing to them punishments, which shall, after allowing a discretionary latitude to be exercised by the Court within certain limits, be carried into execution. We think also, that with a view to the more satisfactory definition of punishments, the *age* of the offender deserves more particular regard from the Legislature.

Besides the defect which we have pointed out in the definitions of punishments, arising from a vagueness in the definitions of offences, we beg permission to observe, that the law, in the assignment of punishments, often exhibits a remarkable degree of inconsistency. This has, apparently, arisen in most instances from the circumstance that new statutes have been passed, without sufficient reference to the antecedent state of the criminal law. To this cause, in some measure, may be attributed the inconsistency which has been already pointed out with regard to the punishment of offences of the same character, because they happen to be classed as felonies or misdemeanors,

misdemeanors. And it is very difficult to account, upon any other ground, for the distinction, whereby, in some offences, a discretionary latitude as to punishment is given to the Court, extending from the smallest fine or a short term of imprisonment, to transportation for life; whilst in others, resembling the former in character, transportation for life is made imperative. A singular example of such inconsistency is exhibited by the 2 & 3 King Will. IV. c. 62, and 3 & 4. King Will. IV. c. 44, the former of these statutes making the punishment of stealing in a dwelling-house to the amount of 5 *l.* transportation for life absolutely, and the latter leaving the punishment discretionary where, in addition to stealing in a dwelling-house to the amount of 5 *l.*, or any other amount, the offence has been aggravated by the house being *broken* open.

We request permission to add one suggestion further upon the subject of punishments, which is, that a Digest, in presenting a faithful transcript of the existing law, will contain many common law and statutory rules, and nice distinctions concerning the *incompetency of witnesses* on the ground of *infamy*, and concerning their restoration to competency. But it has appeared to us to deserve consideration, whether this ground of incompetency of witnesses should be retained as a part of the criminal law. The rules upon this subject, though they are attended with many inconveniences, seldom, we think, attain their object of excluding witnesses from giving testimony. For it happens, we believe, not unfrequently, that convicts are pardoned for the express purpose of making them competent witnesses upon criminal trials. And the necessary legal proof is seldom capable of being produced at the moment, to incapacitate a witness. It is to be observed, that the credit due to a witness who has been convicted of a crime must always be a proper question to be submitted to a jury. But the distinctions between offences, a conviction for which does or does not render a witness incompetent, are often unreasonable, besides not being well defined; and, if any satisfactory argument could be adduced for excluding totally the evidence of a witness on the ground of a conviction, the circumstances by which his competency may be restored, as, for example, by suffering his sentence, appear to be very insufficient for effecting so great change in his credibility.

The principle of making the admissibility of the testimony of a convicted offender to depend upon the circumstance of his having suffered the punishment to which he was sentenced, is, we think, a very defective one. The witness himself is neither more nor less credible on that account; and therefore a test of competency is established, which has nothing to do with his credibility. Considered as part of the penalty for having committed the offence, the exclusion of the witness seems to be equally unreasonable. For the testimony of the offender is the privilege of the party who requires it, or of the public, not of the witness himself; and it is a mode of punishment which, whilst it impedes the course of justice, can scarcely be considered as having any sensible operation in deterring offenders from the commission of crimes.

In the progress which we have made in our labours, we have not had occasion to digest much of the process and practice of Criminal Courts; but we think that we are warranted in suggesting that they might, in some instances, be made more simple and uniform. Many of the ancient forms of procedure, if not obsolete, are little understood, and little used in practice. We may instance, in particular, the process of *outlawry*, which, in all its cumbrous details, incidents and consequences would occupy no inconsiderable portion of the Statute Book, although it is now of little practical utility.

The severity of the proceeding by outlawry, the effects of which frequently exceed the heaviest punishment that could be consequent upon an actual conviction, has induced the courts to listen to a number of nice and trivial objections for the sake of evading it. It would not be difficult, we conceive, to substitute some other form of proceeding, which would be less *objectionable* in *point of severity* and *intricacy*, and which would more frequently attain the only reasonable object of the process of outlawry, that of compelling the appearance of a contumacious offender.

We have also thought that the practice relative to the prosecution of offenders charged with *coroner's inquisitions* stands in need of some legislative revision. It is, we conceive, highly inconvenient, and at the same time unnecessary, that, after a charge has been so substantiated by competent authority as to be sufficient to put the offender on his trial for homicide, the witnesses should be sent before a grand jury, for the purpose of supporting a second accusation by bill of indictment.

This method of proceeding, occasions expense and inconvenience.

The additional expense occasioned may perhaps be regarded as of trifling importance; but it is a serious inconvenience, that all the witnesses, including medical men usually subpœnaed upon trials for homicide, and whose absence from their professional duties often leads to distressing consequences, should frequently be obliged to attend at the assize town much earlier than would otherwise be necessary for the mere purpose of having a bill of indictment found. And we think it is deserving of consideration, whether this inconvenience may not be avoided, and at the same time the ends of justice be equally attained by other means.

The practice relating to *summary proceedings* before magistrates, and to *appeals* against summary convictions, is diversified to such an extent, that almost every distinct offence presents some peculiarity of proceeding. And we cannot but think that such a multiplication of forms is objectionable, as it is certainly inconvenient in opposing an impediment to the digesting the law, and occasioning an unnecessary extension of the Statute Book.

We have confined the suggestions which we have made upon the subject of the principles of criminal jurisprudence to those matters which have been brought under our attention in the progress of digesting the law relative to particular offences; and we beg to observe, that a combined view of the whole body of the criminal law, when completely digested, will probably suggest many improvements which cannot be made to appear satisfactorily from the details of particular branches.

Of all the alterations in the principles of the criminal law which we have proposed, there is none which presents such great difficulties, or requires so much circumspection, in the mode of executing it, as that of remodelling the definitions of offences. This consideration has induced us to add a few remarks more particularly directed to defining, with greater precision, the offence of theft.

The laws of theft, false pretences, and embezzlement are all founded on a fraudulent conversion of the property of another; and the characterizing distinctions depend principally on the means by which the possession of the property has been obtained. These are reducible to three distinct classes:—1st, Where the property is taken by the wrong-doer without the consent of the owner, whether secretly or by surprise; 2dly, Where the property is taken with the consent of the owner, but the consent is obtained by fraud, as by some false pretence, or by some deceitful practice or device; 3d, Where the wrong-doer embezzles property of which he had previous lawful possession by consent of the owner obtained without fraud. The first of these classes comprehends all cases that, probably, in former times fell within the notion of larciny, which offence seems to have been confined originally to instances of a fraudulent taking, either without the knowledge, or at all events without the consent of the owner; but which, by construction, has afterwards been extended to some, but not to all, the cases falling within the second and third classes above mentioned.

Whilst the law, at present, recognizes three several offences of larciny, obtaining by false pretences and embezzlement, as above distinguished, they are, according to the existing law, in numerous instances, confounded with each other, and comprehended within the original offence of larciny, and the constructive extensions of that offence.

It has appeared to us, that the defects complained of do not so much consist in the including some kinds of fraudulent appropriations under the same class with larcinies, as in doing this by technical constructions, and but imperfectly. For whilst the distinctions between the separate offences are retained, notwithstanding the constructive enlargement of the ancient definition of theft, doubts are perpetually occurring whether an offence falls within any of those heads, to which, were it not for technical subtleties, it would properly belong. The body of the offence, in all the three classes of cases which have been mentioned, consists in the fraudulent appropriation of the property of another; and we think it doubtful whether the distinctions which arise out of the modes of obtaining possession, may not be too indefinite and too liable to confusion with each other to render it expedient to found upon those distinctions three different classes of offences. We have thought that the preferable course, though not wholly free from objection, might be, to include all cases of fraudulent misappropriation of property within one general description

description, or at most two, which should directly comprise all offences that are now brought within the description of larciny by construction, and all others to which the same principle ought to apply.

The law, thus simplified, would not be attended with any very material deviation from the present law of larciny, which already includes within its scope many cases of obtaining of property by false pretences, and also of embezzlements by carriers, millers and other bailees and agents. The alteration would be productive of these obvious advantages, that it would divest the law of many technicalities which cannot be understood by the community at large, and which are a source of great perplexity to lawyers; and would obviate the necessity for numerous supplementary enactments of the statute law, made to include offences of the very same description with those which are punishable by the common law.

For example, a general law, including all agents entrusted merely with the custody or application of specific property, would supersede the necessity for special enactments, in the cases of clerks and servants receiving money on account of their masters, and would remove all the difficulties which have been experienced in bringing carriers or other bailees, who misappropriate property of which they had originally a lawful possession, within the scope of the ancient law of larciny; and would supersede the nice distinctions which have been adverted to in a preceding part of the Report as occasioning much difficulty in practice, between a special use, or bare charge, or mere custody of goods, and such a possession of them, as, in the case of fraudulent appropriation, exempts the offender from punishment altogether, or reduces the offence from a felony to a misdemeanor.

The *corpus delicti* being once described with clearness and certainty, aggravations or palliations of the offence, varying the degree of punishment, might, without difficulty, be engrafted on the description; whether they consisted in the situation and character of the person committing the offence, as being a servant or apprentice, or the means used to obtain possession, or the nature of the thing stolen, or its value, or the place from which it was taken.

Whatever mode it may ultimately seem advisable to adopt, in order to reduce this very important branch of the law, including thefts, fraudulent pretences and embezzlement of property, to a more precise and certain form, it will, we apprehend, be necessary to mark the boundaries by plain and certain rules, founded on the character of the injury itself, to the exclusion of all distinctions of a merely technical and artificial nature, the introduction of which has, as we have already had frequent occasion to observe, been attended with much uncertainty and inconvenience.

We have inserted in an Appendix to this Report, our Digest of the law of theft, without any accompanying notes. And to this we have subjoined some extracts from Livingstone's Code; from which it will appear, that it has been judged expedient, in America, to make some material alterations with regard to the common law definition of the offence of theft. We have also added the two chapters from the Code Napoleon, upon the subjects of "Vol," and "Abus de Confiance," and a few extracts from English text writers.

Lastly, With respect to the expediency of combining the proposed Digest of the Statute Law with that of the Common Law, into one body of Criminal Law, we feel confident that such a measure would tend greatly to the improvement of the jurisprudence of the country. In support of our views upon this subject, we may observe that the definitions of crimes, the nature of punishments, and the forms of criminal procedure, originated, for the most part, in common law principles. But most of the unwritten rules touching crimes have been modified by Acts of the Legislature, which assume the terms and definitions of the common law. And thus it happens that the language in which these Acts are expressed, and the subjects to which they refer, are commonly unintelligible without a knowledge of the common law. The actual law in regard to any particular offence lies partly in the statutes and partly in the reports and text books. A reference to a single instance may be sufficient to illustrate our meaning. A modern statute makes it essential to the statutory offence, that it does not amount to an offence at common law, and thus the common law description of the offence must be referred to for the purpose of ascertaining the limits of the statutory offence. As one Digest therefore would be imperfect without the other, this seems to be a sufficient reason for uniting them.

But it may be further urged, that most of the advantages which may be expected to be derived from a consolidation of the Statute Law will be attained by combining the two Digests into one body of Criminal Law; and, in particular, the size of a joint Digest would be much more compendious than that of two separate Digests, and what is still more essential, the means afforded by methodical arrangement, and by the context, for construing the intention of the Legislature with certainty and precision, would, if the two Digests were united, be greatly increased.

We have been the more anxious to state our conclusion upon the subject of the expediency of a joint Digest at an early period of our labours, because if a joint Digest should be ultimately determined upon, much of the time and labour employed in the completion of the two separate Digests, will have been uselessly expended.

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Received the 24th of June 1834.

BROUGHAM, C.

APPENDIX.

DIGEST of the COMMON LAW relating to the Offence of THEFT.

THEFT is the *felonious* taking and carrying away of the personal goods of another. Definition of Theft.

Subjects of Theft.

1. ALL personal goods, save as hereafter excepted, are the subjects of theft. Subjects of Theft.

This rule includes money, plate, apparel, household stuff, stones dug out of quarries, grass in cocks, wood cut, plants rooted or dug up, fruits separated from the plants that produced them, and all movable goods, save as hereinafter excepted. Chattels personal.

2. Theft cannot be committed by severing and immediately taking and carrying away any thing which is parcel of or annexed to the soil, or which is the *unsevered produce* thereof; although it be severed by the wrong-doer with intent to despoil the owner. Parcel of freehold growing produce fixtures.

This rule includes soil, earth, stones, minerals, and whatever else is an unsevered portion of the land or realty.

Also, all trees, bushes, shrubs, plants, fruit, flowers, corn, grain, grass, roots, and other vegetable productions whatever unsevered from the realty.

Also, all buildings and fixtures annexed to the realty.

All iron, copper, lead and other metals and materials whatsoever, annexed to any house or building, or otherwise fixed to the realty.

All rails, palings, hedges, fences, palisades, and other annexations to the realty whatsoever.

3. Although a thing be parcel of the realty, or be any annexation to or unsevered produce of the realty; yet if any person sever it from the realty, and remove it with an intent to steal it, after an interval which so separates the acts of severance and removal that they cannot be considered as one continued act, the thing taken is a chattel the subject of theft, notwithstanding such previous connexion with the realty. Interval between severance and removal.

4. If any parcel of the realty, or any annexation to or unsevered produce of the realty be severed otherwise than by one who afterwards removes the same, it is the subject of theft, notwithstanding it be stolen instantly after such severance.

5. Nothing which is accessary to or which savours of the realty, is the subject of theft at common law. Accessaries to realty: Charters.

This rule comprehends all commissions relating to the realty and returns thereto, all charters, deeds, muniments and written assurances whatsoever concerning the realty; and all boxes in which any such writings that concern the realty are locked, sealed or otherwise fastened up. Box of Charters.

This rule does not extend to heir-looms.

5. Securities concerning choses in action, are not the subjects of theft. Choses in action.

6. The materials and stamps of any written instrument not relating to the realty, are the subjects of theft. Materials and stamps of written instruments.

7. No human body, living or dead, is the subject of theft. Human body.

8. Theft can be committed of such things only as are of some intrinsic value. Things of value.

9. Theft may be committed of things valuable to the owner, though not of value to any one else nor salable.

Domestic animals.

1. ALL domestic animals which are fit for food, or which are not of a base nature, whether living or dead, and also all parts of such animals, their young and their eggs, are the subjects of theft.

This rule includes horses, kine, sheep, swine, geese, hens, ducks, turkies and other animals whatsoever, which are tame and docile and used for domestic purposes, and not of a base nature.

2. Domestic animals of a base nature and not fit for food, are not the subjects of theft.

This rule includes dogs and cats.

Wild animals reduced into possession, and fit for food.

3. Animals of a wild nature which are fit for food, including deer, hares and conies; carp, tench, trout, eels and other fish; swans, pigeons, pheasants, and all other birds and beasts which are fit for food, are the subjects of theft, when they have been reduced into possession, so long as that possession continues.

4. Animals are reduced into possession when they are restrained of their natural liberty, and confined in buildings, stalls, parks, paddocks, mews, nets, trunks, ponds and other inclosures, of such limited extent that they may be taken by the owner whenever he pleases.

Doves, being in a dovecote, are included within this rule.

Wild animals reclaimed and fit for food.

5. Animals of a wild nature which are the subjects of theft when they are deprived of their natural liberty and reduced into possession, are also the subjects of theft if they be reclaimed, and known to be reclaimed, although they go abroad and return at their pleasure.

This rule includes deer and all other beasts, which having been wild by nature are reclaimed, and which from wearing a bell or collar, or from other notorious signs or circumstances, are known to be reclaimed.

The rule also includes swans, peacocks, and other birds which are reclaimed and known to be so.

Hawks, Falcons, Bees.

6. Reclaimed hawks and falcons are the subjects of theft, although they are not fit for food.

So also a stock of bees.

Young of wild animals which are the subjects of theft.

7. The young of such wild animals as are the subjects of theft when reduced into possession or reclaimed, are also the subjects of theft so long as they cannot run or fly and join the common stock, but remain in a house or several grounds, so that the owner of such house or grounds may take them at all times at his pleasure.

This rule includes, amongst others, young pigeons in a dove-house which cannot fly, young swans and cygnets which cannot fly, and are breeding in any parks or several grounds; young hawks or herons in the nest.

Produce of animals the subject of theft.

8. Where the animal itself is the subject of theft, the produce of the animal, if of any value, is also the subject of theft.

This rule extends to the taking of wool from the back of a sheep, milk from a cow, and all other cases whatsoever, where such produce is of value.

Dead animals the subject of theft.

9. Wild animals which when living may be the subjects of theft, are, whether they have been actually reduced into possession or reclaimed, or not, the subjects of theft when dead.

This rule includes all parts of the bodies of such animals.

Wild animals not reduced or reclaimed, or reverting to a wild state.

10. Animals in a wild state are not the subjects of theft.

The rule includes deer, hares, conies, swans, pheasants, hawks, herons, pigeons, and all other birds and beasts not reclaimed or reduced into possession.

The rule includes also wild animals, which after having been reclaimed or reduced into possession, have reverted to their wild state.

Wild animals not fit for food.

11. Animals of a wild nature which are not fit for food, are not the subject of larceny, although they be reduced into possession or reclaimed.

This rule includes bears, foxes, apes, monkies, pole-cats, cats and dogs, ferrets, thrushes, singing birds in general, parrots, squirrels and animals kept merely for pleasure. But not hawks or falcons, or bees as before specified.

Young of wild animals not the subject of theft.

12. The young of wild animals which are not the subjects of theft, when reduced into possession or reclaimed, are not the subjects of theft, whether in the nest, kennel, den or otherwise.

Of

Of the Acts of taking and carrying away.

Taking and carrying away. A taking requisite.

1. It is essential to the offence of theft, that the goods stolen be *taken* into the possession of the wrong-doer.

If by the cutting of a pocket or any other act done with intent to steal money or goods, such money or goods fall to the ground, but the wrong-doer does not pick them up, the taking into possession is not complete.

Duration of wrongful possession.

2. But, if possession be taken, the duration of the possession is immaterial; though it be momentary and be instantly relinquished, it is a sufficient possession.

An *asportavit* necessary.

3. A *carrying away* of goods is also essential, but any, the least removal of a chattel from the place which it occupied, is a sufficient carrying away.

It is not necessary that the property should have been carried away without the knowledge of the owner, or removed out of his sight.

4. There is no sufficient carrying away, when any part of the chattel continues to occupy the same place which it occupied before.

5. There is no sufficient carrying away, where the goods, although moved, remain attached by a string or otherwise to the place from which they were taken; or where any impediment whatsoever remains which in any mode or to any degree is an obstacle to the complete possession of the wrong-doer.

Of the circumstances which make a taking Felonious.

Felonious taking and carrying away.

1. The taking and carrying away are felonious, where the goods are taken against the will of the owner either in his absence, or in a clandestine manner, or where possession is obtained by force or surprize, or by any trick, device or fraudulent expedient, the owner not voluntarily parting with his entire interest in the goods; and where the taker intends, in any such case, fraudulently to deprive the owner of his entire interest in the property against his will.

This rule includes, amongst others, the cases hereafter mentioned, where the constructive possession remains in the owner, notwithstanding a voluntary parting with the actual possession, which has been obtained by some trick, device or fraudulent expedient; the entire interest of the owner not being voluntarily parted with.

Also those where a constructive possession remains vested in the owner, notwithstanding the actual possession has been voluntarily parted with, and no trick, device or fraudulent expedient has been practised to obtain possession; but the chattel is taken out of such constructive possession clandestinely or in the owner's absence.

Theft by owner.

2. Or, where the owner, in cases where he is himself the taker, takes the chattel in such manner with a design to despoil the person having lawful possession of it, of all his interest therein by reason of such possession; whether the consequence of despoiling the person having lawful possession be to subject that person or any other person to damages, or to defraud the Crown.

This rule includes, amongst others, cases where the owner steals from his own bailee, agent or servant, if either they or any other person would be liable to himself for the loss.

This rule does not include cases where a person takes property clandestinely from his joint-tenant or tenant in common.

Ulterior motive.

3. The ulterior motive by which the taker is influenced in despoiling the owner of his property altogether, whether it be to benefit himself or another, or to injure any one by the taking, is immaterial.

Depriving of temporary possession.

4. Where the intention is merely to deprive the owner of the temporary possession and use of the chattel, it is not deemed to be felonious.

This rule obtains whether the property be actually restored or abandoned by the taker without restoration; and whether the wrong-doer take the property with intent to make temporary use of it, or for some purpose merely collateral. But restoration does not purge a felony once committed.

Excusable taking.

5. The taking is without a felonious intent, wherever it results not from any intention to defraud or injure, but from *mistake*; whether such mistake be occasioned by misapprehension, as to the owner's consent or otherwise, inadvertence, carelessness or accident, or from an honest intent to enforce a supposed right or authority, although none such in fact exist.

Pretence of right. Colour of law.

6. No pretence of enforcing any claim of right, or of acting under legal or other process whatsoever, where such process is fraudulently obtained and prosecuted, will negative or disprove the existence of a felonious intention, if it appear that such claim or process is used only as a colour for effectuating a fraudulent design.

Necessity.

7. Extreme necessity does not negative a felonious intention.

Exchange.

8. The inference of a felonious intention is not necessarily excluded by the circumstance that property of equal value has been left in exchange for that taken.

Intention at time of taking.

9. It is essential, that the felonious intention should exist at the time of the taking.

Intent in cases of property found.

10. The intention of a person taking property by *finding*, will be felonious or not, according as his conduct in omitting to use due diligence to discover the owner, or in concealing the property, or in other circumstances, shows that in the taking he had or had not a design to deprive the owner altogether of his property.

Taking against the will of the owner.

11. A chattel is taken against the will of the owner, although he *permits* the property to be taken, or affords facilities to the taking of it with a view to bring parties engaged in a felonious design of stealing it to justice.

Facilities afforded by owner.

12. But if the owner *procure* the chattel to be taken, it is not a taking against the will of the owner.

Assent of owner's wife.

13. If the wife take a chattel of which the husband is the sole or joint owner, the taking is not theft, because they are in law as one person, and she has a kind of interest in the goods.

Theft by Adulterer.

14. A stranger cannot commit theft by taking the goods of the husband by the delivery of the wife, *unless* he be her adulterer.

15. If the wife and a stranger jointly steal the goods of the husband, the stranger is guilty of theft.

Of the Ownership of Property stolen.

General and special owner.

1. The owner of goods is either the general owner; or the special owner, having a lawful possession of the goods distinct from that of the general owner.

This rule as regards special ownership, includes, all cases of possession by bailees, whether they be or be not responsible to the owner in case of loss, by sheriffs and other ministers of justice under any writ or other legal authority, and by finders of goods, and all persons having an actual possession of property distinct from that of the owner, save as hereinafter excepted.

This rule does not include persons who have only the bare charge, custody, or special use of goods, or persons who have let goods to hire, or are otherwise incapacitated from resuming the possession at pleasure, or on payment of a lien, except as hereinafter mentioned.

2. The ownership of property, so far as regards the offence of theft may be in an individual, a corporation, or any number of persons.

Owner, whilst goods in custody of law.

3. A person is deemed the owner of a chattel, although it is taken from him by authority of law, whilst it remains in the custody of the law.

Owner, whilst goods removed by tort.

4. A person is deemed the owner of a chattel, although it has, previously to the theft, been stolen or taken from his possession by fraud.

This rule includes, amongst others, cases where one person steals from another who has himself stolen the chattel from the owner.

Owner unknown.

5. Every chattel which is the subject of theft, is presumed to have on owner, though such owner cannot be ascertained.

Particular cases of ownership.

6. The ownership of some particular descriptions of property is as follows:—

Grave-clothes, in the personal representatives of the deceased, or in the person who was the owner when the corpse was buried, if they can be found.

Children's clothes, either in the parents or the children, according to circumstances, and the general rules regarding property.

Goods of church or chapel in vacation, in the church.

Goods of an intestate before administration granted, in the ordinary.

Of taking from the Possession of the Owner.

1. Every theft includes a trespass, and is an injury to the actual or constructive possession of the owner. — Taking from owner's possession.

2. The owner is deemed to have the actual possession in all cases, where another has but a bare charge or special use of the chattel. — Actual possession, though another has a bare charge or special use.

This rule includes, amongst others, all cases where money, household furniture, utensils and other chattels whatsoever, are kept within the house or upon the lands of the owner, of such he is deemed to have the actual possession, although domestic or other servants, journeymen or other workmen, clerks, foremen, book-keepers, or persons employed in such capacities, have the custody and charge, or guests have the use of such goods and chattels,

Also, all cases where persons are intrusted in such capacities with the custody of money or goods to be returned in specie to the owner, or to be otherwise specifically applied according to his direction.

This rule also includes, all cases where masters of ships, seamen, sorters of letters in the Post Office, and sheriffs' officers are entrusted with the custody of goods by their employers.

3. This rule is subject to the exception, that if goods be delivered to any one not by the owner, but by some other person for the owner, and the owner has neither property in, nor possession of the goods previous to such delivery, the owner has not any possession of such goods as against the person receiving the same for and on account of the owner, provided no act has been done by the person receiving the same to determine his own possession, by delivery to the owner. — No possession in owner, where goods received on his account.

4. But wherever the right of possession in a chattel has vested in the owner, by purchase or otherwise, previous to such delivery, the owner is deemed to have the possession, and the person receiving the same on his behalf, if he be his servant, or act in that capacity, has a bare charge. — Property vested before delivery.

5. The actual possession is deemed to continue in all cases where it has not been changed by a delivery with intent to part with the possession. — Delivery, without intent to part with possession.

This rule includes all cases of money staked at play, which is feloniously taken before the event is decided; and all cases of goods feloniously taken by an expected purchaser, where it was not intended by the owner that he should take them without payment in ready money.

And all other cases where a chattel is feloniously taken without performance of the condition on which the owner intended to part with the possession.

6. Constructive possession is sufficient as against a mere wrong-doer. — Owner has constructive possession as against a wrong-doer.

This rule includes all cases where the owner by bailment, or by loss of a chattel, or by any other means being out of the actual possession of such chattel, but having a right to immediate possession, it is feloniously taken by a mere wrong-doer.

And cases where the owner has a right to immediate possession upon payment of a lien, as in the case of possession by a carrier.

And cases where the owner's goods are in the custody of the law, as where they are taken by the sheriff under a writ of *fieri facias*.

And cases where the owner's servant receives goods on his account, the right to which is not previously vested in the owner.

The rule does not include the case of goods let to hire by the owner.

7. The owner has no constructive possession against one who has an actual possession, distinct from that of the owner, legal in its beginning, and remaining undetermined. — Not against a person having a subsisting lawful possession.

One who is not the owner may have actual legal possession distinct from the owner, by consent of the owner, by authority of law, or by finding.

8. The owner has not a constructive possession against any person who has a distinct lawful possession of a chattel by delivery under any bailment or contract, and the party having such possession does not commit theft by any taking or embezzlement of such chattel. — Owner has not a constructive possession against a bailee.

This rule comprehends all cases where goods are delivered to any banker, factor, carrier, whether a common carrier or otherwise, wharfinger, taylor, hirer of the goods, or other bailee whatsoever.

Constructive possession, as against bailee. In Cases of fraud.

9. But the owner has a constructive possession, notwithstanding such delivery upon a bailment or contract in three cases; viz.

(1.) Where a person obtains the possession of a chattel by fraud, intending, at the time that he obtains such possession, to steal it, and the owner's consent is not obtained to a transfer of his entire interest in the property.

10. It is indifferent whether the possession be so obtained by fraud from the owner, or his servant or agent, or from his wife or bailee.

11. The intention on the part of the wife, servant or bailee, in delivering the property, whether such wife, servant or bailee, intended to part with the entire property or not, is immaterial, unless such wife, servant or bailee had authority to dispose of the entire property.

This rule includes cases where goods are obtained by the offender from a tradesman's servant, whilst such servant is carrying them according to his master's orders, under pretence of being the person entitled to receive them.

Fraudulent hiring.

12. Where the possession is obtained under the pretence of hiring, or other bailment of a chattel, it is not necessary that the agreement should be for any definite time.

Nor is an actual conversion essential.

The fact that the party used the chattel for the pretended purpose is not material.

Nor is it material that the first offer was made by the owner.

The existence of a previous felonious intention in all cases, is a question of fact, for the decision of the jury.

Owner has not a constructive possession where he parts with his entire interest.

13. The owner has not a constructive possession, where he intends to part with his property in a chattel, and suffers it to be taken accordingly; and although the possession of goods be obtained with a felonious intent, the taking will not amount to theft if the owner intend to part with his entire interest in the goods, or if the money is not to be returned in specie.

This rule includes all cases of sales where credit is given, all cases where the property as well as the possession is meant to be parted with, and is obtained by false pretences, and all cases when money is parted with by way of loan, and not by way of deposit.

Bailment determined.

14. (2.) Where a bailment has been determined by breaking open a parcel committed to the trust of the bailee, contrary to the terms of the bailment, and the bailee steals the *whole* or *part*.

This rule includes carriers or other bailees who break bulk, and then appropriate the whole or part of the entire package, or the contents of any such box or the like; millers or others who appropriate part of the corn, or of other articles received by them, though not in any package or envelope.

This rule does not extend to the converting the whole of any parcel, or several distinct parcels.

Contract of bailment expired.

15. (3.) Where the bailment has been determined according to the terms of the contract.

This rule includes cases where the bailment has been determined, by performance of the terms of the contract, as by the carriage of goods to the place appointed, by effluxion of time, by the performance of a journey, for which a horse or carriage has been hired.

Lawful possession by finding, determined.

16. A lawful possession by finding, is determined, by the finder breaking an entire parcel found, contrary to the implied trust in the finder.

As by opening a box found, with intent to embezzle part or the whole of the contents.

EXTRACTS from the PENAL CODE of *Louisiana.*

CODE OF CRIMES AND PUNISHMENTS.

CHAPTER III.

Of the Acquisition or Appropriation of Property by Fraud or Force.

Art. 611.—OFFENCES of this nature may be committed in the following manner :—

1. By the fraudulent appropriation of personal property, which has been delivered to the offender for another purpose.
2. By the like appropriation of property, which came to the possession of the offender by finding.
3. By the violation of epistolary correspondence.
4. By obtaining personal property under false pretences.
5. By theft or robbery.
6. By receiving property, knowing it to be fraudulently obtained.

SECTION I.

Of Fraudulent Breach of Trust.

Art. 612.—The following are the acts which may severally constitute this offence :

1st. The fraudulent appropriation of personal property by any one to whom it shall have been delivered on deposite, sequestration, pledge, or to be carried or repaired, or on any other contract or trust, by which he was bound to deliver or return the thing received.

2d. The fraudulent appropriation of certain specific personal property by any one, to whom it shall have been delivered on a contract of loan for use, or of letting and hiring, after the time at which, according to the contract, the right of use acquired thereby has ceased, or before that time, by a disposition not authorized by such contract.

Art. 613.—These two cases refer to a receiving with an intent to comply with the contract under which the delivery is made, and a subsequent determination of fraud ; if the contract be intended merely as the means of procuring possession, with the intent of making a fraudulent appropriation, it is theft.

Art. 614.—The punishment for the offences described in the first article of this section, is imprisonment in close custody, not exceeding six months, if the property be of the value of thirty dollars or under ; and if above that value, the like imprisonment, not exceeding one year.

Art. 615.—The giving to another the charge or care of property, subject to the immediate orders of the owner, or the use of it in his presence, or for the purposes of his trade, is not a delivery within the meaning of any articles describing this offence. A fraudulent appropriation of property so placed is theft.

SECTION II.

Of Fraudulent Appropriation of Property found.

Art. 616.—If any one shall come, by finding, to the possession of any personal property, of which he shall know, or have reason to believe, any designated person to be the owner, and shall fraudulently appropriate the same or any part thereof, he shall be imprisoned in close custody, not less than sixty days nor more than six months, and shall be fined in a sum equal to double the amount of the property so appropriated.

Art. 617.—Where property has been casually lost, and the finder has no reason to believe any designated person to be the owner of the property found, if it is of the value of more than twenty dollars, and the finder shall conceal the same, and appropriate it to his own use, he shall be fined in a sum equal to double the amount of the property appropriated.

Art. 618.—If the property be found in a place where property of the same description is usually placed, or suffered to be ; or if in an unusual place, in one

where the finder knows it to have been designedly put by the owner; or if the property be domestic animals, and they are found in a place in which they are usually kept, or to which they are suffered to go, or may reasonably be supposed to have strayed, this is not finding within the meaning of the preceding articles; and if the person taking the property fraudulently appropriate it, he is guilty of theft.

Art. 619.—If any one shall fraudulently appropriate property, taken or driven on shore from any vessel, wrecked, stranded or burned on the sea coast, or on any of the rivers, lakes or harbours of this state, he shall be imprisoned, at hard labour, not less than one nor more than three years.

Art. 620.—The property described in the last preceding article, shall be presumed to be fraudulently appropriated, withing the meaning of that Article, in all cases where the property is concealed, and the directions contained in the Code of Procedure, on the subject of wrecked property, are not pursued.

Section III.

Of the Violation of Epistolary Correspondence.

Art. 621.—If any one shall open and read, or cause to be read, any sealed letter, without being authorized so to do, either by the writer of such letter or the person to whom it is addressed, or by law, he shall be fined not more than fifty dollars, or imprisoned not less than ten nor more than thirty days.

Art. 622.—Whoever shall maliciously publish or circulate the whole or any part of a letter so opened, knowing the manner in which it was obtained, and without legal authority, shall be fined not less than fifty nor more than two hundred dollars, or imprisoned not less than one nor more than three months.

Art. 623.—If property of any assignable value be taken from such letter, it is theft.

Art. 624.—If any one shall take any letter, whether sealed or not, or any writing whatever from the legal possession of another, without his consent, and shall maliciously publish the same, he shall be fined not less than one hundred nor more than five hundred dollars, or imprisoned not less than one nor more than six months.

Section IV.

Of obtaining Property by false Pretences.

Art. 625.—If any one, with a fraudulent intent, shall obtain any personal property, or the release of any right of any assignable value, with the consent of the owner or possessor thereof, by means of any false pretences, without the use of which such consent would not have been given, he is guilty of this offence.

Art. 626.—No mere declaration of the value, or cost, or quality, or quantity of the property sold, although such declaration should be false; no promise of a consideration for the delivery of personal property, although such promise be not performed; no mere declaration that the party is able to pay, or perform, or deliver a consideration; is a false pretence under the above definition.

Art. 627.—The owner's consent to the delivery of the property is an essential part of the definition of this offence, and a characteristic that distinguishes it from theft. A temporary possession for examination or any other purpose, while the contract for the transfer is pending, is not such a delivery, by consent, as is required by the description of the offence. And if the fraudulent appropriation be made before such final consent be given, it is theft.

Art. 628.—This consent is presumed to have been given whenever the consideration is received, and the property is left, or put in the power of the person to whom, by the purport of the contract, it appears to be transferred, although such consideration should prove worthless or fraudulent. It is also presumed to have been given whenever credit has been given for the price, however short the time.

Art. 629.—Credit is presumed to have been given when, although the sale or other transfer was made on a stipulation of paying cash, the seller shall have taken a draft or order, or other security for the amount, and voluntarily left the property in the hands of the vendor.

Art. 630.—It is a false pretence for any one to assign or deliver any written contract as his own property, when, to his knowledge, it belongs to another bearing the same name.

Art. 631.—It is a false pretence to assume any false description, which would, if true, give greater credit to the party assuming it. By "description" is meant profession, trade, office or employment.

Art. 632.—If any one shall commit this offence by falsely personating another, he shall incur the highest punishment designated for the same.

This modification of the offence is committed,

1. By assuming to be another, whose name or credit shall induce the owner to deliver the property.

2. By assuming to be another person bearing the same name as the person who commits the offence.

Art. 633.—The assumption need not be by positive words; it is sufficient, if by any device whatever the person delivering the property, or releasing the right, is designedly made to believe that he who receives such property, or release, is the person whose name or character he assumes.

Art. 634.—It is an offence under the first article of this section, after a sale of personal property and before delivery, to substitute other property of less value than that sold, with intent to defraud the purchaser of the price paid, or to be received.

Art. 635.—It is a false pretence to promise immediate payment for personal property, and after obtaining possession thereof, to refuse either to restore the property or to pay the price. The offence described in this article is committed by a refusal to pay or deliver the property, on demand, at any time within three days after the purchase, if the property be then in the possession of the purchaser, or within one hour if demand be then made, whether the property be in his possession or not.

Art. 636.—It is sufficient to make the party liable under the preceding article, if demand be made at the place where the payment was promised to be made, and the not making the payment there is a sufficient refusal within the meaning of the said Article.

Art. 637.—It is a false pretence to give in payment for any personal property sold and delivered as for cash, any check, bill or order, which the person giving the same affirms will be paid at sight, but which he shall, at the time, know to be of no value; unless such check, bill or order be taken on the credit of the parties thereto, or some of them, and it shall be presumed to have been so taken whenever it is made payable otherwise than at sight or on demand.

Art. 638.—It is a false pretence to sell any merchandize by a sample, taken not from that actually sold, but from other merchandize of a greater value, with intent to defraud.

Art. 639.—It is a false pretence to produce a false invoice of merchandize sold, or to produce an invoice of other goods of the same description, affirming it to be the true invoice of the goods sold, for the purpose of deceiving the purchaser as to the cost and value of the property purchased.

Art. 640.—It is a false pretence to make, or knowingly to produce, any false letter or other paper, not amounting to forgery, in order to influence another in the purchase or sale, or other disposition of property.

Art. 641.—It is obtaining property under a false pretence to procure it by gain, either of skill or chance, or of both, by any other means than those which are given by the regular chances of the game, if it be one of chance; or by the fair exercise of skill and knowledge of the game, if it be not a game of hazard.

Art. 642.—It is a false pretence fraudulently to make any false reports for the purpose of raising or depressing the price of the public funds, or the stock of any incorporated company, or to circulate them knowing them to be false.

Art. 643.—The enumeration contained in this chapter, and in other parts of the code, of certain acts which shall constitute the offence described, does not exclude other acts coming within the definition. Nor does the declaration, that certain other acts are not considered as offences, restrict the exception to those particular acts.

Art. 644.—If the value of the property, obtained by an offence under this section, shall not amount to more than thirty dollars, the punishment shall be imprisonment, at hard labour, not exceeding three years; and if the value exceed that sum, the imprisonment shall not be less than one nor more than four years.

Section V.

Of Theft.

Art. 645.—Theft is the fraudulently taking of corporal personal property, having some assignable value, and belonging to another, from his possession and without his assent.

Art. 646.—The subject on which this offence can operate is exclusively personal property; but it embraces every species of that property that can be taken, and excludes only incorporeal rights.

Art. 647.—The "taking," mentioned in the description of this offence, is that which designates it from the other fraudulent appropriations of property heretofore described. The following rules and illustrations shew the nature of the taking intended, and the circumstances under which it constitutes the offence:

1. There must be to constitute this offence a taking, and that taking must be from the possession of the owner; therefore, although there has been a fraudulent appropriation, yet, if the possession was acquired by the accused in such a way as to bring the case within the description of either of the offences made punishable by the preceding part of this chapter, it is not theft.

2. But every fraudulent taking from the possession of the owner, and subsequent appropriation of personal property, which does not come within the description of some one of the offences described in the former sections of this chapter, is either theft or robbery.

3. If any servant or clerk, or person employed as such by any person, receive on account of his employers, from any other person, or from the employer himself, in trust or charge, to be kept or disposed of under the direction of the employer, any such property as is described in the definition of this offence, the possession of such clerk or servant is, as relates to this offence, the possession of his employer; and if the servant or clerk fraudulently appropriate it, it is theft.

4. Whenever the delivery is extorted by fear, it is a taking, within the definition of this offence, and one of those circumstances which constitutes the offence of robbery.

5. The possession of a factor or agent, entrusted with the sale or other alienation of property, is not such a possession of the owner as will make the factor or agent guilty of this offence, if he appropriate the proceeds.

6. Taking alone, without carrying away, is sufficient within the definition.

7. Taking may be either by a removal or simply by laying hold upon the article, either directly with the hand or by means of any instrument, in such a way as to evince a design to remove it.

8. The offence is complete by the taking; therefore, a voluntary return of the property will not prevent conviction; but it shall lessen the punishment one-half.

9. No one can be convicted of theft or robbery for any taking of property, in which he has a joint interest with the person from whose possession it was taken.

10. He who has the general property, of personal property, may commit this offence by taking the same fraudulently, from one who has a special property in it, with intent to make him answerable for the value.

11. If one of several persons, having a joint interest in personal property, either as partners, husband and wife, or otherwise, deliver it voluntarily to another, who takes it with a fraudulent intent against the other persons interested, it is not theft.

12. Where husband and wife are separated in person and estate, the delivery by the husband of the wife's property, over which she has given no control, without her assent, to a person who is connusant of the facts, and who takes it with a fraudulent intent, it is theft in both.

13. But where the separation is of property only, no one can be convicted of theft of the wife's property, who shows a voluntary delivery by the husband.

14. The last two preceding rules apply equally to property of the husband, delivered under similar circumstances by the wife.

15. The dispositions of law, in the case of theft or other offences committed by the wife in company with the husband, are found in the third chapter of the first book.

16. Neither the ownership nor the legal possession of property is changed by theft alone, without the circumstances required in such case by the Civil Code, in

order to produce a change of property; therefore, stolen goods, if fraudulently taken from the thief, are stolen from the original proprietor.

17. The possession of articles of dress or ornament, which are personally used by minor children, who are not of sufficient discretion to know the value of property, is the possession of the parent or guardian; therefore, such property fraudulently taken, although with the consent of the child, is theft.

Art. 648.—Although nothing but corporal personal property, as the same is defined in this Code, is the subject of this offence; yet if any one shall sever from any building fixed on the land of another, any of the materials of which it is formed, or shall take any produce of the soil, growing on such soil, of the value of five dollars or more, for the purpose of fraudulently appropriating the same, and in pursuance of such intent, shall remove them from the said land, such severance is sufficient to bring the materials, or other produce taken, within the description of personal property, and make the person taking the same guilty of theft.

Art. 649. Simple theft, if of property not exceeding in value thirty dollars, is punishable by imprisonment, at hard labour, not exceeding three years. If the property be above the value of thirty dollars, the punishment shall not be less than two nor more than four years.

Section VI.

Of aggravated Theft.

Art. 650.—The crime of theft may be aggravated by several circumstances, which are described in the following sections. If theft be not accompanied by any of them it is simple theft.

Section VII.

Of Theft by effraction.

Art. 651.—If any one shall, in the day time, with a fraudulent design, enter a house, or a ship or other vessel, without breaking or other violence, and shall then and there commit a theft, he shall be imprisoned not less than three nor more than six years, at hard labour.

This article does not relate to domestic servants or other inhabitants of the house in which the theft is committed.

Art. 652.—The last article only relates to property being in the house or ship, not in the personal possession of any one in it. Taking property of this last description may be either simple theft, private stealing from the person, or robbery.

Art. 653.—If any one break into a house, or into any ship or other vessel, in the day time, with intent to commit a theft, whether the theft be committed or not, he shall be imprisoned at hard labour, not less than four nor more than seven years.

Art. 654.—If any one be in the house, or in the ship or other vessel, either at the time the offence mentioned in the last two preceding articles is committed, and resist the offender, or be restrained from resisting by fear, the punishment shall be increased one-fourth.

Art. 655.—The breaking intended by the last three preceding articles means first, that the entry must be made with actual force; the slightest force brings the offender within their purview; the lifting of a latch of a door that is shut; the raising of a window; the entry at a window, chimney, or other unusual place; the introduction of the hand or any instrument to draw out the property, through any aperture made for the purpose, although the whole body does not enter, is a breaking.

Art. 656.—If any theft shall be committed by breaking any closet, box or other other place of the like nature, in which the property stolen was contained, the punishment shall be not less than four nor more than seven years at hard labour.

The breaking meant by this article must be by actual force. Not merely lifting the lid of a box, or opening a door, when either are unfastened, the use of false keys, or of the true one fraudulently obtained, is a breaking.

Section VIII.

Of stealing from the Person.

Art. 657.—If the theft be committed by privately stealing property from the person of another, the offender shall be imprisoned, at hard labour, not less than two nor more than six years.

Art. 658.—By "privately," is meant either without the knowledge of the party whose property is taken, or so suddenly that he has no time to make resistance before the property is carried away.

Art. 659.—If the party perceive the theft, and attempt to resist it, and the theft is committed by violence, it is robbery; if not completed, after violence or threats, it is an attempt to rob.

Art. 660.—If the article be taken, under the definition heretofore given of that word, the crime of private stealing is complete, although, owing to the difficulty of extricating it from the person of the possessor, or from his detection of the attempt, it be not actually carried away.

Art. 661.—The theft must be from the person; if the property stolen be in his presence only, it does not amount to this offence.

Section IX.

Of Robbery.

Art. 662.—Robbery is theft, committed by fraudulently taking the property of another from his person, or in his presence, with his knowledge and against his will; whether it be taken by force, or delivered or suffered to be taken through fear of some illegal injury to person, property or reputation, that is threatened by the robber or his accomplice.

Art. 663.—The audacity of an open infringement of the laws, and the alarm and danger it creates, are the characteristics of this species of theft. Wherever either of these occur in any degree in the commission of theft, the additional guilt is incurred; therefore the law gives no measure for the degree of violence necessary to constitute this crime. Any force that accomplishes the object is sufficient.

Art. 664.—No device will be sufficient to give another character to this crime. If the property be fraudulently taken by violence, or thus received when it is surrendered through fear, it is immaterial whether it be done by a direct command or by a request to give as alms, or under any other pretence.

Art. 665.—If by any of the means which constitute robbery, one is forced to give property for an inadequate price, it is robbery.

Art. 666.—If property be stolen by simple theft, and before it is carried away, the owner is forced by any of the means which constitute robbery to give up his attempts to recover possession of the property, it is robbery.

Art. 667.—Any threat, in order to be an effectual cause for the fear mentioned in the definition of this offence, must be to do some illegal act productive of injury, either to person, property or character. A threat of withdrawing favour, or doing any other lawful act, is not sufficient.

Art. 668.—The threat need not be direct, it is sufficient if it be expressed indirectly, or by gestures only, so as to produce the effect.

Art. 669.—The punishment for this offence is imprisonment at hard labour, not less than seven nor more than fifteen years.

Section X.

Of receiving Property knowing it to be fraudulently obtained.

Art. 670.—Whoever shall receive, either by way of purchase or on any other contract, or for safe keeping or concealment, or shall conceal, or endeavour to conceal any property, knowing it to be fraudulently obtained by any of the acts which by this chapter are created offences, shall be punished in the same manner with the principal offender.

Art. 671.—It is no objection to the conviction of a receiver, under this section, that the principal offender has not been convicted; but if any one be indicted, and in custody, or on bail for stealing, or otherwise fraudulently obtaining the same property, the person accused as receiver shall not be tried without his consent until the prosecution against the principal offender is disposed of.

Art. 672.—The offence, described in this section, is a distinct and substantive offence, not governed by the rules which apply to accessaries.

Art. 673.—If any one, knowing that property has been taken by theft, aid the thief in removing it to its final destination or place of concealment, such person is an accomplice in the theft, and not a receiver.

Art. 674.—An accomplice in a theft, who is not present at the act, and afterwards receives the property, is punishable as an accomplice.

Art. 675.—Nothing in this chapter contained applies to the taking of property, which the person taking believes to be his own, or that of another who has authorized him to take it.

EXTRACTS from the CODE NAPOLEON.

CODE PENAL, Liv. III. Tit. II.

CHAPITRE II.

Crimes et Délits contre les propriétés.

Loi décrétée le 19 Février 1810. Promulguée le premier Mars suivant.)

SECTION PREMIERE. *Vols.*

379. Quiconque a soustrait frauduleusement une chose qui ne lui appartient pas est coupable de vol.

380. Les soustractions commises par des maris au préjudice de leurs femmes, par des femmes au préjudice de leurs maris, par un veuf ou une veuve quant aux choses qui avaient appartenu à l'époux décédé, par des enfans ou autres descendans au préjudice de leurs pères ou mères ou autres ascendans, par des pères ou mères ou outres ascendans au préjudice de leurs enfans ou autres descendans, ou par des alliés aux mêmes degrés, ne pourront donner lieu qu'à des réparations civiles. A l'égard de tous autres individus qui auraient recélé ou appliqué à leur profit tout ou partie des objets volés, ils seront punis comme coupables de vol.

381. Seront punis de la peine de mort les individus coupables de vols commi avec la réunion des cinq circonstances suivantes:—1°. Si le vol a été commis la nuit;—2°. S'il a été commis par deux ou plusieurs personnes;—3°. Si les coupables ou l'un d'eux étaient porteurs d'armes apparentes ou cachées;—4°. S'ils ont commis le crime soit à l'aide d'effraction extérieure, ou d'escalade, ou de fausses clefs, dans une maison, appartement, chambre ou logement habités ou servant à l'habitation, ou leurs dépendances, soit en prenant le titre d'un fonctionnaire public, ou d'un officier civil ou militaire, ou après s'être revêtus de l'uniforme ou du costume du fonctionnaire ou de l'officier, ou en alléguant un faux ordre de l'autorité civile ou militaire;—5°. S'ils ont commis le crime avec violence ou menace de faire usage de leurs armes.

382. Sera puni de la peine des travaux forcés à perpétuité, tout individu coupable de vol commis à l'aide de violence, et, de plus, avec deux des quatre premières circonstances prévues par le précédent article. Si même la violence à l'aide de laquelle le vol a été commis a laissé les traces de blessures ou de contusions, cette circonstance seule suffira pour que la peine des travaux forcés à perpétuité soit prononcée.

383. Les vols commis dans les chemins publics emporteront également la peine des travaux forcés à perpétuité.

384. Sera punis de la peine des travaux forcés à temps, tout individu coupable de vol commis à l'aide d'un des moyens énoncés dans le N° 4 de l'article 381, même quoique l'effraction, l'escalade et l'usage des fausses clefs aient eu lieu dans des édifices, parcs ou enclos non servant à l'habitation et non dépendans des maisons habitées, et lors même que l'effraction n'aurait été qu' intérieure.

385. Sera également puni de la peine des travaux forcés à temps, tout individu coupable de vol commis, soit avec violence, lorsqu'elle n'aura laissé aucune trace de blessure ou de contusion, et qu'elle ne sera accompagnée d'aucune autre circonstance, soit sans violence, mais avec la réunion des trois circonstances, suivantes; 1°. Si le vol a été commis la nuit;—2°. S'il a été commis par deux ou plusieurs personnes;—3°. Si le coupable, ou l'un des coupables, était porteur d'armes apparentes ou cachées.

386. Sera puni de la peine de la reclusion, tout individu coupable de volcommis dans l'un des cas ci-après;—1°. Si le vol a été commis la nuit, et par deux ou plusieurs personnes, ou s'il a été commis avec un de ces deux circonstances seulement; mais en même temps dans un lieu habité ou servant à l'habitation;—2°. Si le coupable, ou l'un des coupables, était porteur d'armes apparentes ou cachées,

même quoique le lieu où le vol a été commis ne fût ni habité ni servant à l'habitation, et encore quoique le vol ait été commis le jour et par une seule personne;—3°. Si le voleur est un domestique ou un homme de service à gages, même lorsqu'il aura commis le vol envers des personnes qu'il ne servait pas, mais qui se trouvaient soit dans la maison de son maître, soit dans celle où il l'accompagnait; ou si c'est un ouvrier, compagnon ou apprenti, dans la maison, l'atelier ou le magasin de son maître, ou un individu travaillant habituellement dans l'habitation où il aura volé;—4°. Si le vol a été commis par un aubergiste, un hôtelier, un voiturier, un batelier, ou un de leurs préposés, lorsqu'ils auront volé tout ou partie des choses qui leur étaient confiées à ce titre; ou enfin, si le coupable a commis le vol dans l'auberge ou l'hôtellerie dans laquelle il était reçu.

387. Les voituriers, bateliers ou leurs préposés, qui auront altéré des vins ou toute autre espèce de liquides ou de marchandises dont le transport leur avait été confié, et qui auront commis cette altération par le melange de substances malfaisantes, seront punis de la peine portée au précédent article. S'il n'y a pas eu mélange de substances malfaisantes, la peine sera un emprisonnement d'un mois à un an, et une amende de seize francs à cent francs.

388. Quiconque aura volé, dans les champs, des chevaux, ou bêtes de charge, de voiture ou de monture, gros et menus bestiaux, des instrumens d'agriculture, des récoltes ou meules de grains faisant partie de récoltes, sera puni de la reclusion. Il en sera de même à l'égard des vols de bois dans les ventes, et de pierres dans les carrières, ainsi qu'à l'égard du vol de poisson en étang, vivier ou réservoir.

389. La même peine aura lieu, si, pour commettre un vol, il y a eu enlèvement ou déplacement de bornes servant de séparation aux propriétés.

390. Est réputé *maison habitée*, tout bâtiment, logement, loge, cabane, même mobile, qui, sans être actuellement habité, est destiné à l'habitation, et tout ce qui en dépend comme cours, basses-cours, granges, écuries, édifices qui y sont enfermés, quelqu'en soit l'usage et quand même ils auraient une clôture particulière dans la clôture ou enceinte générale.

391. Est réputé *parc* ou *enclos*, tout terrain environné de fossés, de pieux, de claies, de planches, de haies vives ou sèches, ou de murs, de quelque espèce de matériaux que ce soit, quelles que soient la hauteur, la profondeur, la vétusté, la dégradation de ces diverses clôtures, quand il n'y aurait pas de porte fermant à clef ou autrement, ou quand la porte serait à claire-voie et ouverte habituellement.

392. Les parcs mobiles destinés à contenir du bétail dans la compagne, de quelque manière qu'ils soient faits, sont aussi réputés enclos, et lorsqu'ils tiennent aux cabanes mobiles ou autres abris destinés aux gardiens, ils sont réputés dépendans de maison habitée.

393. Est qualifié *effraction*, tout forcement, rupture, dégradation, démolition, enlèvement de murs, tois, planchers, portes, fenêtres, serrures, cadenas, ou autres ustensiles ou instrumens servant à fermer ou à empêcher le passage, et de toute espèce de clôture, quelle qu'elle soit.

394. Les effractions sont extérieures ou intérieures.

395. Les effractions extérieurs sont celles à l'aide desquelles on peut s'introduire dans les maisons, cours, bassecours, enclos ou dépendances, ou dans les appartemens ou logemens particuliers.

396. Les effractions intérieures sont celles qui, après l'introduction dans les lieux mentionnés en l'article précedént, sont faites aux portes ou clôtures du dedans, ainsi qu'aux armoires ou autres meubles fermés. Est compris dans la classe des effractions intérieures, le simple enlèvement des caisses, boîtes, ballots sous toile et corde, et autres meubles fermés, qui contiennent des effets quelconques, bien que l'effraction n'ait pas été faite sur le lieu.

397. Est qualifiée *escalade*, toute entrée dans les maisons, bâtimens, cours, basses-cours, édifices quelconques, jardins, parcs et enclos, exécutée par-dessus les murs, portes, toitures ou toute autre clôture. L'entrée par une ouverture souterraine, autre que celle qui a été établie pour servir d'entrée, est une circonstance de même gravité que l'escalade.

398. Sont qualifiés *fausses clefs*, tous crochets, rossignols, passe-partout, clefs imitées, contrefaites, altérées, ou qui n'ont pas été destinées par le propriétaire, locataire, aubergiste ou logeur, aux serrures, cadnas, ou aux fermetures quelconques auxquelles le coupable les aura employées.

399. Quiconque aura contrefait ou altéré des clefs sera condamné à un emprisonnement de trois mois à deux ans, et à une amende de vingt-cinq francs à cent cinquante

cinquante francs. Si le coupable est un serrurier de profession, il sera puni de la reclusion. Le tout sans préjudice de plus fortes peines, s'il y échet, en cas de complicité de crime.

400. Quiconque aura extorqué par force, violence ou contrainte, la signature ou la remise d'un écrit, d'un acte, d'un titre, d'une pièce quelconque contenant ou opérant obligation, disposition ou décharge, sera puni de la peine des travaux forcés à temps.

401. Les autres vols non spécifiés dans la présente section, les larcins et filouteries, ainsi que les tentatives de ces mêmes délits, seront punis d'un emprisonnement d'un an au moins et de cinq ans au plus, et pourront même l'être d'une amende qui sera de seize francs au moins et de cinq cents francs au plus. Les coupables pourront encore être interdits des droits mentionnés en l'article 42,* du présent Code, pendant cinq ans au moins et dix ans au plus, à compter du jour où ils auront subi leur peine. Ils pourront aussi être mis, par l'arrêt ou le jugement, sous la surveillance de la haute police pendant le même nombre d'années.

§ II. *Abus de Confiance.*

406. Quiconque aura abusé des besoins, des faiblesses ou des passions d'un mineur, pour lui faire souscrire, à son préjudice, des obligations, quittances ou décharges, pour prêt d'argent ou de choses mobilières, ou d'effets de commerce, ou de tous autres effets obligatoires, sous quelque forme que cette négociation ait été faite ou déguisée, sera puni d'un emprisonnement de deux mois au moins, de deux ans au plus, et d'une amende qui ne pourra excéder le quart des restitutions et des dommages-intérêts qui seront dus aux parties lésées, ni être moindre de vingt-cinq francs. La disposition portée au second paragraphe du précédent article pourra de plus être appliquée.

407. Quiconque, abusant d'un blanc-seing qui lui aura été confié, aura frauduleusement écrit au-dessus une obligation ou décharge, ou tout autre acte pouvant compromettre la personne ou la fortune du signataire, sera puni des peines portées en l'article 405.† Dans le cas où le blanc-seing ne lui aurait pas été confié, il sera poursuivi comme faussaire et puni comme tel.

408. Quiconque aura détourné ou dissipé, au préjudice du propriétaire, possesseur ou détenteur, des effets, deniers, marchandises, billets, quittances, ou tous autres écrits contenant ou opérant obligation ou décharge, qui ne lui auraient été remis qu'à titre de dépôt ou pour un travail salarié, à la charge de les rendre ou représenter, ou d'en faire un usage ou un emploi déterminé, sera puni des peines portées dans l'article 406. Le tout sans préjudice de ce qui est dit aux articles 254,‡ 255§ et 256,‖ relativement aux soustractions et enlèvemens de deniers, effets ou pièces, commis dans le dépôts publics.

409. Quiconque, après avoir produit dans une contestation judiciaire quelque titre, pièce ou mémoire, l'aura soustrait de quelque manière que ce soit, sera puni d'une amende de vingt-cinq francs à trois cents francs. Cette peine sera prononcée par le tribunal saisi de la contestation.

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* 42. Les tribunaux, jugeant correctionnellement, pourront, dans certains cas, interdire en tout ou en partie, l'exercice des droits civiques, civils, et de famille suivans:—1° De vote et d'élection; 2° D'éligibilité; 3° D'être appelé ou nommé aux fonctions de juré ou autres fonctions publiques, ou aux emplois de l'administration, ou d'exercer ces fonctions ou emplois; 4° De port d'armes; 5° De vote et de suffrage dans les délibérations de famille; 6° D'être tuteur, curateur, si ce n'est de les enfans et sur l'avis seulement de la famille; 7° D'être expert ou employé comme témoin dans les actes; 8° De témoignages en justice, autrement que pour y faire de simples déclarations.

† *i. e.* d'un emprisonnement d'un an au moins et de cinq ans au plus, et d'un amende de cinquante francs au moins et de trois mille francs au plus.

‡ 254. Quant aux soustractions, destructions et enlèvemens de pièces ou de procédures criminelles, ou d'autres papiers, registres, actes et effets contenusd ans des archives, greffes ou dépôts publics, ou remis à un dépositaire public en cette qualité, les peines seront, contre les greffiers, archivistes, notaires ou autres dépositaires négligens, de trois mois à un an d'emprisonnement, et d'une amende de cent francs à trois cents francs.

§ 255. Quiconque se sera rendu coupable des soustractions, enlèvemens ou destructions mentionnés en l'article précédent, sera puni de la reclusion. Si le crime est l'ouvrage du dépositaire lui-même, il sera puni des travaux forcés à temps.

‖ 256. Si le bris des scellés, les soustractions, enlèvemens ou destructions de pièces ont été commis avec violences envers les personnes, la peine sera, contre toute personne, celle des travaux forcés à temps, sans préjudice de peines plus fortes, s'il y a lieu, d'après la nature des violences et des autres crimes qui y seraient joints.

EXTRACT from the PREFACE to HAWKINS's "PLEAS of the CROWN."

HAD any of the great men who formerly have written on this subject, gone through the whole law relating to it, all farther attempts of this kind had been unnecessary. The treatise published under the name of Sir Matthew Hale, is indeed very useful, and written in a clear method and with great learning and judgment; but it is certainly very imperfect in the whole, and seems to be only a model or plan of a work of this kind, which is said to have been intended by him.

Sir Edward Coke's Third Institute is also a treatise of great learning, and not unworthy of the hand that produced it; but yet seems by no means a complete work, many considerable heads being either wholly omitted in it, or barely touched upon.

The treatise of Sir William Staundforde seems to be writ with great judgment, but he takes in a very small compass, scarce mentioning any offences under felonies.

As for the treatises of Lambard, Crompton, Pulton and Dalton, they having an eye chiefly to the direction of justices of the peace, and treating of the Crown Law no farther than as it concerns them, are far from being complete systems of it.

Upon the whole, I apprehend that none of the authors before mentioned were so perfect, but that by reducing all the laws relating to this subject under one general scheme, they might generally be understood with much less difficulty than they have hitherto been.

EXTRACTS from the PREFACE to Sir M. FOSTER's "CROWN LAW."

I NOW submit to public censure a Report of a few Crown cases, which for the most part have fallen within my own observation, and in which I have taken some share. What other notes I have taken merely for my own use, are too crude and imperfect to admit of a publication; and as I have neither leisure nor inclination to revise them, they will never see the light.

Learned men who have employed their time in transmitting to posterity with accuracy, precision and true judgment, an history of cases of weight and difficulty falling within their own experience, have been real benefactors to the public; and their memory is and ever will be treated with due esteem. But many of the hasty indigested things called *Reports of Adjudged Cases* not deserving the name of tolerable *abridgments*, stuffed as they frequently are with the *obiter* opinions of judges upon the *breaking* of a case, which probably never proceeded beyond one slight argument, these things and others of the like kind, mere *fragments of learning, the rummage of dead men's papers, or the first essays of young authors*, have been the bane and scandal of the law, considered as a science founded on principle. They burden the memory or possibly may swell the common-place; but not entering with due precision into the merits of the question they leave the judgment uninformed, and furnish materials for endless altercation. They are, if I may be allowed the expression, the *ignes fatui* of the profession; they always bewilder the reader, and frequently mislead him.

I have in a few instances taken the liberty of subjoining to the report of the case some observations of my own by way of proof or illustration, and sometimes of censure. I make no apology for this freedom. I wish the ablest of our reporters had more frequently taken the same.

The learning touching these subjects is a matter of great and universal concernment. It merits, for reasons too obvious to be enlarged on, the attention of every man living. For no rank, no elevation in life, and let me add, no conduct how circumspect soever, ought to tempt a reasonable man to conclude that these inquiries do not, nor possibly can, concern him. A moment's cool reflection on the utter instability of human affairs and the numberless unforeseen events which a day may bring forth, will be sufficient to guard any man conscious of his own infirmities, against a delusion of this kind. Those therefore whose birth or fortunes have happily placed them above the study of the law *as a profession*, will not be offended if I presume that discourses on these subjects, in preference to every other branch of the law, demand their attention.

I have

I have in the prosecution of these subjects endeavoured rather to ground myself upon principles of law and sound policy than on the bare authority of former writers; who will frequently be found contradicting each other, and *sometimes themselves.*

Preface by the Editor of the third Edition of Foster's "Crown Law."

I HAVE added in this edition three new cases, which the learned *Author intended to insert* in the first edition, and had caused to be transcribed for that purpose. Two of them are the cases of John Midwinter and *Richard Sims* on the Stat. 9 Geo. I. c. 22, and of *John Bell* on the Stat. 8 & 9 W. III. c. 26; and the third is an anonymous case on the Stat. 9 & 10 W. III. c. 41. In the two former cases he differed from most of the Judges, and they were omitted by him in consequence of the advice of friends.

The case of Midwinter and Sims is of great importance and very extensive influence; and as it is *imperfectly stated* in the case of R. *v.* John Royce in B. R. 1767, reported in 4 Burrow, 2073–2086, I think it right to take this opportunity of communicating it to the world.

I am sorry, that I cannot entertain so favourable an opinion of the case of *the coal-heavers* which is inserted in Mr. *Leach's* Cases in Crown Law, p. 61–63. Seven men were indicted on the Stat. 9 Geo. I. c. 22, being the same Statute on which Midwinter and Sims were indicted for shooting at John Green in his dwelling-house, and were tried at the Old Bailey in 1768. Three of them were proved to have been present when the others fired, but they had not been seen to use any fire-arms themselves. The jury found them all guilty, and the Judges on a reference to them determined that the offence of all was capital; and they were all executed. This case is exactly similar to the case of Midwinter and Sims; and if Mr. Justice Foster's opinion in that case be well founded, namely, that the benefit of clergy is taken away only from persons *actually* committing the offence, it follows necessarily that three of those men suffered a more severe punishment than the law authorizeth.

The second case added in this edition is the case of *John Bell,* who was tried at the Old Bailey in 1753, on an indictment for high treason, grounded on the Statute 8 & 9 W. III. c. 26, for having in his custody a press for coinage without any lawful authority or sufficient excuse, and was convicted. On a reference to the Judges, two questions were made, on the first of which Lord Chief Justice Ryder differed from Mr. Justice Foster and the other Judges, and on the second, he and Mr. Justice Foster concurred in opinion against the others. This case was omitted by the advice of Lord Hardwicke; and in the margin of the copy, intended for the printer, the author hath written this note: "I am satisfied that the Chief Justice, upon the first question, and the other Judges upon the second, were totally mistaken. A great man, formerly of the profession, by whose advice the case is omitted, told me, that he hath no doubt upon either of the questions. I believe that his advice proceeded from a regard to the Judges, or from his fear of establishing a bad precedent by the authority of great names, though he did not explain himself fully upon that head." The case is shortly mentioned by Lord Mansfield in 1 Burrow, 154: "In indictments," saith he, upon 8, 9 W. III. c. 26, for having a coining-press, "every thing which shows that the defendant had no authority, must be negatively set out; and so it was done in the indictment of Bell, which was lately argued before all the Judges." I have no recollection that the opinions of the Judges in this case are reported in any book; and therefore, as the points are of real importance, and it is still possible that a less accurate account may be published, and especially as I received directions from the author about publishing it at a proper time, I am unwilling to omit the present opportunity of doing it.

The last of the new cases is an anonymous one of a woman, who was indicted on the Statute 7 & 8 W. III. c. 41, for having in her custody divers pieces of canvas, marked with the King's mark, she not being a person employed to make canvas for the King's use. This case hath some connexion with Bell's, and was omitted in consequence of the omission of that case. It is of some importance, and ought now to accompany the case of Bell.

I have endeavoured likewise to clear up a few points which have long lain under some obscurity. And where I differ from authors whose merits I acknowledge, and whose memory I highly value, I always do it with diffidence, and never without offering my reasons, which are submitted to the judgment of the learned.

The MSS. cited in the following papers, I am satisfied are genuine; copies of them are in many hands. And I doubt not the citations will appear to have been faithfully made.

If the freedom I have taken with them needeth any apology, they have been of considerable service to me; they have given me light upon many points, *which the printed reports do not afford*; and they are the remains of gentlemen eminent in the profession. For these reasons I was unwilling they should be *wholly lost to the public.*

EXTRACT from PREFACE to First Edition of BURN'S "JUSTICE OF THE PEACE."

THE materials which the Author has made use of are chiefly of four kinds:—The *Statutes* at large—the several treatises concerning the *Pleas of the Crown*—the *Reports* of cases adjudged in the Court of King's Bench—and the books concerning the *office of a Justice of the Peace.*

As to the *Statutes* at large, or Acts of Parliament, the Author hath by no means thought himself at liberty, as Mr. Dalton and others have done, to deliver the import thereof in his own words, but hath constantly abridged the Act in the words of the Act itself, leaving out as little as possible which may seem any way material. And to each distinct clause he hath annexed the interpretation thereof, where the same hath been determined in the Court of King's Bench, or expounded by other good authority.

The treatises concerning the *Pleas of the Crown* are those of Stamford, Coke, Hale and Hawkins. Of the first of these the Author hath made little use, further than as he is adopted by the other three. As to which three great authorities, where the law hath been declared by Lord Coke, and not controverted by any other, nor altered since his time by any Act of Parliament, or judicial determination, the author hath given to him the preference; and where any of these differeth from the other, he hath noted the difference.

In citing of Mr. Hawkins, he hath not thought it allowable, as is usual with others, to omit the several degrees of caution and assent, with which he delivereth his opinion; as, *it seemeth*, or *it hath been said by some*, or *it seemeth to be the better opinion*, or *it seemeth to be agreed*, and the like; which are by no means arbitrary words without much meaning, but are inserted by him with the utmost deliberation and judgment.

As to the books of Reports; where the cases therein have been considered by Mr. Hawkins, and the other learned persons before mentioned, the Author hath judged it very proper to leave the matter there as settled by them. As to the rest, he hath by no means thought himself of ability to proceed in Mr. Hawkins's manner, by laying together all the reports on the same subject, and thereupon extracting an opinion out of the whole; but hath inserted the same at large, or what he hath thought most material thereof, and left the determination thereupon to the reader's better judgment.

And here it may be requisite, that the reader be admonished not to expect that the book shall be more perfect than the materials of which it is composed. All the books of reports are not of equal authority. Some, as those of Keble, Salkeld, Lord Raymond, and many others, are approved or allowed by the Judges; others, which are perhaps not of less internal authority, have not received that sanction. Such, for instance, are those of Lord Coke. During the greatest part of his present Majesty's reign, no authentic collection of reports hath been published of cases adjudged in matters relating to the subjects of this book. Herein the author could do no otherwise than make use of the materials he hath. Such are particularly Andrews's Reports, and two volumes of Sessions cases published without the author's name. Of these, it may be observed, that in the main they do agree very well with books of good authority, where they happen to report the same cases, and have no appearance of wilful falsification in cases not reported elsewhere. But for these, or any other, the Author himself voucheth not. And as he doth not add to their credit, so he doth not detract from it; but leaveth every author, as he needs must, to answer for himself. For he hath made it an invariable rule upon all occasions to cite his authorities, what such soever they be; and in all material instances, in the very words of the original authors; that so, what may be of good authority in itself shall not be rendered less so by his handling of it. And where no authority is alleged, he desires the reader will look upon it as

such, namely, as having no authority; the same being nothing else but the author's own private observations, which are submitted to every reader's judgment, to approve or reject as he shall see cause.

The books of authority concerning the office of a Justice of the Peace, are those of Fitzherbert, Crompton, Lambard and Dalton; the last of which was published in the reign of King James the First; since which time no book under that title hath been allowed as sufficiently authentic. And even the additions which have been made to Dalton since his death, seem to have no better claim to an uncontrollable authority than other collections which have not obtained it. And Dalton himself is much injured in the modern editions in like manner as was observed before of Mr. Hawkins, by delivering that as absolute, which Mr. Dalton published under the several degrees of assent or doubtfulness before mentioned; and which the author, in justice to Mr. Dalton, hath restored. Where Dalton hath adopted Lambard, Crompton and Fitzherbert (which he doth most frequently in their own words), the Author hath thought it sufficient to cite Dalton's single authority. And generally, in all other cases, where authors are agreed, he hath judged it unnecessary to allege more than one or two good vouchers.

Concerning the other books of this kind, which have been published since Dalton's time, it is unnecessary to enlarge; since of the most of them the author hath made no use, and of the rest very sparingly; and he will not seek to recommend his own book by finding fault with others before him.

EXTRACT from Preface to first Edition of Sir Edward Hyde East's Treatise of the Pleas of the Crown.

I should have considered it an unbecoming presumption, as well as an unnecessary labour, had I ventured, without additional materials, on a new arrangement and discussion of the subject of these volumes, already so ably and authoritatively treated of by Lord C. J. Hale and Mr. Serjeant Hawkins. But it is now near 90 years since the last of those authors published his valuable work, and the accumulation of new matter, both by Statutes and adjudged cases, is become so great, that a revision of this most interesting branch of our law would, I thought, be an acceptable offering to the members of my profession, however far the execution of it might fall short in point of ability of those models which they have been accustomed to contemplate.

It may be said, that much has already been done towards the completion of what I have proposed by the excellent discourses of Mr. Justice Foster, by the notes which have from time to time been added to the several editions of Serjeant Hawkins's work, and by a collection of cases on the Crown Law, published within a few years past by Mr. Leach.

With respect to the first of these, it is greatly to be lamented, from the specimen which that learned Judge has given of his talent in this species of writing, that he did not take a more general view of the criminal law, which he seems at one time to have meditated. Had he extended the same attention to other parts of it as he has done to the subjects of high treason and homicide, this or any other treatise of the like sort, would have been much less wanted. His searching and well-poised mind would have cleared many of the difficulties which have impeded my progress, and the authority of his opinion would have settled many doubts which I have only ventured to suggest, or at most to hint a solution of.

With regard to the additions made to the subsequent editions of Hawkins, however serviceable as notes and references, yet from the very nature of such materials they are for the most part little calculated to give that complete and satisfactory information which is essentially requisite to be obtained without delay in criminal cases.

The publication of Mr. Leach's Reports is of another description. About a twelvemonth or more before that made its appearance, I had begun to make a collection of Crown MSS. with a view to a work of this kind at some distant period, and had been furnished with many of the cases which are to be found in that book, particularly by the late Mr. Justice Buller, who encouraged me to undertake the publication of them, provided I could obtain the consent of the other Judges, without which he did not feel himself at liberty to do more than to furnish me with copies for my own information and amusement. While I was deliberating upon his proposal, Mr. Leach's book was first published, which removed part of the difficulty I had felt in making the desired application to the Judges; and soon afterwards,

afterwards, in the course of July 1789, Lord Kenyon, by the consent of the whole Bench, gave me permission to take a copy of that collection of cases, of which, as Chief Justice of the Court of King's Bench, he was the depositary, and which will hereafter be mentioned in the list of MSS. referred to in the subsequent sheets. From several of the other Judges I also received the most liberal communications of their own MSS., and particularly from Mr. Justice Gould, whose venerable years, and indefatigable professional labours, had given him more opportunity than any other of making a large collection of cases within his own time. These MSS., as coming from the most authentic sources, carry with them the greatest authority. If, however, my intention had been merely confined to publish a collection of Crown cases, it is probable that Mr. Leach's book would have made me refrain, from a consideration, since justified by the event, that whatever inaccuracies first appeared in that volume, the principal at least would be soon corrected in the subsequent editions. But as my intention went further, and I had originally proposed to exhibit the modern decisions in the shape of notes to Lord Hales' Summary, taking that as the ground-work of the arrangement, on account, as well of its authenticity as its brevity; the printing of many of those decisions, together with the accumulation of additional matter, stimulated me to enlarge my plan, and to take a more general view of the criminal law, in which I was further encouraged by the friendly communication of other MSS., as soon as my design was known, from many gentlemen, whose names I should be proud to connect with my own if I were at liberty so to do.

I was thus drawn on by degrees to engage in this very arduous undertaking, before I was well aware of its magnitude. Let this be some alleviation of my presumption with the public; and the members of my own profession, who can alone justly estimate the extreme labour and difficulty, as well as the painful anxiety accompanying an attempt of this nature will, I trust, judge of it with their habitual candour and indulgence. I make no apology for the length of time the work has been preparing for and in the press. I am more afraid that the importunity of friends has led me to hasten the publication of it sooner than I ought in prudence to have done; but had I waited till I had satisfied myself with my own correction of it, I know not when my mind would have been relieved from the burthen, which has already broken in too much upon my private life.

I shall now proceed to make a few general remarks on the scope and conduct of the work, and then conclude with mentioning the several MSS. and publications which are referred to in it.

I wished much to have brought this work into a narrower compass, which might have rendered it in some respects more convenient for common use, and would have saved me much time, labour and expense; but these ends could not have been obtained without greatly lessening the utility and value of the materials. It is well known to every lawyer, that in criminal matters an abbreviation of an adjudged case is very seldom satisfactory, and that of a statute is nearly useless, and can never be ultimately relied on. In many instances where the marginal abstract of a case will, I trust, be thought to give the full substance and effect of it, yet the case itself could not with any propriety have been omitted, without assuming to myself an authority, which all might well dispute, who wished for more authentic information of the decision, and many would regret on account of losing the precise and formal precedent, which has its use. The importance and necessity, indeed, of having the most correct information at hand, is sufficiently obvious to those who practise at the Crown Bar, where it is most usual and always desirable for the ends of justice and the influence of example, as far as certainty can be reasonably obtained, that the trial which commences should without intermission be definitively concluded by judgment.

The following is an account of the principal MSS. referred to in this work.

1. A copy of a book in which the Crown Cases reserved for the opinion of the Judges for many years back are entered. The original is in the custody of the Lord Chief Justice for the time being of the Court of King's Bench. The determinations are entered shortly, sometimes with the reasons, but generally without. This deficiency I have been enabled to supply, for the most part, by the assistance of the private MSS. next after mentioned. This book is cited as MS. Crown Cases reserved; abbreviated, MS. Crown Cas. res.

2. Copies

2. Copies of the reserved cases above referred to, which were delivered to the several Judges before they met to consider of them, with their memoranda or notes of the grounds of the determinations. I have been liberally favoured with communications of this kind from several of the Judges, which are quoted as MS. Jud. or MS. of the Judges. Part of these I may now mention, without breach of delicacy, as having been communicated to me by the late Mr. Justice Gould and Mr. Justice Buller, and which have the sanction of their names.

3. Lord Hales' Summary, interleaved with MS. corrections and additions. This MS. compilation, though begun before, (probably by Mr. Stow, a gentleman at the Bar) was put into its present form by Mr. Justice Yates, whose son is now in possession of it. Copies of it were communicated to different Judges, who have contributed from time to time the fruits of their own experience. My own copy was taken from one in the possession of the late Mr. Justice Buller. The work was bound up in three volumes, according to which I have cited it by the description of 1, 2 and 3 MSS. Sum., and I have added the page of the MS., because copies of it are now in the hands of many gentlemen of the profession. The greatest part of the work is a compilation from printed books, chiefly from Mr. Justice Foster's Treatise on the Crown Law, Lord Hales and Hawkins's Pleas of the Crown.

4. One volume of MS. is cited by the name of MS. Tracy, by which Judge it was compiled, as a comment on Lord Hales' Summary. A copy of this, which is occasionally referred to in Mr. Justice Foster's Treatise, was communicated to me by Mr. Justice Lawrence.

5. A similar compilation by Mr. Justice Burnet. The original is part of a most valuable collection of law MSS. made by Lord Chancellor Hardwicke; a copy of which was furnished to me by his descendant, my worthy friend, the Right honourable Charles Yorke. This is cited as Burnet's MS. Summary, or MS. Burnet.

6. Lord Holt's MS. from the last-mentioned collection.

7. A MS. volume of Crown Cases, communicated by the late Lord Ashburton to Mr. Justice Heath, by whom I was favoured with a copy. These, which are cited as MS. Dunning, were taken by his Lordship when at the Bar.

8. A MS. work of the late Mr. Serjeant Foster, being a Treatise of the Crown Law, and probably intended by him for publication, had he lived to have given it the finishing revisal: Mr. Bolton, whose property in it was derived immediately from the author, very liberally confided the custody of it to me, with liberty to make what extracts from it I pleased. But as I found that the author had been working upon materials similar for the most part to my own; the use I have made of his treatise has been very sparing, confined altogether to a few original cases, which had chiefly fallen under his own notice, and which I have marked with his name.

9. MSS. of Mr. Masterman, sometime since Secondary of the Crown Office, for the use of which I am indebted to Mr. Barlow, the present Secondary, to whom they belong.

10. Two volumes of MS. cases, cited as Shapleigh's MS., the name of a gentleman formerly at the Bar, who it was once suggested to me, was probably the author. I have since, however, had reason to doubt the information. They were communicated to me by Charles Short, Esq. the Clerk of the Rules on the plea side of the Court of King's Bench, who received them from a relation of his at the Bar, long since deceased; but he knows not by whom they were taken. Mr. Justice Buller, who formerly inspected them, gave them the praise of accuracy.

11. A few MS. cases taken by myself, or communicated to me by friends, for whom I am gladly responsible. These are simply marked MS.

SECOND REPORT

FROM

HIS MAJESTY'S COMMISSIONERS

ON

CRIMINAL LAW.

DATED 9 *June* 1836.

Ordered, by The House of Commons, *to be Printed,*
20 *June* 1836.

Having been desired by one of Your Majesty's Principal Secretaries of State to present, at an early period, the result of our inquiries respecting the Defence of Prisoners by Counsel, and the infliction of Capital Punishments, we have completed in the first instance, and now submit separately to Your Majesty, so much of our Report as relates specially to those two subjects.

DEFENCE OF PRISONERS BY COUNSEL.

Defence of Prisoners by Counsel.

One of the peculiarities incident to crimes of the degree of Felony, but not amounting to the offence of High Treason, which it is incumbent on us to notice, is that the Prisoner is denied his full defence by Counsel, (or, in other words, that his Counsel is not allowed the liberty of addressing the Jury,) contrary to the practice in all other judicial proceedings, as well criminal as civil, and contrary even to the practice in case of Felony, where the Jury are to decide, not upon the principal question of guilty or not guilty, but upon some collateral issue.

An inquiry into this subject seems to involve two principal questions:—Whether the allowing a defence by the speech of Counsel on charges of Felony tend to the discovery of truth; and if so, Whether that advantage be counterbalanced by any inconveniences inseparable from the practice.

With regard to the first of these questions, it will hardly, we think, be disputed, that the permitting the advocate to speak for the client tends, generally, to the discovery of truth and the consequent advancement of justice, since the practice has obtained in every civilized age and country, and particularly is adopted by our own law in all judicial proceedings excepting trials for Felonies.

The principles of legal investigation ought not to differ from those suggested by every man's experience in the ordinary transactions of life, unless the deviation be warranted by very urgent and satisfactory reasons arising out of the peculiar nature of judicial inquiries. Such experience would seem to require that some statement and explanation should accompany the proof of facts in dispute. If two men separately undertook to decide the same matter of fact, he who had heard all the circumstances, together with the statements and explanations of the parties, would, we conceive, be more likely to arrive at a just and true conclusion than he who had only heard the facts proved by witnesses, unaccompanied by any statements and explanations of the parties: and it can scarcely admit of doubt that an individual called upon to decide a matter in dispute would not think it fair to hear the statements and explanations of one side only. The judgment of the one who had heard the facts only, or who had heard the statements or explanations of one side only, is the more likely to be erroneous, when it is considered that the parties themselves, who know the real facts, possess a light for explaining and reconciling adverse evidence, which cannot be derived from any other source. In fine, it is very possible that upon the mere consideration of such facts as admit of proof, the truth may not suggest itself to the inquirer; but this cannot happen where the party in the right has opportunity given for statement and explanation.

In one respect, the above principles are more applicable where the facts are to be judged of by a Jury, than where the decision is left to an individual; for the Jury being greatly limited in point of time, and required to form their conclusion before they separate, it is the more essential that the most ample means should be afforded for enabling them to come to a correct conclusion.

But if the hearing of the accused be essential to justice, it is also essential that he should be heard in the manner most likely to be effectual, that is, by his Counsel, since without that aid the privilege would frequently be illusory.

That an accused but innocent person should, generally speaking, be as well able to state his case and to contend by argument against false witnesses, or an unfortunate coincidence of unfavourable circumstances, as a skilful advocate, is a position which it would be difficult to support *à priori*, and which is, we believe, at variance with experience. It is, however, sufficient for the present purpose that in numerous instances an accused but innocent person is incompetent to conduct his own defence; and in such cases it is manifestly of little use to allow him the privilege of a speech to the Jury.

A party.

Defence of Prisoners by Counsel.

A party charged with a crime, though in full possession of all his faculties, must often, from a sense of the disgrace and danger to which he is exposed, and from ignorance of the forms of law, conduct his defence to great disadvantage. It is very possible, indeed, that in some particular instances a party under such circumstances may possess a firmness, and express himself with an eloquence more convincing and more effectual than the happiest exertions of a retained advocate. Such, however, is not the ordinary case; it much more frequently happens, that an innocent person is surprised and confused by false evidence, and rendered incapable of making an efficient defence by a forcible exposition of the improbabilities and discrepancies arising on a nice comparison of facts, which may be the only means of discovering the truth and rescuing an innocent man. To cope with a false charge so supported, calls for the greatest exertion of the skill of the experienced advocate; it can seldom happen that an ordinary defendant can in such a situation possess the coolness and talent requisite for the task. Suppose, for instance, the case of a woman charged (though innocent) upon circumstantial evidence with the murder of her illegitimate offspring; those whose painful duty it has been to witness such distressing trials can well bear testimony to the state of the wretched culprit, who overpowered with a sense of shame, disgrace and fear, is yet expected to make a defence which may require the most watchful attention to the evidence. It frequently happens that hardened villains possess more coolness and composure than the innocent; and that the latter, instead of having even their ordinary reason and speech at command, are deprived of their usual presence of mind, and exhibit a degree of confusion which might seem to indicate a consciousness of guilt. Few but those accustomed to legal investigations are capable of analyzing or commenting with effect upon a mass of facts adduced during a trial depending upon circumstantial evidence.

Where the party labours under bodily infirmity or mental incapacity, to confine the Prisoner's defence to his own personal exertions is in effect to impose silence. Whatever a man's capacity may be, it is a hardship to compel him to undertake his own defence, when he feels conscious that his nerves or his talents are inadequate to the undertaking.

We here extract some observations from our examinations relative to the incompetency of innocent persons to address Juries, and the fatal consequences thence resulting:

Mr. Alderman Harmer's Evidence, App. pp. 47, 48.

"Have you turned your attention to the subject of allowing Counsel to address the Jury for the Prisoner in cases of Felony?—I confess that it has appeared to me a hardship that in any petty assault case the Prisoner's Counsel might address the Court for the accused, and yet that they should not be permitted to do so in cases of a capital nature, where the person is perhaps unable, from the weight of the charge against him and the situation in which he is placed, to address the Court; and sometimes very ignorant men that cannot understand even the bearing of the case against them; and I have generally found that innocent men have always been the least capable of defending themselves; their mind is so agitated by the falsehood of the testimony that they are in confusion, and they cannot possibly direct their attention to it.

"You find the practised thief the most collected?—Always; when I used to be concerned, if I went to a thief, he would tell me every point of evidence against him, and what every man had said before a magistrate; but not so with a man that is innocent; he would be hardly able to tell me what had passed. I feel that in practice great inconvenience might arise from prolonging the proceedings, but as a matter of justice I confess I think it ought to be allowed."

"In your judgment, are there cases where it is essential to the safety of an innocent man, that his Counsel should address the Jury?—I think I have been concerned in many such cases. The only thing I could do as a remedy was, to prepare a written defence for the accused. After possessing myself pretty well of the facts of the case, I have prepared such a defence as I thought would best explain the facts for my client; but of course circumstances may arise in the course of a trial which would render the defence mischievous instead of beneficial.

"May not it often happen that the case of an innocent man cannot be brought sufficiently before the attention and consideration of the Jury, by evidence or cross-examination, or by the suggestions of the Judge, who has not studied

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studied the case?—I should hardly think it could, because the Counsel is stopped in a moment if he throws out any thing that may be construed into a remark or an argument in his cross-examination. He must confine himself to a matter of fact.

" Do not you find a difference in that respect, under the different Judges, that some allow it to a much greater extent than others?—Certainly.

" With respect to the notion that the Judge is Counsel for the Prisoner; do you think that, however eminent a Judge may be, he is competent to seize all the points as a Counsel would do?—Certainly not, as a person fully possessed of all the facts; and I cannot help saying that I have seen some instances in which the Judges have taken up a wrong impression against a Prisoner, and it has been very difficult to remove it.

" Have you had experience of any cases where persons you believed innocent were convicted, and where you had reason to suppose that had they been defended by Counsel, with power to address the Jury, a different result would have taken place?—I think so. I have known certainly instances in which I had not a particle of doubt the men were innocent, who have been convicted and executed; and where, if a Counsel had been permitted to address the Jury on their behalf, I think a different result might have been anticipated.

" Were those cases principally of circumstantial evidence?—Rather of positive. I think in three cases where there was positive evidence, and in one of them a false charge altogether.

" And where the speech would have been directed against the credibility of the witnesses?—In two cases out of the three: in the other there was a mistake.

" In those three cases, were those persons capable of defending themselves?—Certainly not. In one of the cases to which I alluded, I was quite satisfied the offence was never committed; and if there had been any body to remark upon the evidence, it was impossible that he could have been convicted."

Sir F. Pollock's Evidence, App. p. 36.

" At all events, do you think there is any thing that justifies that wide distinction now made, between Treason on the one hand and Felony on the other, and Felony and Misdemeanor?—I certainly do not; and I may add, that not only does it appear to me to be contrary to all principle, contrary to what every man would certainly wish for himself or those persons in whom he might take a great interest; but I have known, I think I may say on several occasions, great injustice done for want of Counsel.

" Do any instances occur to you at the moment, to which you are able to refer?—I have no desire to conceal the strong impression which has been made upon my mind on several occasions many years ago. I remember once a person of the name of Hodgson tried for rape. I think it must have been about the year 1811. He was convicted. I feel quite convinced that if his Counsel could have addressed the Jury he must have been acquitted, and it was a conviction that gave dissatisfaction to the whole Bar, and I believe to the public. I was present during the whole of the trial, and recollect, to this day, the circumstances that were detailed in evidence, and I think there can be no doubt of his innocence of the crime as charged upon him, though probably he had been in a situation to create considerable suspicion.

" That was a case of direct evidence, where, amongst other things, the prosecutrix swore to being carried across a public street in Leeds?—Yes, the Brigate. I have no doubt she was at first a consenting party, but that she was forcibly detained a longer time than was convenient to the domestic arrangements of the family in which she was a servant, and having been detained, probably by some degree of force, during the latter part of the interview, she converted the whole matter into a charge of rape.

" In that case the speech of Counsel would have been directed to the question whether the statement of the prosecutrix was credible throughout?—Yes; and I would remark here that that is a class of cases which peculiarly calls for the assistance of Counsel.

" Do not you think it is also very desirable, in cases of circumstantial evidence, to show the bearing of the evidence?—That is the class of cases I mean. I remember a case of a conviction for murder on the Northern Circuit; the precise year I do not now recollect, nor am I desirous to name either the individual

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or the Judge who tried him; but I have the strongest impression that the man was convicted, being entirely innocent, the death being not at all satisfactorily accounted for as a case of murder, either in respect of the motive of the Prisoner or the means by which he had committed the crime, and I thought then that if the attention of the Jury had been called by the speech of Counsel to the circumstances, the result would probably have been very different. The man was executed, and to the last persisted in declaring his innocence, and in stating *that* to be the truth which was the view of the case taken by several gentlemen at the Bar at the time. I remember in particular one Counsel who was present, and who is now a distinguished ornament of the Bench, agreed with me entirely in the view I took. Believing, therefore, that on more than one occasion accused persons in this country have been executed upon convictions which did not appear to be warranted by the evidence, and which evidence would not have produced conviction if Counsel had been allowed to address the Jury; I am a strenuous advocate for allowing Counsel whenever the accused party is desirous of having the benefit of that assistance."

Another reason for the privilege of appearing by Counsel, is greater certainty in the administration of justice. By the aid of the advocate, the fruits of previous investigation are submitted to the Court or Jury, the material facts and arguments are presented to the mind in one comprehensive view, and a Court or Jury is thus enabled to decide in the most certain and expeditious method that can well be devised. If speeches by Counsel were admitted on trials for Felony, many of the inquiries now made by the Judge or opposite Counsel would be unnecessary, and the deliberations of the Jury would frequently be expedited.

It appears to us that the reasons for permitting a full defence by Counsel apply to all classes of crimes; or, if a distinction is to be made, with greater force to those of a higher and more penal class, than to those of a lower, where the consequences of error would not be so fatal. We do not understand how the legal consequences which follow the proof of the facts constituting a crime, ought to affect the mode according to which those facts should be investigated. Besides, many Felonies are, in point of law, scarcely distinguishable from Misdemeanors. For example, a very slight difference of fact may distinguish the attempt to commit a Felony from the perpetration of the Felony itself. To steal title-deeds to land is but a Misdemeanor, but to steal a bond is Felony. To take a gun forcibly from another with a treasonable intention, would be an overt act of treason; to take it with a felonious intention, would be a capital Felony; to take it with intent to commit a Felony, would be a Misdemeanor. It is difficult to conceive, that where the mere act is the same, and its criminal quality depends simply on the intent of the party doing it, different modes of investigation should be necessary. As the very same acts may constitute different degrees of crime, according to the intent, it may frequently be at the option of the prosecutor to elect for which he will prosecute; and thus a private prosecutor may have it in his power to exclude or admit a full defence by Counsel.

Little reliance can be placed on Felony as a test for the exclusion of a full defence by Counsel, when it is considered, that the class of Felonies has been from time to time increased not only by statutes creating new Felonies, but by constructive enlargements of ancient boundaries; so fluctuating a distinction cannot, upon any sound principle, determine the best and surest methods for the attainment of truth, which must depend on fixed and certain principles. In ancient times the crime of Felony, with slight exception, included none but capital offences, and therefore comprehended but a very few of those offences which now fall within its scope. This affords an additional reason for, at all events, rejecting a test which is palpably insufficient, and for laying down some rule founded on more certain principles.

It may also be remarked that in the case of appeals of Murder and other Felonies, a full defence by Counsel was always admitted; so that the assertion that Felonies and Misdemeanors ought to be tried differently, is not invariably supported by the law itself.

The hardship which the present practice imposes on an accused party when his reputation, liberty, or even life, are placed in jeopardy by a criminal charge, affords a singular contrast to the spirit of indulgence which characterizes the law on all criminal charges with the exception of Felony, and in respect of civil

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civil proceedings without exception. It appears to us to be inconsistent with any sound or intelligible principle of Jurisprudence, that the aid of Counsel to address the Jury should be allowed on the charge of a mere Assault, but denied on a charge of Murder; that it should be accorded to enable a man to defend himself against a pecuniary claim to the amount of 40*s.*, but rigidly withheld where the charge affects not merely the whole of his property, but his life. "This rule" (observes Sir William Blackstone,* an eminent authority on all questions of legal principle and sound policy,) "seems to be not at all of a piece with the rest of the humane treatment of Prisoners by the English Law; for upon what face of reason can that assistance be denied to save the life of a man which yet is allowed him in prosecutions for every petty trespass?" It has been urged by Mr. Serjeant Hawkins that the denial of a full defence by Counsel is an actual advantage to an innocent person. "This exclusion," he observes,† "many have complained of as very unreasonable, yet if it be considered, that generally every one of common understanding may as properly speak to a matter of fact as if he were the best lawyer, and that it requires no manner of skill to make a plain and honest defence, which in cases of this kind is always the best; the simplicity, the innocence, the artless and the ingenuous behaviour of one whose conscience acquits him, having something in it more moving and convincing than the highest eloquence of persons speaking in a cause not their own: and if it be further considered, that it is the duty of the Court to be indifferent between the King and Prisoner, and to see that the indictment be good in Law, and the proceedings regular, and the evidence legal, and such as *fully proves* the point in issue, there seems no great reason to fear but that, generally speaking, the innocent, for whose safety alone the Law is concerned, have rather an advantage than a prejudice in having the Court their only Counsel. Whereas, on the other side, the very speech, gesture, countenance and manners of defence of those who are guilty, when they speak for themselves, may often help to disclose the truth, which probably would not so well be discovered from the artificial defence of others speaking for them."

On this defence of the practice we cannot but observe, in addition to our former remarks, that if it be consistent with any general and reasonable principle that a defendant should be permitted to address the Jury in person, but not by Counsel, that is, if the ends of justice were best attained by such a limitation, the necessary consequence would be, that the present mode of administering justice in every Civil Court and in every criminal case, except that of a trial for Felony, is greatly defective.‡

The reasons for permitting Counsel to speak for the Prisoner are substantially the same as those for allowing Counsel to examine and cross-examine witnesses on his behalf. It would indeed require some decisive and satisfactory reasons to warrant such a severance of the ordinary functions of an advocate; and if it be just that the power of examination and cross-examination should be allowed to be delegated to an advocate, because the accused cannot be supposed to be possessed

* 4 Comm. 355. In the trial of Thomas Rosewell, a dissenting clergyman, for High Treason, in 1684, even Judge Jeffries, in summing up, confessed to the Jury, "that he thought it a hard case that a man should have Counsel to defend himself for a twopenny trespass, and his witnesses be examined upon oath; but if he stole, committed Murder or Felony, nay High Treason, where life, estate, honour and all were concerned, that he should neither have Counsel, nor have his witnesses examined upon oath."—*Howell's St. Tr.* vol. 10. p. 207.

† Hawkins, P. C. b. 2. c. 39. s. 2.

‡ On a question like this, which must be resolved upon a plain and obvious principle, and which depends simply upon the consideration which of the two modes is the better calculated for the discovery of truth, it is scarcely possible that the practice and opinions of other nations, whether ancient or modern, should materially influence the decision; the more especially, as neither of these modes of inquiry is new, each having been practised from very remote times. We may, however, be permitted to observe, that neither the Roman law, nor any code founded upon that basis, has countenanced the propriety of excluding the defence of an accused person by his Advocate. The Digest, in treating of proofs, derives its distinctions from the principles suggested by natural justice and reason; and one of the first is, that which is made between the *probatio inartificialis*, as consisting of *testes*, *instrumenta*, &c., which are included under our general notion of evidence, and the *probatio artificialis*, as consisting of arguments skilfully founded on such evidence, *argumenta e facti visceribus ingeniose eruta*. It is distinctly stated, that the one branch as well as the other was incumbent on the party offering the proof, and the method observed in deducing the rules regarding proofs from the elementary principles from which they are derived, absolutely exclude any such distinctions as have become incorporated with the law of England in a remote and illiterate age.

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possessed of the skill and experience which are requisite for the doing this with effect, it is difficult to ascertain on what ground it is assumed that every one accused of a crime, without regard to age, sex or capacity, is capable of making his defence by a speech to the Jury.

We should, however, notice that it has been often suggested, that it is not necessary that the evidence should be explained or commented upon by Counsel, because this is done in ordinary practice by the summing up of the Judge, who is, moreover, said to be of Counsel for the Prisoner. It is assumed by those to whose opinion no doubt much deference is due, that the presiding Judge will supply every deficiency arising from the present practice.

It is remarkable that this position, on the correctness of which the result of the inquiry so much depends, is left to rest on mere gratuitous assumption. If indeed it were true that the Judge was able in every case, however difficult and complicated, to exhibit it in all its bearings and relations to the Jury in the most advantageous manner for the ends of justice, there can be no doubt that the functions of the advocate would for that purpose be useless. But this assumption is, we think, fallacious. It might be just as well urged, that every other branch of the advocate's duty could be discharged by the Judge, as, for example, that he could effectually discharge the duty of a Counsel in the examination and cross-examination of witnesses; and yet how unfounded would such an assumption be. A Judge without such a knowledge of the real circumstances of the case as the accused alone is able to supply, could seldom know how to conduct a cross-examination for the Prisoner's benefit; he would be unable to distinguish between false and true witnesses, and he would be unable, either to elicit the truth from honest, or to impeach the testimony of perjured witnesses. In respect of this important branch of the Counsel's duty, we feel confident that no Judge, however desirous he might be of protecting an innocent man, could fulfil the office of his advocate. It would, we conceive, be equally impossible that the Judge should be able in cases of difficulty to supply the advocate's office in commenting to the Jury upon the witnesses and facts. The Judge hears the whole of the case for the first time upon the trial, except in so far as he previously may have derived an imperfect knowledge of it from the depositions; during the trial he has little opportunity for weighing conflicting evidence, occupied as he usually is in taking notes; the advocate, on the other hand, has had the opportunity of considering the Prisoner's statement before the trial, and, knowing the facts, is able to present them to the Jury in the point of view most favourable to the Prisoner. The advocate possesses more certain means than the Judge, of distinguishing between true and false testimony, between that which is substantial and that which is merely colourable. When the charge is false, he possesses, through his intimate knowledge of the real facts, an almost infallible key to the truth; he can show that all the evidence truly given is consistent with the innocence of the accused, and is prepared to examine into and comment upon those discrepancies upon which innocence must frequently depend for its manifestation. It is, we conceive, impossible that any Judge, however transcendent his talents, should, without such means of knowledge, be able to present the Prisoner's case to the Jury in so favourable a point of view as he would be after hearing the observations and arguments of the Prisoner's Counsel. It is, on the contrary, very possible that the view of the case submitted by the Prisoner's Counsel, and enforced by his arguments, might escape him altogether.

Those who contend that all the uses of a speech by Counsel are attained by means of the "summing up" of the Judge, must insist on the position that every Judge on every criminal trial is as competent to state the case to the Jury in all its bearings—to make a nice comparison of all its branches—to point out coincidences—and to detect variances and discrepancies, as Counsel who have derived means of explanation from the most certain sources, and who have been able, previously to the trial, to weigh all the circumstances and arrange them for argument. It is not likely that any material argument should escape notice where it is the duty of the advocate on each side to suggest every thing favourable to the cause of his client; but it is next to impossible that the acutest mind should, on the mere hearing of a long detail of conflicting circumstances, and without the aid of comments from professional advocates intimately acquainted with all the facts, be able to state its various bearings with the requisite fullness and accuracy. And, admitting that the Judge, in summing up, may be

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be deemed the Prisoner's Counsel, still he never makes, nor is he in a situation to make, a statement preparatory to the introduction of the Prisoner's evidence; though, as we have sufficiently shown in other parts of our Report, such a statement is essential to a full and fair defence, and would conduce in other respects to the interests of justice.

It seems to be a hardship to deprive a Prisoner of the power of having those views of his case, which he himself or his Counsel has taken, presented to the Jury by a person of his own selection. Some Judges will always be more qualified than others for conducting criminal trials, and impressing the different views of a case upon the minds of a Jury; but it cannot reasonably be expected that satisfaction should be given by a Judge the most eminently qualified, if he omit to state to the Jury those views of the case which, rightly or wrongly, are thought by the Prisoner and his Counsel to be material to the defence.

It is, we think, unreasonable to expect that every Judge should be able, however long his attention has been kept up, however much his physical powers have been exhausted by the unremitting labour of taking notes, not only to advert to every material argument upon the facts of the case which might suggest itself to the Counsel on either side, but to urge all these with so much at least of the force and energy of the advocate, as to give them their due effect with the Jury. This is still less to be expected at the Assizes, where the attempt to finish the list of causes and deliver the gaol, often occasions late sittings, and is attended with a degree of mental and bodily fatigue which must in some degree impair the energies of the most powerful mind.*

The assertion that the Judge is the Prisoner's Counsel, in the ordinary sense of the words, and without a gloss which tends but to mislead, is a position too extravagant to require comment. It is the duty of the Advocate, by the most strenuous exertion of his powers, to urge his own view of the case, and by force of argument to compel the Jury to adopt it: whilst the office of the Judge, in a case of conflicting evidence, is to prepare the minds of the Jury for correctly forming their own conclusion; and with this view he is frequently led to state the facts deposed to hypothetically, or in the alternative. To go beyond this, and to lead or urge them to find a particular verdict, would be not to discharge the duty of the Judge, but to usurp the province of the Advocate. To decide is one thing, to prepare the minds of others for deciding is another, requiring such very different powers, and so very different a consideration of the evidence, that it is scarcely possible for one who has prematurely decided for himself to possess a mind at liberty to leave the facts with perfect impartiality to a Jury.

It is important to recollect, that the question is not, whether the arguments of Counsel shall be substituted for those of the Judge, but whether, in questions of fact as well as of law, they shall not generally be called in aid of those of the Judge. "I ever thought it" (observes Sir R. Atkyns) "a severity in our law, that a prisoner for his life is not allowed the assistance of a grave and prudent lawyer or some other friend to make his defence for him, even as to matter of fact as well as to law. I know 'tis said the Court is of Counsel for the Prisoner; but for my part I should never desire to depend upon that only."† Sir Robert Shower, in the arguments for a new Bill of Rights in 1682, said, "In the name of God, what harm can accrue to the public in general, or to any man in particular, that in cases of State Treason Counsel should not be allowed to the accused? What rule of justice is there to warrant its denial, when in a civil case of an halfpenny cake, he may plead either by himself or his advocate? *That the Court is Counsel for the Prisoner can be no effectual reason, for so they are for each party, that right may be done.*‡"

We

* Instances may be adduced, in which the learned Judge, towards the conlusion of a long trial, has been so much affected by the fatigue he has undergone, as to be incapacitated not only from commenting upon, but even from summing up the evidence; we may, for instance, refer to the celebrated trial of Spencer Cowper before Mr. Baron Hatsell, at Hertford, for the alleged murder of Mrs. Stout. *See* 5 Harg. St. Tr. The prisoner in this instance was a Barrister of great talent and learning, who was capable of defending himself with his usual ability, and who lived to fill the office of Judge. Had he not been so qualified to conduct his own defence, he might, so far as the summing up of the learned Judge was concerned, in so difficult a case of circumstantial evidence, instead of being a Judge, have died in a few days under the hands of the executioner.

† Letter by Sir R. Atkyns, on the subject of Lord Russell's Trial, 3 Harg. St. Tr. 758.

‡ Somers's Tracts, vol. 2. p. 568.

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We extract from the examinations which we have taken, some observations relative to the competency of the Judge to supply the want of a speech from the Prisoner's Counsel.

Evidence of Sir. F. Pollock, App. p. 38.

" It has sometimes been said upon this subject, in answer to the objection, that this difference in practice ought not to prevail between cases of felony and misdemeanor as to the Prisoner's Counsel addressing the Jury, that the Judge is the Counsel for the Prisoner, and that he is therefore sufficiently protected; do you conceive it to be founded on any principle of law, that the Judge should in any practical sense be the advocate of the Prisoner?—I do not apprehend that in point of law it is the duty of a Judge to act as an advocate either for the Prisoner or for the prosecution, but to attain the true end of the inquiry; and though it certainly would be the duty of the Judge, if the Prisoner were without Counsel, to prevent any improper questions being put, or incompetent evidence from being received, or a conviction taking place upon illegal or insufficient grounds, and although it is also the duty of the Judge to take care that the case shall be presented to the Jury in a fair, clear and true light, yet it cannot be his duty to sift the case of the prosecution with the zeal of an advocate, and present what may be the defence in the strongest manner in which it may be urged on behalf of the accused.

" Do not you think one advantage of giving the Prisoner Counsel is, that you would get rid of that vulgar notion, that the Judge is counsel for the Prisoner, which prevails, and which is inconsistent with the character of the Judge?—It certainly is a very erroneous notion in point of fact; it does not, in my opinion, obtain sufficiently in point of fact to dispense with the necessity of the accused having Counsel of their own appointment.

" Even supposing that a Judge was ever so desirous of advocating the Prisoner's cause, would he in many cases be able to do it for want of knowing what the Prisoner's case really was?—I think it is quite impossible for any Judge, however acute, enlightened, experienced or humane, effectually to present the defence of the Prisoner in as satisfactory a manner as the Prisoner's Counsel could do it."

Evidence of W. Ewart, Esq., M.P., App. p. 31.

" It has been sometimes said in answer to objections on the ground that the Court ought to assign Counsel, that the Judge is the Prisoner's Counsel; do you conceive that objection to be founded on principle?—No; I think it quite contrary to principle; if he is an efficient Counsel, he transgresses his proper power as a Judge; if he is an inefficient Counsel, the Prisoner is not properly defended.

" In your opinion would he be an efficient Counsel, without knowing such facts as the Prisoner could communicate?—He could not. Blackstone, I think, states that the Judge is only so far Counsel for the Prisoner as to see that he is fairly treated. If that is the amount of the Judge's defence, he is not an adequate Counsel.

" Have you found that in practice at the sessions or otherwise, the presiding Judge is usually Counsel for the Prisoner?—No; I think that, as far as my limited experience has gone, he certainly is not."

Evidence of E. A. Wilde, Esq., App. p. 64.

" Do you not conceive that the comments of Counsel upon the evidence and the different views that may be taken of it, may be a material aid and assistance to the Judge in his summing up to the Jury?—I do; I believe it was a saying of Lord Eldon's that he got more benefit by detecting fallacies, by hearing the arguments of those who agreed with him, than he did from the arguments of those who differed from him; and therefore it is necessary to hear both sides.

" Do you not conceive that that is a principle particularly applicable to cases of long and complicated evidence?—I do.

" May not the real state of facts, which can only be known to the Prisoner himself and those he instructs, escape the penetration of the Judge?—I think that they may escape the penetration of the Judge, and it is not surprising that it should be so; the difference between the Judge and the Counsel being that the Judge's mind is directed to the whole case, while that of the Counsel is addressed more particularly to that which he knows is beneficial with reference to a particular point.

" May that not be a point on which the whole case materially depends?—Yes, and

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and particularly in those cases on which perhaps Judges think the strongest, cases of circumstantial evidence."

It has been urged, that the proposed change is not needed, because, according to the present practice, no advantage is given to the prosecuting Counsel over the Counsel for the prisoner; the privilege which the prosecuting Counsel has of addressing the Jury being confined to a simple statement of the evidence. Now though it were strictly true that this privilege is never abused, still the opening speech frequently adds materially to the weight of the evidence for the prosecution. The giving order and connexion to a mass of facts tends to impress the Jury with their materiality and to impart greater force to the evidence than it would otherwise possess.* Whilst, therefore, it may be true that the license is not abused, and that its exercise tends to impress the Jury with just notions of the value of the evidence, it seems to be irreconcilable with any correct principle that the Counsel for the Prisoner should not also be allowed for the same purpose, and at least to the same extent, to disclose to the Jury the facts which he proposes to prove, and thus to give to the Prisoner's evidence the superior weight which that evidence would acquire from order and connexion. It is however by no means true that in practice the Counsel for the prosecution uses the privilege merely for the legitimate purpose of enabling the Jury to understand the bearing of the evidence. It is impossible, in such a case, either for the prosecuting Counsel or for the Judge to determine exactly the extent of the license. It is, we apprehend, not merely difficult, but impossible, to distinguish between the effect of a skilful arrangement of facts and of a commentary upon them; an impression is often made upon the minds of the Jury by an able address, before the evidence is given, which is not the less dangerous for the professions of fairness and candour with which it may be accompanied. Occasionally, even on trials for Murder, the whole skill of an expert advocate has been allowed to be exerted in his opening statement. We may cite as an instance the celebrated speech of Mr. Garrow, on his opening the case against Patch on an indictment for Murder.

It has been said that the probable advantages of the proposed change are in a great degree attained by the present practice, according to which such a latitude is allowed a Prisoner's Counsel, upon cross-examination, as amounts to a permission to convey all his views of the evidence to the minds of the Jury. But it is, on the other hand, to be considered, that a much higher degree of professional skill and dexterity is requisite for the purpose of making an impression on the Court and Jury through the medium of cross-examination, or under colour of taking some collateral exception, than by means of a direct address. And although the indirect attempts by which a Counsel for a Prisoner endeavours to make an impression on the Jury, are frequently treated by the Court with considerable indulgence, they are too uncertain in their effect, and depend too much on the disposition of the presiding Judge, to supply the place of a direct address to the Jury. It may also be observed that the very latitude now given to the cross-examination of the Prisoner's Counsel affords a strong presumption of the hardship of excluding his speech.

It has been said, also, that the Prisoner has frequently the ablest assistance in preparing a written defence. To this, however, it may be answered, that a written defence, if prepared before the trial, will often be irrelevant and of little use

* The practice of different Circuits with regard to the conduct of prosecutions, has been by no means uniform. On the Northern Circuit the Counsel for the prosecution always states the case. The practice of the Midland Circuit has been peculiar and different from other Circuits in this respect, it being unusual for the Counsel for the prosecution to make to the Jury even a simple statement of facts. Judges have sometimes complained of this practice, as not sufficiently apprising them of the nature of the evidence to be adduced, so that they might properly scrutinize it; and also as being unfair to the Prisoner in not acquainting him thoroughly with the import of the charge he had to meet. On the Midland Circuit, however, Counsel of great eminence have, on various occasions, deviated from the ordinary practice of that Circuit, and in some cases, where the evidence for the prosecution has been circumstantial, and of an intricate nature, have laid a statement of it before the Jury. That the making such a statement has been beneficial to the Prisoner may be questioned; many persons present on the occasions alluded to, have been of opinion, that a speech, confined to a simple statement of the evidence, without any comment, was, in effect, the most powerful address that could, under the circumstances, be made against the Prisoner; and that the Prisoner was placed under great disadvantage, for want of the assistance of Counsel, who might expose the fallacy through which a multitude of facts, by their simple allocation in a luminous though candid statement, tend to lead to an erroneous conclusion.

use to the Prisoner. If it be prepared whilst the trial is going on, it must obviously be very much hurried, from the circumstance of its being necessary to write it down. And in either case it is often read to the Jury very inefficiently by the officer of the court. We believe, moreover, that it is only of late years that written defences have been prepared by Counsel. The practice is not at all general, and doubts have been entertained of its propriety.

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We conclude our review of the reasons which have been urged to show that the speech of a Prisoner's Counsel upon a charge of Felony is unnecessary, by adverting to one of ancient date, which, however strange and unreasonable it may seem to be at the present day, is probably derived from the original practice of the Criminal Law in this country. This reason is, that Counsel could render no assistance, inasmuch as no one could be convicted except upon proof so convincing and clear as to exclude the possibility of defence. Thus it has been laid down upon high authority in a case in the State Trials, that " there is no other good reason can be given why the law refuseth to allow the Prisoner at the bar Counsel in matter of fact, where his life is concerned, but only this, because the evidence by which he is condemned ought to be so very evident and so plain that all the Counsel in the world should not be able to answer upon it." *

The position, that a defence by Counsel is excluded by the very nature of the proof required for a conviction, is obviously false with reference to modern times, and would in any age appear absurd if it were not explicable by the ancient history of the Law of England. So late as the reign of King Henry the Third, when the fact on a charge of Felony was doubtful, the trial, in the absence of any certain known accuser, (that is, where the charge proceeded on common fame,) was usually by the ordeal. When this superstitious custom had been superseded in consequence of a letter from the Pope, in the early part of that reign, a doubt was entertained, as appears from Bracton, how any Prisoner could be convicted when he put himself on the *Patria* or Jury for his deliverance; the Jury themselves (who formerly were the witnessess,) having no certain and actual knowledge of the fact. To that time, Prisoners, it appears, could not be convicted, unless the Jury themselves had actual knowledge of the fact, and the assistance of Counsel to speak to the fact would consequently have been useless. It is perhaps to this singular constitution of the ancient Criminal Law, that the exclusion of full defence by Counsel in cases of Felony is attributable. Counsel were excluded, because it would have been idle to maintain the innocence of a Prisoner in the presence of those who were judges of the fact as having been eye-witnesses of it. When (probably in consequence of the abolition of the ordeal) Juries, from being eye-witnesses of the fact, exercised the function of judges of the fact upon the testimony of others, and frequently upon circumstantial evidence only, the assistance of Counsel became material and essential to the purposes of justice. The continuance of the exclusion after the reason had ceased, may be referred to other causes. It formed but one of the numerous and oppressive disabilities† to

* By the Lord High Steward (the Earl of Nottingham) on the trial of Lord Cornwallis for the murder of Robert Clerk, 2 Harg. St. Tr. 726.

† In former times criminal trials were regarded, not merely as the means of protection to society, but also as an important branch of the Royal Revenue. The Petty Jury who tried Prisoners were originally brought as witnesses, to declare on their oath their opinion as to the guilt or innocence of parties charged on indictments. In process of time the Petty Jury used to take occasionally other helps than their own knowledge. But as papers and persons were called in merely as assistants to them by permission of the Judges, it is not difficult to conjecture, considering the mode in which the Judges were appointed in arbitrary times, the subjection of Juries, and the influence which the King's law officers exercised upon criminal trials, that the manner in which the Jury were allowed to avail themselves of any assistance independent of their own knowledge, should be the most favourable for the prosecution, and most unfavourable for the Prisoner. Nor is it surprising that the Prisoner should have been placed in a somewhat more fair situation with respect to the prosecution on trials for misdemeanors which led to no forfeitures, than on trials for felonies, which afforded a lucrative branch of revenue. Accordingly, it appears, that witnesses for a Prisoner were allowed to be sworn in misdemeanors a long time before this was allowed in trials for felony. Indeed it was not till the reign of Queen Mary, that, in consequence of her recommendation to her Judges, Prisoners indicted for felony were allowed to call witnesses for their defence. There was a time when no person could be Counsel for a Prisoner without being formally assigned; when Counsel for a Prisoner were not allowed even to cross-examine; when it was deemed criminal in a Counsel to give any suggestion by word or writing to a Prisoner as to the management of his case; and when written suggestions to a Prisoner have been taken away from him by order of the Court. Thus the prohibition of speeches by Counsel appears to be only a relic of still more unfair prohibitions exercised against Prisoners, and not a regulation advisedly contrived in a free and enlightened age.

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to which Prisoners for capital offences were formerly, and are, though to a less extent, still subjected. It is, we conceive, unnecessary to remark further on a reason, which, without reference to the circumstances in which the exclusion originated, would appear absurd.

We now advert to certain evils which, it has been suggested, would arise from a removal of the present anomaly, and which, it has been contended, would render the speeches of Counsel positively mischievous.

Of these evils, those naturally claim priority of consideration which concern the immediate objects of our inquiry, that is, the best mode of protecting innocence and detecting guilt; for it may be remarked, that the question is not, as some seem to suppose, whether the proposed change would operate generally in favour of Prisoners charged with Felony, but whether it would not also tend to the conviction of the guilty.

It has been suggested, in the first place, that, if speeches were allowed, occasional disparity in the talents of the contending Counsel might be more productive of injustice than is the case at present, the more especially as the prosecutor is usually more wealthy than the Prisoner. This is an inconvenience which may no doubt occasionally occur, but it is one which is inseparably incident to the administration of justice. We do not, however, think that the prosecutor's possession of larger means for procuring the assistance of legal talent would cause any material inconvenience. That the Prosecutor, however profuse, should be able to monopolize all the talent of the Bar in the Central or Assize Court, is next to impossible; the numbers of talented lawyers on each circuit, and the manifest injustice which such an attempt would disclose, effectually exclude such a device. The prosecutor might, no doubt, select those whom he deemed to be, and who in fact were, the most able; still it could seldom happen that others were not left perfectly competent to the duty of defence, and so nearly equal in point of talent with those against whom they had to contend, as to leave little to fear in a just cause. To ensure perfect equality is even now impracticable, and the prosecutor already has it in his power to select from the whole Bar a Counsel ready to exert all his talents for the procuring a conviction; whilst, according to a very inconvenient regulation, a Prisoner cannot, without paying for a license, which is often far beyond his means, procure the assistance of a King's Counsel. And, besides, a moderate degree of talent on the part of a Counsel would, in general, be sufficient to acquaint the Judge with his views of the case, which the Judge might afterwards state with greater effect to the Jury. We may add, that the objection seems to be inconsistent with commonly received opinions, since the admission of full defence by Counsel on trials for High Treason has generally been deemed an important advantage to the subject.

With reference to the objection respecting the disparity of Counsel, we extract the following observations from the Appendix:—

Sir F. Pollock's Evidence, App. p. 38.

"It has been suggested, that if the most able and eloquent Counsel were employed in criminal cases, it might often be the case that there might be great disparity between the Counsel employed for the prosecution and for the Prisoner; in your opinion would a greater disparity obtain then than does now, where an able Counsel is frequently employed for the prosecution, with the power of addressing the Jury, and the Prisoner's Counsel has not that privilege?—I think not; I have no doubt that sometimes the disparity of Counsel may be an impediment to the attainment of justice; it is undoubtedly one of the imperfections of the system, but it is a necessary and unavoidable one. Upon the whole, it is very much better that Counsel should be employed rather than the parties themselves, for the disparity would then be much greater."

It is also suggested, that if the change took place, trials for Felony would no longer be conducted with the same degree of decorum as they are at present.

This argument, admitting the assertion that the change would be followed by a diminution of decorum, can only be used for the purpose of showing either that a diminution of decorum would render the discovery of truth less certain, or would outweigh the additional chance of discovering the truth which the proposed change might afford. We do not think it probable that such a change would be likely to occasion any such inconvenience as is suggested; we believe that the respect now justly and universally paid to the Judge, a respect founded not more on his authority and the dignity of his high office, than on full confidence in his earnest desire to promote the ends of justice and of truth, would be as fully adequate as it is at present, in all causes Criminal as well as

Civil, whether the privilege of speech be allowed or withheld, to the due maintenance of order and decorum. But supposing the argument to be better founded than it is upon the fact which it assumes, we do not understand how it can affect the material question, whether the change would not tend to facilitate the discovery of truth; and we think that even order and decorum in a Court of Justice would be dearly purchased at the price of placing life or liberty in jeopardy.

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It has also been said, that the Judge, in order to remove an impression produced by the eloquence or ingenuity of the Counsel, might feel himself obliged to make remarks, and assume a tone apparently hostile to the Prisoner; and that this would be both irksome to the Judge and detrimental to the Prisoner. We think, however, that it ought not to be presumed that Judges in commenting upon the speeches of the Prisoner's Counsel would ordinarily give way to any irritation of temper, or that they would not calmly and discreetly distinguish between the fallacies which those speeches might contain, and the material considerations which they might suggest. Upon trials for Misdemeanor, at present, in cases where the Prisoner's Counsel, in consequence of his not calling witnesses, is entitled to the last word, we do not believe that an honest defence is ordinarily prejudiced from the circumstance of the Judge's charge immediately following the Counsel's speech.

It is further urged, that Counsel would be excited to the display of a higher degree of warmth than is now usual, and that the same forbearance would not be evinced by the prosecuting Counsel as at present. We believe that a greater degree of zeal than at present prevails on Criminal trials would be excited by the proposed change of practice, but it cannot, we think, be fairly anticipated that such increased zeal on the part of the contending Counsel would be attended with any material impediment to the discovery of truth, but the contrary. We think, also, that in cases of offences visited with very severe punishment, more forbearance would be exhibited than is at present ordinarily witnessed upon trials for Misdemeanors.

Upon this subject we extract the following observations from our Appendix:—

"I do not think we should find the same zeal for success in cases of Felony between Counsel as in other causes; I do not think there would be a strenuous exertion made by any gentleman at the Bar to obtain a conviction; I think the good sense and humanity of the barristers would prevent their attempting to work injustice by their talent." Mr. Alderman Harmer's Evidence, App. p. 48.

"It has been suggested that the allowing Counsel to address the Jury in a case of Felony, as in a civil Court, would be likely to generate contention and heat in the discussion of the case, and that Counsel would rather aim at victory than the strict execution of justice; in your judgment, would that be likely to be the case?—I should think not." Ibid. p. 47.

"With respect to the mode and temper with which a criminal case ought to be conducted, in your judgment, would not a great deal depend upon the presiding Judge, who would give the tone and might prevent that undue eagerness in procuring a conviction which perhaps some Counsel might be tempted to indulge in?—I should certainly think it the duty of a Judge to repress on the part of the prosecuting Counsel any eagerness to convict, or the adoption of any line of conduct which went beyond a faithful discharge of his duty to the public, who alone ought to have any interest in the event of a criminal proceeding." Sir F. Pollock's Evidence, App. p. 38.

It has also been objected that the fear of the comments which might be made upon the conduct of prosecutors by Prisoners' Counsel would tend to deter injured parties from prosecuting. This objection, even supposing that it were in every case optional with the prosecutor to withhold or withdraw his charge, appears to us to be too remote and indefinite to be weighed against the sacrifice of any means conducive to the attainment of truth. We may, however, observe, that the fears of a person who might be so deterred, are more likely to depend on the probable disclosure of facts than on any comment upon them by Counsel; and that every prosecutor even now is liable to have his motives and character scrutinized by evidence and upon cross-examination. It is probable that, at present, parties may occasionally be deterred from prosecuting by the apprehension of exposure; so that if the principle of making a partial sacrifice of truth to the fear of deterring such prosecutions were a sound one, it might go to the length of excluding all cross-examination affecting the motives or character of

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of a prosecutor. We think, however, that such a suppression of truth would be exceedingly dangerous, and that little is lost to the cause of justice in compelling such disclosures, or permitting such comments, as may be material and important to the attainment of truth.

It has been also suggested, that if Counsel for the Prisoner were allowed in all cases the power of addressing the Jury, great inconvenience might be occasioned in the administration of justice in the inferior criminal tribunals, from the inability of the presiding magistrate to counteract the effect of an eloquent and energetic address to the Jury on behalf of a Prisoner. We think that this suggestion involves some considerations of very considerable importance, and that it calls upon us for some observations; although we feel an unwillingness to enter upon an objection which supposes a degree of incompetency in a portion of the inferior magistrates to preside as Judges.

Upon principle, we cannot find any sufficient ground for excluding speeches of Counsel on trials of offenders before the inferior tribunals; for we apprehend that the arguments which we have already noticed prove conclusively the general position, that the power of being heard by Counsel is essential to the attainment of truth, and that fatal errors would occasionally result from the exclusion. We are, however, very far from asserting that in all cases of trials for Felony the denial of such aid would be material; in perhaps a large majority of such cases tried before the inferior tribunals the evidence is too clear and decisive to admit of doubt, and in most trials for Felony the Prisoner does not produce witnesses. But it is impossible by any means to distinguish previously to a trial whether the aid of Counsel in addressing the Jury will or will not be material. The difficulty of investigating a fact cannot possibly depend on its legal consequences or the magnitude of the mischief, the extent of the bodily injury or the value of the thing stolen.

Any distinction therefore which allowed the hearing of Counsel in one class of cases and denied it in another, would be arbitrary. It could rest on no other principle than this, that it would be better to apply a partial remedy than none; and that it would be desirable to make an experiment of the change of practice by reducing, in the first instance, the extent of the existing inconvenience in those cases where the consequences of excluding the surest means of investigation, and thereby incurring the risk of error, would be most fatal.

It is possible that inconveniences may arise in inferior Courts, from the presiding magistrate being incompetent by education or experience to remove the impression made by a Counsel's address. But, in such a case it is difficult to conceive that he would possess capacity sufficient, in the absence of suggestions by Counsel, to supply their place, by submitting to a Jury the real effect and bearing of the evidence. And if he be incapable of removing false impressions from the minds of the Jury where Counsel are allowed to address them, there is, we apprehend, little likelihood that he would be able to direct them safely without such aid.

And here we may briefly remark, that the objections to the proposed change, with reference to the present subject, seem to be somewhat inconsistent: for they suppose that the change is needless on trials in the Superior Courts on account of the alleged competency of the presiding Judge; and that the change would be mischievous on trials in the Inferior Courts: on account of the alleged incompetency of the presiding Magistrate.

But assuming that the proposed alteration would, in some respects, render the duty of the presiding Magistrate somewhat more difficult, we conceive that the inefficiency of any of the existing Tribunals is rather an inducement for their improvement, than an argument against a course of practice which would be deemed expedient, if they were efficient: an observation which acquires a greater degree of importance from the consideration that a very small proportion of prisoners for Felony are tried before the Judges of the Superior Courts.

We observe, in conclusion, that if the objection be well founded, that inconvenience would arise on trials for Felonies before inferior Tribunals from allowing the privilege of speech to Counsel, the same objection now exists in respect of trials before the same tribunals for Misdemeanors.

We have next to advert to an objection purely collateral, and which does not affect the question as to what is the most efficient mode of convicting the guilty and protecting the innocent. The suggested inconveniences on which this is founded, are, we believe, much exaggerated; but were it otherwise, they

they could not, we think, be fairly placed in comparison with the mischief which would result from rejecting means essential to the discovery of truth.

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It is objected that a great increase of expenditure of time and money would be occasioned by the change.

After devoting much attention to this objection, we think it probable that the change would be attended with a considerable increase in expense both of time and money; but we cannot assent to the opinion of those who state that trials would be protracted to twice, or even to thrice their present length.

In tedious protracted cross-examinations, resorted to not so much for the eliciting of truth, as for the extracting some contradiction or inconsistency in the testimony of the Witness, and exhibiting it to the Jury, or for throwing discredit or suspicion on the Witness, or for the explaining to the Jury the Advocate's views of the facts, a degree of license is sometimes permitted, which frequently occupies a considerable portion of time, and which, if he could express his views directly, would probably no longer be allowed. If the Counsel had the opportunity of addressing the Jury, he would be careful after a fact favourable to his client had once been stated, to avoid the risk of weakening its force by cross-examination; the fact being in evidence, he would reserve his comment to the period of his address to the Jury, when he could make it the more directly and forcibly, and without fear of contradiction. Without that opportunity, he too often labours to impress the Jury with its importance, by dwelling upon the fact and its circumstances in the course of cross-examination.

The zeal of the defending Counsel is stimulated by the consciousness that his own reputation is at stake; abstinence from cross-examination would, in the majority of cases, be the wisest course; but unless the Counsel exerts himself, the Prisoner thinks his cause abandoned, and silence may induce the Jury to suppose that no answer can be given to the charge. Hence it is, that a Counsel will cross-examine at length, in the hope of stumbling upon an inconsistency; will dwell upon a number of irrelevant points; and, if he be discreet, will abstain from such as are important, in order that, whilst he avoids questions of vital importance, he may not appear to have been guilty of a dereliction of duty.

It may not unfrequently happen that time will be consumed by unnecessary speeches of Counsel; as to which we may cite the observations of an eminent American Barrister, contained in a letter to a Member of the Commission, and which is inserted in the Appendix:—

"It is true that the time of the Courts is occasionally wasted in listening to the idle declamation of raw and inexperienced practisers; but this is an evil of little consequence, as we think, in comparison with the mischief of placing the criminal in any degree within the power of the Judge, and putting the latter in the two incompatible relations of Judge and Counsel." App. p. 72.

We do not, however, conceive that a comparison ought to be made between the conflicting inconveniences: that the temporary delay which the alteration might possibly occasion to Judges, Jurors or Counsel, ought to be placed in competition with the enormous evils which may result from the condemnation of innocent persons, and subjecting them to loss of liberty or life by denying them those ordinary means of defence which are allowed to a defendant in an action of debt, and even in all criminal cases of superior or inferior degree to Felony. We feel convinced that the complete and satisfactory investigation of truth on all criminal charges, those especially which affect liberty and life, is of far too great importance to society to bear abridgement, and to be sacrificed to any collateral suggestions of mere convenience. We therefore think it unnecessary to dwell on the evidence stated in the Appendix to this Report, tending to show that it is questionable whether in fact a greater portion of time would be consumed by allowing Counsel, in cases of Felony, to address the Jury.

Some who feel the injustice of allowing the Counsel for the prosecution to state the case to the Jury, whilst silence is imposed on the Counsel for the Prisoner, propose to remove the anomaly by silencing also the Counsel for the prosecution.

It appears to us that such a measure is on several grounds objectionable. It is in many instances essential to a just and effectual investigation, not only that the Jury should be apprised, by means of an opening speech, of the materiality and

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and mutual bearings of different parts of the evidence, but also that the Prisoner and his Counsel should be thus apprised of the mode in which the evidence is meant to be applied. Without this aid, and without knowing what further evidence was to be adduced, it would frequently be impossible to apply a cross-examination with effect. A witness, for example, might be called to prove a fact which, at the time when the evidence was given, appeared to be of little importance, but which in connexion with subsequent evidence, became most material. It is true, that in such a case the Counsel for the Prisoner would be allowed to have the witness recalled for the purpose of cross-examination, as to those facts the materiality of which was not seen at first, but it would often be impossible that this could be done so advantageously on a recal of the witness as in the first instance.

It appears to us that the evidence as well for the prosecution as for the defence of Prisoners, would be better understood by a Jury, and more likely to be justly estimated, were they prefaced by some observations of Counsel explanatory of the bearing and tendency of the facts to be proved. Such observations also enable the opposite party the better to sift the evidence at the time it is adduced. It is indeed but fair to the Prisoner, especially if he be not defended by Counsel, that he should be apprised of the inferences and presumptions intended to be drawn, or capable of being drawn, by reasonings from the facts produced against him; for such an intimation may suggest topics of inquiry to be pursued in the examination of the Prosecutor's witnesses and of his own, a course of proceeding which is no longer practicable when such consequences are urged for the first time in the Judge's summing up to the Jury.

We think that even the present restrictions on the speeches of Counsel for the prosecution are very injurious to the interests of justice; inasmuch as they frequently occasion the acquittal of guilty persons, in consequence of the evidence for the prosecution not being thoroughly understood by Juries, and the legitimate inferences to be drawn from that evidence not being presented to the minds of the Jury, or, at least, not being adequately impressed upon them. We believe that many persons in the habit of presiding at the trials of Prisoners have regretted the omission of observations arising out of the evidence material as well for the prosecution as for the defence, and which have occurred to themselves after the trials have been over.

On this subject we extract the following observations from our Appendix :—

Sir F. Pollock's Evidence, App. p. 36.

"Various arguments are urged in favour of the present system. One frequently urged is the injury that it would be to the prisoner, and I think it would frequently be injurious in showing the strength of a prosecution and exposing the weakness of a defence; but I think that argument ought to have no weight, because the object of a trial is not to conduct the proceeding in a manner most favourable to the accused. The object is to do justice and obtain the truth, and if that in some cases would more strongly tend to conviction, I think, with reference even to those cases alone, it ought to be adopted, but still more so in the cases where innocence would be better protected."

Evidence of W. Ewart, Esq., M.P. App. p. 32.

"There have been some objections taken to the increased severity of punishment which it might introduce. There is no doubt that guilt would escape more seldom than it does at present. But I apprehend the foundation of this alteration to be the attainment of truth, and consequently the more certain punishment of guilt, as well as the more complete defence of innocence. I cannot therefore admit the validity of this objection.

"Has it not been objected sometimes, that a greater number of prisoners would be convicted?—I do not think that is an objection, if they deserved conviction."

Evidence of E. A. Wilde, [illegible], App. p. 63.

"I have no doubt that if the Prisoners had Counsel many guilty persons would be found guilty who would otherwise get acquitted. The general impression is that of sympathy by the Judge and Jury because the Prisoner has not the benefit of Counsel."

With reference to the practice which it may be advisable to pursue, in case of full defence by Counsel being permitted, we think it is conducive to truth and justice that the Counsel for the Prisoner should be allowed to address the Jury in the last instance. It has been suggested, and we think with reason, that the introduction into Criminal Courts of the Nisi Prius practice ought greatly to be deprecated. One great cause of complaint attending that system, is the undue advantage given to the Plaintiff in a cause; his Counsel has, to use the ordinary expression, the first and the last word; he is allowed by his opening speech

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to pre-occupy the minds of the Jury by the statement he makes, knowing that he shall have the last also, in case the Defendant calls witnesses. The Defendant's Counsel has the opportunity of addressing the Jury, but, so far as the Defendant's case is concerned, his speech must be purely hypothetical, not upon facts which are proved, but on those which according to his instructions he expects that his witnessess will be able to prove: he cannot possibly foresee the variances which may occur in the evidence, and therefore cannot possibly be prepared to adapt his speech to the precise case which may ultimately be left to the Jury. Under such disadvantageous circumstances, it is by no means surprising that a Nisi Prius Counsel should often, at a great sacrifice, decline to call witnesses for the Defendant, knowing the risk which he would incur by so doing, and unwilling to encounter a speech in reply. The inconvenience is not confined to mere Nisi Prius cases; we know that on indictments for Misdemeanors important evidence has, as matter of discretion, been frequently sacrificed to such apprehensions. We deem it, therefore, to be of the highest importance to exclude all such apprehensions from criminal trials, in case the Legislature should deem it fit to remove the present anomaly; and with that view we suggest the propriety of admitting the Prisoner's Counsel in all cases to the privilege of making the last address previously to the Judge's summing up to the Jury. Upon this point of practice we beg particularly to refer to the Evidence of Sir F. Pollock, in the Appendix.

Before we conclude our remarks upon the exclusion of full defence by Counsel, we would offer the following observations.

When it is considered that Criminal Justice in this country is administered principally through the medium of a popular tribunal, it will be at once perceived how exceedingly important it is, not merely that the administration of Criminal Justice should be moderate and just, but that it should appear to be such to those to whom, as Jurors, duties so important are confided. Experience fully proves, as might be easily anticipated, that the very apprehension lest a punishment disproportionate to the crime should be inflicted, frequently deters the injured from prosecuting and Jurors from convicting; and we may venture to assert, that the law which closes the lips of the Prisoner's Advocate in every case of Felony, and which the Judge is so frequently obliged to announce in open Court to the Prisoner, when he says he leaves his defence to his Counsel, appears to the generality of people to be harsh and unreasonable. Such a feeling is necessarily prejudicial to an inquiry which has truth only for its object; an additional temptation is thrown out to show undue favour to the Prisoner; and whilst this unjustly tends to the escape of the guilty, it cannot possibly compensate the innocent for the want of a fuller investigation of the facts by the aids which he only, through his Advocate, can supply.

In confirmation of this view of the subject we cannot do better than refer to some observations in our Appendix, and to a Petition presented by Mr. George Lamb, on the 6th April 1824, from several Jurymen in the habit of serving on Juries at the Old Bailey.

Evidence of E. A. Wilde, Esq. App. p. 64.

"In your judgment what is the impression made on a Jury by the refusal to allow the Prisoner to be heard by Counsel; do they consider it as a hardship?—Considering the law has existed so many years, I do not think the minds of Juries are addressed to it, but from the fact of there being a Counsel on one side and not on the other, they naturally become embarked with the Prisoner, and more particularly when the Judge seems to act on that impression."

"They feel at the moment that the prisoner is placed under a disadvantage?—Yes."

The Petition presented by Mr. George Lamb was as follows:—

"That your Petitioners, fully sensible of the invaluable privilege of Jury Trials, and desirous of seeing them as complete as human institutions will admit, feel it their duty to draw the attention of the House to the restrictions imposed on the Prisoner's Counsel, which they humbly conceive have strong claims to a legislative remedy. With every disposition to decide justly, the Petitioners have found, by experience, in the course of their attendances as Jurymen at the Old Bailey, that the opening statements for the prosecution too frequently leave an impression more unfavourable to the Prisoner at the Bar, than the evidence of itself could have produced; and it has always sounded harsh to the Petitioners to hear it announced from the Bench, that the Counsel to whom the Prisoner has committed his defence, cannot be permitted to address the Jury in his behalf, nor reply to the charges which have, or have not, been substantiated

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stantiated by the witnesses. The Petitioners have felt their situation peculiarly painful and embarrassing when the Prisoner's faculties, perhaps surprised by such an intimation, are too much absorbed in the difficulties of his unhappy circumstances, to admit of an effort towards his own justification against the statement of the Prosecutor's Counsel, often unintentionally aggravated through zeal or misconception; and it is purely with a veiw to the attainment of impartial justice, that the Petitioners humbly submit to the serious consideration of the House the expediency of allowing every accused person the full benefit of Counsel, as in cases of Misdemeanor, and according to the practice of the Civil Courts."

We may lastly remark, that the excluding a full defence by Counsel forms one of those incidents to crimes of the degree of Felony, the continuance of which opposes very considerable impediments, not only to the present administration of justice, but also to future improvements. It very frequently happens that Prisoners capitally indicted for attempts at Murder, by cutting or other means, or for Rape, and some other crimes, are acquitted of the capital charge, although a great personal outrage has been committed. The consequence very often is total impunity: for owing to the extremely technical distinctions between Felony and Misdemeanor, of which the exclusion of a full defence is the most important, the Prisoner cannot be convicted on the same indictment for the offence of which he is really guilty, because it is but a Misdemeanor; and if he could be found guilty on that charge he would lose the benefit of a full defence by Counsel, together with some other advantages which need not at present be noticed more particularly. To punish the offender in such a case, it is necessary to go again through the process of a criminal prosecution, at the cost of great delay, great expense, and, frequently, much inconvenience to the Prosecutor and his witnesses. We understand that it has been in the contemplation of some members of the Legal Profession to introduce a specific legislative measure for the purpose of removing this impediment to justice. This object, however desirable, cannot be accomplished without removing wholly or partially the present anomaly. If a Prisoner charged with the perpetration of a capital crime may be found guilty of the mere attempt, either the full defence must be admitted where it is now excluded, or excluded where it is now admitted. We think that it is worthy of the most serious consideration, whether difficulties of this nature would not be best remedied by removing the anomalies in which they originate.

Having thus adverted to and observed upon the principal reasons for and against the present anomaly, we humbly submit the following results of our inquiry.

It appears to us, That, as a general position, the right of a party accused to be heard previously to condemnation is founded on principles of reason, humanity and justice, recognized by the law of England:

That it is essential to this right that it should, at the option of the accused, be exercised through the agency of Counsel:

That no reasonable distinction as to the exercise of the right can be made between Felonies and other classes of crimes:

That the present practice is in many respects detrimental to the interests of Justice, in regard to the conviction of the guilty, as well as to the protection of the innocent:

That whilst it appears to us that considerable inconvenience might follow from permitting a full defence by Counsel on trials for Felony, we do not think that the arguments urged in favour of the anomaly are sufficient to warrant its continuance:

That the Prisoner's Counsel should in all cases be entitled to the concluding address, and that the same practice in this respect should be extended to trials for Misdemeanors.

Considering, however, the deference due to opinions which are entitled to high respect, and that the alleged inconveniences of the proposed change would principally occur on trials in the inferior Criminal Courts, we have to remark, that if it should be deemed desirable to make an experiment as to the probable effect of the change, full defence by Counsel might be allowed, in the first instance, in capital cases only, and it might be declared, that in other cases of Felony the Prisoner's Counsel should have the like privilege, in case the prosecuting Counsel addressed the Jury.

PUNISHMENTS, AND PARTICULARLY THAT OF DEATH.

Punishments.

Your Majesty's Commissioners, in examining the expediency of the present mode of administering justice as it regards the infliction of Punishments, have principally considered whether it would not be beneficial to restrict the punishment of death to the cases wherein it should ordinarily be carried into execution, instead of suspending it over large classes of offences, and permitting the selection of a few culprits only out of many who are capitally convicted for putting it in force; and if the former be the better policy, what offences are of such a nature as to make it expedient that they should ordinarily be punished with death. We have also considered what provisions may be necessary in regard to those offences from which it may be expedient to remove the capital punishment; in which inquiry we have been led to examine the secondary punishments at present inflicted by the Law. We have added some remarks on the propriety of allowing a longer period than is at present permitted to intervene between the conviction and execution of persons condemned for the crime of Murder.

The scarcity of distinctions defining the gradations of guilt, and annexing commensurate penalties, constitutes a remarkable characteristic of the Criminal Law of this country. Crimes bearing little moral resemblance to each other, are, by sweeping definitions, frequently classed together without discrimination as to penal consequences.

The constant or even the ordinary enforcement of penal laws of so indiscriminating a character, would be impracticable. It would be contrary to the plainest and most commonly received principles of Criminal Jurisprudence to punish without distinction, offenders whose crimes differed widely in respect of moral guilt and mischievous consequences to society, or to inflict the punishment of death for offences which may be adequately repressed by milder means. Besides, if it were understood that the minor degrees of those offences which are now capital would ordinarily be visited with the utmost severity of the law, it would be difficult, by reason of the sentiments of the various parties concerned in the administration of justice, to procure convictions of guilty persons. Accordingly, whilst the law annexes the punishment of death to several extensive classes of offences, that punishment is and can be executed on a few only of the more atrocious offenders by way of example.

In illustration of these remarks, we may refer to the offence of Burglary, which is by law in all cases a capital crime. To the completion of the offence, there are no other essentials than the breaking of a dwelling-house in the night time with intent to steal or commit some other Felony. Within this definition, extended as it has been by construction, are included offences the most distant in point of atrocity. A hungry pauper, for example, who after it is dark breaks a pane of glass, and thrusts a hand through the broken window to seize a loaf of bread, is just as liable to suffer death, as one of a gang of ruffians who break into a dwelling-house to pillage the inhabitants, and who execute their purpose with circumstances of the utmost violence and cruelty.

Since, then, the punishment of death cannot be invariably executed in all cases where it is annexed by the law to the crime, the question arises, whether it is of use in those cases where it is so annexed, but not actually inflicted.

Having carefully considered the opinions of many eminent persons who have given great attention to Criminal Jurisprudence, the Reports of several Committees relating to the same subject, the official returns, and the answers to our own inquiries, we are induced to believe that the selection of a few culprits who alone are to suffer death out of a great number convicted for the same offence in point of law, does not diminish, but, on the contrary, tends to increase the number of the offenders.

It is matter of ordinary observation, that the fear of death, however strong when the event is near and certain, has no proportional influence when the event is remote and uncertain. Daily experience proves that men are constantly induced to engage in the most hazardous occupations, without regard to peril of life. From the Report of the Committee appointed by the House of Commons to inquire into the causes of deaths amongst Miners, it appears, that on an average of 25 years, not fewer than 82 violent deaths had occurred every year among

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persons so employed; whilst it appears that the number of executions in England and Wales in 1834 and 1835 was 34 only in each year. If from this were subtracted the number of those executed for Murder, and attempts at Murder, (crimes which are not committed for the most part by ordinary offenders, but are attributable to the influence of violent and ungovernable passion,) the comparative risk of capital punishment as contemplated by criminals would be further diminished. Besides, in addition to the chances of escape after committal for trial, are to be calculated those of avoiding apprehension; those resulting from the unwillingness of injured persons to prosecute from knowing that an offence is capital; and from the common practice of trying persons who have been guilty of a capital offence as for a minor offence, at the sessions, by means of omitting circumstances of aggravation. "Among so many chances of escaping," observes Sir W. Blackstone,* "the needy and hardened offender overlooks the multitude that suffer; he boldly engages in some desperate attempt to relieve his wants or supply his vices; and if unexpectedly the hand of justice overtakes him, he deems himself peculiarly unfortunate, in falling at last a sacrifice to those laws which long impunity has taught him to contemn."

On the subject of the unwillingness to prosecute for capital offences we make the following extracts from our Appendix:—

Evidence of Mr. Alderman Harmer, App p. 44.

"It is a matter of common occurrence, for prosecutors and witnesses to devise some stratagem to secure the escape of the offender; and I have known them to suppress facts, and colour their evidence to effect their object. When reproved for such conduct, they have justified the act by asserting that it was better to err in their testimony than to be the means of taking away the life of a fellow creature. Often have I been consulted by prosecutors and witnesses, as to whether they were liable to any other consequences than forfeiture of their recognizances by neglecting to attend to give evidence; and I have known a prosecutor not only submit to pay the amount of his own recognizances, but those of a witness also, whom he prevailed upon to keep out of the way because his testimony would have convicted the Prisoner; and the only motive for paying this money and foregoing a public duty, I know to have been a merciful feeling to save human life. Had the punishment been short of death, no consideration would have induced the gentleman to whom I allude to forbear prosecuting."

App. p. 63.

"I have frequently seen persons withhold their testimony, even when under the solemn obligation of an oath to speak the whole truth, because they were aware that their testimony, if given to its full extent, would have brought the guilt home to the parties accused; and they have, therefore, kept back a material part of their testimony. In all capital indictments, with the exception of Murder and some other heinous offences, I have often observed prosecutors show great reluctance to persevere, frequently forfeiting their recognizances; and indeed I have, on many occasions, been consulted by prosecutors as to the consequences of refusing to conform to their recognizances, that is, to appear and prosecute the prisoner."

The example of miners, mariners, and other persons engaged in the like adventurous pursuits, may not be precisely parallel to the case of persons under consideration, yet we think it may be observed, that if the fear of death be not sufficient to deter the honest and industrious from pursuing a course of life attended with imminent danger, it is much less likely to have any material influence, (especially where it is less imminent), on a class of society whose habits have excluded them from any honest mode of life, whilst a course of vicious sensual indulgence, and an aversion to labour, have increased in a great degree the temptation under which they lie to commit crimes. The efficacy of penal laws is to be judged of, not as they are likely to operate on the greater mass of mankind, who are restrained from the commission of crimes by a sense of religion and morality, respect for public opinion, love of their family and connexions, or other similar motives, but by their effect on that portion of society who are addicted to a criminal course of life, and habits of idleness and vice.

When it is considered that in the two successive years of 1834 and 1835, 164 Prisoners in the former and 194 in the latter year were convicted of the capital crime of Burglary, and yet that not one in the former, and only one in the latter year

* 4 Comm. p. 19.

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year was executed, it is difficult to conceive that the fear of capital punishment, in respect of that particular crime, can operate to the prevention of the offence. The offender in 1836 may reasonably anticipate that the executive Magistrate will not more rigidly enforce the law in 1836 than he or his predecessor did in the two preceeding years.

It has not, in fact, been found that the repeal of capital punishments with regard to any particular class of offences, has been attended with an increase of the offenders. On the contrary, the evidence and statements to be found in our Appendix, go far to demonstrate, that as the proportion of those actually executed for, to those actually convicted of, any particular class of crimes, has become less, the absolute number of the offenders has diminished.

We insert, in confirmation of our remarks, an extract from the Evidence of Mr. Barry,* in our Appendix:

Evidence of J. T. Barry, Esq., App. p. 4 & 5.

"Have you any other facts to state bearing upon this subject?—I have some other facts regarding the administration of the law in this country, as shown by the Returns to Parliament, which I think bear upon the subject. Here is, first, a Parliamentary Return made last year, Paper No. 141; I have examined this particularly with reference to the effect which the recent instances of mitigation of our law might have had upon the number of commitments in England and Wales, and the proportion of convictions; I have done that by taking the first three years, and comparing them with the last three years of the seven included; thus getting the total of commitments before the change, or while the punishment of death was retained and frequently inflicted, and comparing it with the total commitments when that punishment ceased to be inflicted for those offences. I have also ascertained the same thing with regard to all the other offences in the calendar.

"Will

* Since taking Mr. Barry's examination, the Commissioners have received the following Tables from that gentleman, showing the increase and decrease of crime in proportion as the punishment of death has been abolished or continued:—

DECREASE of CRIME resulting from the Discontinuance of Capital Punishments, and the substitution of more certain Penalties, in the cases of Coining, Forgery, Horse-stealing, Sheep-stealing, £. 5 Larcinies in dwellings, House-breaking and Burglary.†—(Extracted from Parliamentary Returns.)

ENGLAND and WALES, excluding *London* and *Middlesex*.

Upon the Eight Circuits.	Executed.	Committed.	
Two Periods compared:			
Three Years, 1827, 1828, 1829 - -	54	3,950	Decrease.
Three Years, 1833, 1834, 1835 - -	1	3,643	

Average Convictions, 74 in 100 Committals.

London and Middlesex.	Executed.	Committed.	
Two Periods compared:			
Three Years, 1827, 1828, 1829 - -	42	672	Decrease.
Three Years, 1833, 1834, 1835 - -	1	649	

Upon the other hand, those crimes for which the punishment of death continues to be inflicted, namely, Arson, Murder, Attempted Murder, Highway Robbery, Rape, &c. appear to have considerably increased in the same period, as will appear by the following abstract of Parliamentary Returns:—

ENGLAND and WALES.

Two Periods compared.	Executed.	Committed.	
First Period, three years, 1827, 1828, 1829	108	1,705	Increase 542, or 31 per cent.
Second Period, three years, 1833, 1834, 1835	102	2,247	

Average Convictions, only 44 in 100 Committals.

† Burglary is still capital.

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"Will you state generally what the result has been with respect to the mitigations of punishment?—There is one preliminary remark to make in considering the effect of the change in the punishment as it regards Housebreaking; it is necessary, in order to judge of the effect on that particular crime, to take Burglary along with it, because Burglary was, before the change, frequently prosecuted as Housebreaking; we are therefore obliged to take these two offences together. Now it happens that in the last year to which this Return refers there is no execution for Burglary; in this comparative abstract, for these two reasons, Burglary is put along with Housebreaking in the column of crimes with mitigated punishments. Then classing the whole offences of the calendar under three heads; first, non-capital in either period; secondly, capital in the first period only; and thirdly, capital in both periods; we have, first, those that were not capital in either period, and comparing the total commitments of the last three years with the total commitments of the first three years, there appears to have been an increase in the latter period of 13 per cent. upon *non-capital* or minor offences. The second class consists of offences from which the punishment of *death has been removed* by statute (including Burglary, for the reasons I have stated). It appears that the commitments for these offences have increased two per cent., but this is virtually a decrease, considering the diminished reluctance to prosecute, which actuates the public since the removal of the capital punishment. Besides, the increase upon the first class, or minor offences, was much greater, being 13 per cent., as I have stated. In the third class we have those offences that are *still capital*, and were so in both periods. The commitments in the first period for these were 1,861, in the second period 2,694; the increase was therefore 44 per cent. The executions that took place for these offences were in the first period 110, in the second period, 126; so that not only the denunciation continued, but was inflicted in a larger number of instances. In spite of that, the increase of commitments for these capital offences, as I have said, was 44 per cent. I think the reason of that increase may in some degree be found by referring to the table of *convictions*. By taking the total convictions for each offence in the last three years of the period, and (distributing all the offences as before into three classes) we get these results; first, the total for non-capital offences gives an average of 72 convictions (and a fraction) in every 100 commitments. There will be found a remarkable coincidence if we take the first three years for the same non-capital offences, for in that period also we get 72 per cent. (within a small fraction), so that there seems to be an almost uniform proportion of convictions to commitments (in the aggregate) on *non-capital* charges at different times, when calculated upon these large numbers. Secondly, the convictions for the offences of the second class, the punishment of which was formerly capital, average altogether exactly 73 in 100 commitments. Thirdly, the average proportion of convictions for the third class, or those offences that remain capital, is only 47 in every 100 commitments. Now the total number of convictions for capital offences in the last three years is 1,279; but if we had obtained the same ratio of convictions as in non-capital cases, there would have been perhaps 500 or 600 additional persons subjected to punishment who have now escaped with impunity by verdicts of acquittal (excepting persons found guilty of a minor offence). As to the number of executions that took place for offences that have since *ceased* to be punished with death, in the first three years there were 96 executions; in the last three years of the period there were only 13 executions, which, of course, took place early, before the capital punishment had ceased; yet those crimes, as just now mentioned, were virtually fewer under the mitigated law. Upon this subject, the proportion of capital convictions to commitments, there were some highly interesting, conclusive and most useful results obtained two years ago by a gentleman at present visiting some of the courts of Europe, who has devoted much of his attention to the subject; I mean the Tables of T. B. Wrightson, contained in a little work on the Punishment of Death (generously printed at his own expense for circulation among Members of the Legislature). His Tables embrace the three offences of Robbery, Burglary and Housebreaking, and are founded on our own Parliamentary Returns for the 21 years ending with 1831. The whole term he divides into three periods of seven years each; and as the numbers are all given in centesimal proportions, his Tables are exceedingly perspicuous. They show the septennial average numbers, first of executions in every 100 of convictions; and, secondly, of corresponding acquittals in every 100 of commitments.

ments. In this way the several offences are contrasted with each other, and the periods likewise with each other, as they regard the individual offences.

"Will you state generally what is the result?—The general results, which the Author demonstrates in the most satisfactory manner by these statistical proofs obtained from our own Parliamentary Returns for the long period of 21 years, are, first, that Juries are reluctant to find guilty on capital charges; and, secondly, that their disinclination to do so, varies just in proportion as the infliction of death is the more or less likely consequence of their verdict. These positions he further supports by adducing statistical proof of the excess of acquittals on capital, over those on non-capital charges, and by the larger number of acquittals in London and Middlesex, while executions were frequent, than in the country, where they were comparatively rare.

"Is it then the general object of Mr. Wrightson's publication and his calculations, to show that the tendency of severity of punishment is to produce acquittals?—Yes, the tendency of capital punishment in particular. I consider these Tables of very great value; and having gone over the calculations minutely, I can speak to their accuracy.

"And you agree in Mr. Wrightson's general result?—I do.

"Is Mr. Wrightson a gentleman who has paid great attention to this subject?—Yes, for some years past."

The question now under consideration relates to those less aggravated capital offences of any particular class in which the law is not usually carried into execution. To them the preceding observations apply with peculiar force, from the great improbability of any danger of death being incurred. And it may be further observed, that the occasional selection of culprits for capital punishment from the number of those convicted of any particular class of offences, tends to increase the less aggravated offences of the class, in consequence of the impunity arising from the unwillingness of injured persons to prosecute, and of Juries to convict, in any case where capital punishment is left in the discretion of the Judge. Sir F. Eden, in his work on the Principles of the Penal Law, observes, "The convicts who have stolen cloth from the tenters, fustian from the bleaching ground, or a lamb from their landlord's pasture, knew the law to have assigned death without the benefit of clergy to each of their offences; but in the depth of ignorance and profligacy, mere instinct informed them, that common humanity would recoil at the idea, and they relied for their security on the ingenuity of mercy to evade the law." As such ingenuity was commonly exercised by Juries through the means of their power of acquittal, the nominal assignment of the capital punishment must not only have failed in deterring the offenders from the commission of the particular crimes here spoken of, but must have opened to them an additional prospect of impunity.

Accordingly we find that the bleachers themselves, out of regard to their security, petitioned Parliament in 1811 for a repeal of the capital punishment for depredations against their own property.

The following is the Petition, signed by 153 persons:—

"That your Petitioners' property is much exposed while lying out to bleach; and great depredations are annually committed on your Petitioners.

"That the laws which punish the offence with death have been found ineffectual to restrain these depredations; for that owing to the lenity of prosecutors, the unwillingness of juries to convict, and the general leaning to the side of mercy, when the punishment is, by the common opinion of mankind, considered as dispoportioned to the offence, very few convictions take place; and in consequence offenders mostly escape, and are encouraged in the commission of crimes, which are multiplied from the probability of escape being increased, and from the impunity which lax prosecutions afford.

"That your Petitioners are strongly impressed with the sentiment, that by certainty of punishment being substituted for severity of punishment, crimes would be diminished, and your Petitioners' property better secured: they therefore humbly pray, that Parliament may in its wisdom alter the punishment of death, in case of robbing bleach-greens, into transportation for life, or such a period of confinement in penitentiary houses as to them may appear eligible; provided a system of confinement in such houses should hereafter be adopted by the Legislature."

A similar Petition was presented in the same year from the master calico-printers in the vicinity of London.

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If we are correct in the position, that the practice of selecting for execution a few offenders of a large class as examples, does not materially diminish the number of offenders of the class from which the selection is made, another question arises, Whether the threat of capital punishment tend to deter from the commission of crimes marked and aggravated by circumstances of peculiar atrocity.

It appears to us, that in the minds of persons committing such crimes, the fear of capital punishment is extinguished or greatly weakened by the causes on which we have insisted; that a great change in opinions and manners has rendered the frequent infliction of it less expedient than perhaps it may have been in former ages, when human life was comparatively little regarded, and the character of offenders was marked by greater ferocity; and that the progress of social improvement will probably afford a sufficient inducement for still further mitigating the severity of Criminal Justice. But though we think, for these reasons, that the punishment ought to be limited to crimes of peculiar atrocity, we also are decidedly of opinion that it cannot be yet dispensed with, if, indeed its abolition should ever be expedient.*

Whilst a system of discretionary selection for capital punishment can, as we have already attempted to show, produce no considerable effect in diminishing the number of offenders of any particular class, such for instance as Burglars, yet the punishment may have a very material and salutary effect in restraining offenders from acts of particular outrage and cruelty, when it is known that such aggravations will, on conviction, almost certainly be punished with death. It is important also to remark that the punishment of death may be inflicted in such cases without shocking the feelings of society.

Upon this point we make the following extracts from Mr. Alderman Harmer's Evidence in our Appendix.

Evidence of Mr. Alderman Harmer, App. p. 70.

"What are the offences in which you think there is neither a general reluctance to prosecute or to convict?—Murder, Arson, Burglary; but not in its extended sense, such as breaking a pane of glass or lifting a latch, but where it is committed by a professed house-breaker, who breaks into a house in the middle of the night, Highway Robbery accompanied with violence, Cutting and other offences under Lord Ellenborough's Act, where it is the clear intent of the offender to commit Murder, but the interposition of Divine Providence or accident only prevents its accomplishment."

Assuming that the punishment of death is usefully applied for the repression of offences of peculiar atrocity, it remains to consider whether the best mode of its application is by the discretionary selection of a few offenders from a larger number, or by previous definitions of the aggravating circumstances under which the penalty of death shall (subject to the exercise of the Royal Prerogative) be usually inflicted.

The conclusion at which we have arrived upon this subject is, that the exercise of a wide discretionary power in the selection of a few from a large number of convicted offenders, as fit objects for capital punishment, renders the punishment of death less efficacious than it would be, if the circumstances under which it was to be inflicted were previously known, and its infliction were much more certain.

We proceed to state the reasons which have led us to this conclusion.

It is of the very essence of a law that its penalties should be definite and known; how else are they to operate on the fears of offenders, or to afford a practical guide of conduct? And if this be generally true, it is most emphatically so when the penalty is that of death.

Where the circumstances which will bring down capital punishment on the offender are undefined, and the power of selection is not exercised according to established principles, they cannot be known with the requisite certainty; and experience shows that every degree of uncertainty is sure to be magnified by the offender in deciding between present indulgence and the fear of future punishment.

This uncertainty must always be very considerable in the absence of any general principles or rules for guiding the selection. Of such the law is totally destitute. It supplies no rules for the selection of criminals for capital punishment,

* *See* Mr. Livingstone's Preface to the Criminal Code of Louisiana for the arguments in favour of abolishing the punishment of death in the case of every crime, and also the Examination of Mr. Barry in our Appendix.

punishment, for the obvious reason, that formerly all capital convicts were usually executed.

The individual discretion which is now substituted for such general rules, is pregnant with uncertainty.* For the discretion exercised in the selection of the persons who are to suffer death out of a number capitally convicted, must necessarily be subject to variations, depending on the peculiar notions of policy entertained by different individuals, or their firmness and resolution of mind. These may vary even in the same individual, according as outward circumstances make a different impression either as to the necessity of severity, or to the extent to which he may spare his own feelings; they may vary even according to the bodily health of the same individual. Much more may they be expected to vary in different persons.

Discrepancies such as these are notoriously the subjects of observation and anxious study on the part of those whose fate may depend upon them; and whilst there can be no doubt that every one of those on whom the administration of criminal justice devolves, endeavours to administer punishment in an equable and consistent manner, peculiarities are observable which sometimes are the foundation of a general reputation, and of speculation on the part of criminals, whose hopes and fears vary according to their notions and estimate of the disposition and habits of the Judge. Whilst such surmises may often have little foundation in fact, they have at all events an unfavourable practical result. They spread the belief among offenders, that severity of punishment depends on accidental and casual circumstances, and is therefore precarious and uncertain; and whether the fact be so or not, the effect is bad, as it lessens the apprehension and preventive effect of capital punishment.

On this subject we make the following extracts from the Examinations in our Appendix.

Evidence of Dr. Lushington. App. pp. 12 & 13.

"What do you conceive to be the particular mischiefs in the present system, according to which the denunciation of capital punishment is so extensive, and the infliction of it so rare?—My own notion of it is that there are very few criminals deterred from the commission of crime by any fear of the punishment of death; the chances are so much in their favour, taking the whole from the commencement of a prosecution to the period of execution, that I verily believe, and I am quite satisfied I could show by a variety of examples that that is the general feeling.

"Then you think that the rarity of the capital punishment diminishes the efficacy of the capital laws?—Not the rarity of capital punishment, but the uncertainty of its being inflicted in any particular instance. I have been into the gaol at Newgate before the order came down for executions to take place, when there were 35 persons capitally convicted; such has been the uncertainty that the then governor of the gaol has pointed out to me as the persons likely to be executed certain four or five individuals, and that same night came down the order, and not one of them was ordered for execution, but other four persons.

"Is that uncertainty also attended with this ill effect, that juries not knowing whether the sentence will be executed or not, and if executed, upon what grounds, they are unwilling to convict of capital offences?—Certainly they are unwilling to convict. I have had strong remonstrances made to me by persons who have served upon juries against having so odious a duty imposed upon them. I am now alluding especially to the period when the prosecutions for forgeries and uttering forged bank notes were so frequent."

The uncertainty is further increased, because the selection is sometimes made to depend, not on aggravations incident to the offence itself, but partly also on collateral considerations.

The exercise of the discretionary power frequently depends on casual circumstances wholly independent of the principal crime, or even of the previous conduct of the offender. A malefactor sometimes, we believe, owes his life to the circumstance that it happens that others are convicted at the same Assizes, whose guilt is greater than his own, upon whom the Law must take its course, and whose

* The nearest approach to a general rule guiding the practice of selection, exists with regard to the offences of Burglary and Robbery; since when these offences are accompanied with great personal violence, the offenders are not unfrequently punished with death. But the practice, even with regard to these two offences thus aggravated, is extremely varying and uncertain.

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whose death, it is humanely hoped, will be a sufficient vindication for outraged laws, and suffice by way of example to others. The Prisoners' collateral misconduct, solicitations of Prosecutors, the number of executions upon the same circuit, are all circumstances which increase the uncertainty of capital punishments.

Although it be true that the infliction of capital punishment on an offender, selected because he may have been long a terror to the neighbourhood from his brutal character, or a pest to it from incorrigible habits of dishonesty, or because he is suspected or even known to have been a party to some other offence for which he ought justly to have suffered, may, in its immediate result in the individual case, be beneficial to a limited local extent; yet, if an offender be executed for any such reasons collateral to the offence of which he is convicted, it is plain that the punishment is inflicted, not with a view to the direct and legitimate object of punishment, the prevention of the particular crime, but to get rid of an individual obnoxious to society for some other cause; not because the individual himself ought to be prevented from a repetition of that crime, but because he had committed some other. However convenient this course may be in a particular instance, it is not supported by any sound principle; for it fails to attain the great end of punishment, the deterring of offenders by example, whilst it is in the highest degree unjust towards the person selected for punishment, to put him to death without first fully warning him of the circumstances under which he will incur the penalty.

When a criminal convicted of one offence, *e. g.* Burglary, suffers because he has before been implicated in the commission of some other crime, *e. g.* Murder or Arson, this can have but a remote operation in preventing the crime of Burglary; for that is not the offence in respect of which the punishment of death is really inflicted, and there are no striking aggravations in the particular Burglary which should distinguish that offender from any other. The death of the offender can still less operate by way of example to deter others from the committing of the collateral offence of Murder or Arson, when it is considered that this is but a private reason, which, though it influences the decision of the executive Magistrate, is never formally avowed.

With regard to the injustice done to the individual criminal, he is not forewarned of the consequence of his crime, although he knows that the punishment of death is annexed to a large class of crimes in which his own is included. He is in effect told, not that death will be inflicted, but that it may be inflicted. If he offends in the particular instance, in no higher degree than those on whom an inferior punishment is ordinarily executed, he may reasonably expect the same measure; and if he be selected for collateral considerations, he is punished without due warning. It can make no essential difference in reason or in justice, whether the power of selection be exercised by remitting the penalty of death to all except a few of a large class, against whom it has been indiscriminately denounced, or by the selection of the same number from the same class, without such previous denunciation; in either case the party is equally unapprised of the circumstances which will subject him to loss of life.

Another circumstance which also tends to weaken the efficacy of discretionary selection for capital punishment, is want of sufficient certainty as to the facts themselves on which the selection is to be founded. If the aggravations which are to render the offence capital be previously defined and made the subject of formal charge on the indictment, they are also regularly investigated, and their truth or falsity, as determined by the verdict of the Jury, is placed upon record. Circumstances of mere aggravation now want this solemn sanction, and thus life is made to depend on facts which have not been established by the only proper and acknowledged tribunal. Where the selection is grounded upon collateral circumstances, such as the previous conduct and character of the offender, it becomes still more dangerous to rely on indirect means of inquiry; there is the greater probability of mistake, error or misinformation, and the objection becomes the stronger in proportion.

It is an ancient and well-known rule of Law, that a man shall not be punished for a crime which is not clearly alleged against him on the record. But the office of the record is now confined to showing that the criminal has committed an offence for which he *may* be executed, not for which he *will* be executed; and it often, nay usually, happens, that criminals are executed in respect

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respect of aggravations which the record does not specify. We cannot but think that the ancient rule is just and humane, and essential to the effectual operation of the Penal Law; and that if it be right so to relax the rigour of that law as to execute but a few of those who fall within its scope, it is also essential to justice so far to adhere to the ancient rule as to provide that no offender should suffer without due warning, or in respect of any charges which are not alleged and proved against him. We think it dangerous that the selection for capital punishment should be made to depend on any facts but those which are expressly charged and proved, after full opportunity given to the accused to controvert them.

The preceding remarks lead us to notice the practice which prevails as to recording sentence of death. To avoid the necessity of going through the solemn and awful ceremony of passing judgment of death in cases where it was never intended to be executed, and the danger of weakening the impression which it is well calculated to make, it was deemed proper to invest the Court, in some capital cases, with power to direct the judgment simply to be recorded. This, no doubt, was a considerable improvement on the former practice. To oblige the Judge to pass sentence of death when common humanity compelled him to inform the prisoner that the sentence would not be executed, and thus in effect to reverse his own sentence at the very instant of pronouncing it, was to derogate from the most solemn and impressive forms of Criminal Justice. But the Statute directs that in such case the sentence shall be recorded. This, we think, is a practice which appears to be liable to considerable objections; a further delay occurs before the sentence is known, and it is after all given without publicity, and without the effect, so far as example goes, of a sentence proportioned to the extent of the crime, passed upon or soon after the conviction, in the hearing of those who, being present at the trial, know for what it was inflicted. It is singular that in this, the only case in which sentence of death is formally recorded in Court, it is recorded because it is not to be executed.

We have before observed, that the practice of selecting for capital punishment a few culprits convicted of capital offences, leads to the impunity of those who would not on conviction have been the subjects of such selection. This inconvenience, though collateral to the immediate question under consideration, the deterring of atrocious offenders, is not to be neglected in determining on the most expedient method of accomplishing that object.

When it is considered that Criminal Justice in this country is administered principally through the medium of a popular tribunal, and how much it depends on the option of parties injured whether an offender should be prosecuted at all, it will easily appear how essential it is to certainty in the administration of the Criminal Law, that the measure of punishment should not be inconsistent with the feelings and opinions of those through whose aid and by whose decision it is to be administered. The system of threatening capital punishment without any intention of actually inflicting it, except in a few cases of marked atrocity, is attended with the peculiar disadvantage, that whilst it hardly deters the offender from placing his life in hazard, it prevents many from prosecuting at all, even in cases where in all probability the punishment of death would not be actually executed; and that it leads scrupulous Jurors to acquit, under the apprehension that death may be inflicted for collateral reasons unknown to them.

We think it peculiarly expedient, where the tribunal is of a popular character, that the punishment should, in a great measure, accord with popular feelings. Assuming that such feelings may be sometimes erroneous, it is still to be remembered that the infliction of punishments shocking the sentiments (perhaps the religious sentiments) of those who are to pronounce on the guilt or innocence of the prisoner, must necessarily create a struggle in the minds of conscientious Jurors between those sentiments and the obligation of their oath. In such a case they frequently lay hold of trivial circumstances as reasons for acquitting the prisoner; and thus the administration of justice is perverted to the impunity, and consequently to the encouragement of evil-doers.

On this subject we may refer to the following extracts from our Appendix:— Evidence of Mr. Alderman Harmer, App. p. 69.

"I know that many persons who are summoned to serve as jurymen at the Old Bailey have the greatest disinclination to perform the duty, on account of the

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the distress that would be done to their feelings in consigning so many of their fellow-creatures to death, as they must now necessarily do, if serving throughout a session; and I have heard of some who have bribed the summoning officers to put them at the bottom of their list, or keep them out altogether, so as to prevent them from discharging this painful duty; and the instances, I may say, are innumerable, within my own observation, of jurymen giving verdicts, in capital cases, in favour of the Prisoner directly contrary to the evidence. I have seen acquittals in forgery, where the verdict has excited the astonishment of every one in Court, because the guilt appeared unequivocal, and the acquittal could only be attributed to a strong feeling of sympathy and humanity in the Jury to savea fellow-creature from certain death. The old professed thieves are aware of this sympathy, and are desirous of being tried, rather on capital indictments than otherwise. It has frequently happened to myself, in my communications with them, that they have expressed a wish that they might be indicted capitally, because there was a greater chance of escape."

Evidence of J. T. Barry, Esq. App. p. 6.

"Do you attribute the small proportion of convictions on charges of Arson, in any degree to the severity of the punishment, and the probability that it would be carried into effect?—Yes; to the probability of its being carried into effect, connected with the nature of the evidence, which is extremely equivocal sometimes. It must often be difficult to satisfy a Jury, and we have repeatedly known cases of Arson in which the Jury have brought in a verdict of guilty, with a recommendation to mercy. If a prisoner in such case suffer death, as they generally do for this offence, then acquittals follow. In Norfolk and Cambridge, some time since, there was no less than eight indictments preferred at one assize, seven of which were thrown out by the Grand Jury, and the eighth prisoner was acquitted. If the punishment of Arson were of a different kind, I think a much larger number of convictions would be obtained.

"Then although the small per centage of convictions in cases of Arson may in part be attributable to the nature of the evidence, which is usually circumstantial, and therefore may fail to convince the Jury, are you of opinion that it in part arises from the severity of the punishment?—Not so much from the severity of the punishment, as its irreparable nature, where an erroneous conviction happens. I believe that Juries wish in this case a severe, though not a sanguinary punishment, which places them sometimes under the apprehension of taking the Prisoner's life unjustly—of inflicting a punishment which cannot be recalled. The evidence on charges of Arson is often such as to leave some doubt in the case.

"Do you conceive that that fear operates to an unreasonable extent?—In charges of Arson, as well as some other capital charges, I believe that Jurors more readily allow circumstances of doubt to operate on their verdict, than in charges which are not capital; therefore it happens that many persons who are really guilty escape, and the repetition of the crime is thereby encouraged.

"And you attribute that in part to the apprehension on the part of the Jury of becoming the instruments of the party's death?—Certainly."

"Is it your opinion, generally, that the number of acquittals increases with the probability of execution?—Yes; I am quite borne out in that view of the case by a very particular examination of the Returns.

"Is it your opinion that the administration of justice would be more certain if the number of capital offences was diminished?—Decidedly. I am afraid that a great many now escape with impunity who should not escape.

"In your judgment, has the probability of capital punishment in cases where it is only inflicted, upon the average, once in fifty or sixty times, any material effect in preventing crime from fear of that punishment?—I think not; because by removing the punishment altogether, there has been no increase of those offences; but we have more prosecutions in proportion, and more convictions."

In another collateral respect, it appears to us that want of discrimination in the denunciation of punishment is impolitic. It may be hoped that the law, in the annexation of severe and appropriate penalties to heinous offences, may operate not only on the fears, but also on the consciences and feelings of mankind, and serve to impress their minds with just conceptions of the comparative enormity of crimes. Want of discrimination in this respect necessarily defeats the latter object. So far as punishment is a test of guilt, a man who forcibly snatches

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snatches another's umbrella, with intent to steal it, is just as criminal, in contemplation of Law, as if he had cut the owner's throat; a hungry boy who breaks the window of a dwelling-house after it is dark and steals a loaf, is as guilty, so far as penal consequences are concerned, as a robber who breaks into the same house and murders the inhabitants. In practice, no doubt, distinctions are made which the law does not express, but even this late vindication by the law of its latent powers of discrimination, is often of too uncertain and obscure a character adequately to supply the place of previous distinctions directly and explicitly expressed; and certainly public feeling is much outraged, when selection is made for capital punishment without the distinctions upon which the selection is made being known, and often without there being any distinctions in point of fact.

It may be observed, also, that it is probably in consequence of the severity of the law in cases where the punishment is capital, but is never inflicted, that much unreasonable strictness has arisen, or at least has been preserved in criminal proceedings; as, for example, with respect to variances and like matters. The construction of penal statutes and the definitions of common law offences have been inconveniently influenced by the same cause. Such strictness has often been justified on the sole ground of its being *in favorem vitæ*.

The inconveniences of the principle of selection on which we have insisted, appear to us to be much greater than those which necessarily attach to the principle of defining the aggravations which shall, in ordinary course, subject offenders to the punishment of death. The principle of defining aggravations is obviously open to the objections, that some uncertainty must always arise from the interpretation to be given to the definition itself; that where a line is drawn between offences, the offences immediately on each side of it may too closely resemble one another to warrant any considerable disproportion between the punishments respectively annexed to them; that from circumstances for which it is impossible to legislate beforehand, those offences which are not made capital may, in some few instances, present a more atrocious character than those which are; and, further, that much salutary terror will be removed from persons committing offences all but capital, and who at present would incur great danger of actually suffering the extreme punishment. But such inconveniences are, to a certain extent, necessarily incident to all accurate distinctions between offences, and we think, for the reasons which we have already insisted upon, and for those which we shall immediately suggest, would be more than counterbalanced by the advantages of holding out, at least in the generality of cases, to persons who might be tempted to commit crimes of peculiar atrocity, a much greater certainty of suffering death, and of taking away from those who might be tempted to commit crimes now punishable, but not actually punished with death, one great chance of impunity, and of removing those complaints, as well of injustice to prisoners, as of impediment to the administration of justice and of violence to the sentiments and feelings of the community, which, as we conceive, we have shown to be imputable to the present system.

We conclude the foregoing observations on the practice of discretionary selection by a few remarks on the arguments advanced in favour of it in the Moral Philosophy of Dr. Paley. We think them entitled to special consideration, because they are all that could be said for the practice by an eminently acute and skilful reasoner; and because they are the arguments chiefly relied upon by those who have defended it when subjected to Parliamentary discussion.

His arguments may be reduced to the following heads:—

1. The practice is consonant to the ancient and approved maxim, "*Pœna ad paucos, metus ad omnes.*" It accomplishes the purposes of capital punishment by a small sacrifice of human life; the penalty actually falling on a few offenders, whilst the fear of it lights upon all who are tempted to offend.

And this argument is supported by the subsidiary one, that the selection may be entrusted without danger to the executive magistrate.

2. The selection of proper objects for capital punishment principally depends upon circumstances which cannot be defined beforehand, although in particular cases they are easily perceived after the commission of the offence.

3. If death were only inflicted according to previous definitions, there are many offences which would not be embraced by any of them; and the offenders

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offenders would escape with impunity, or would avoid their merited punishment.

1. The first argument rests on the assumption, that the practice attains the general end of punishment, or, at least, the special end of capital punishment. But we think we have shown sufficiently, in foregoing parts of our Report, that it has no tendency whatever to diminish crimes generally; and that, although it may diminish crimes of peculiar atrocity, it accomplishes the purpose far less surely and effectually than the infliction of capital punishment in pursuance of previous definitions. We would add to the reasons which we have there produced, that the gratuitous and fallacious assumption on which the argument rests leads to a practical consequence which all will reject. If the practice of selection be a sound one—if the net should be spread for all offenders in order that a few may be executed, it follows that all or most offences ought to be rendered capital. For almost every offence, as, for example, Trespass against the person, might be accompanied by aggravations appearing to render the criminal worthy of death.

The subsidiary argument, that the exercise of *lenity* may, without danger, be entrusted to the executive Magistrate, is, we apprehend, wholly fallacious. If the law, indiscriminately annexing the penalty of death to a large class of offences, arms the executive Magistrate with the power of selecting the persons upon whom it shall be inflicted, the power is just as capable of being exercised with severity as with lenity. It would not be lenity, but most unjustifiable severity, to execute the sentence of the law in nine cases out of ten of a large class of capital offenders, *e. g.* such as are convicted of Burglary. We believe that the law is, in fact, administered with an excess of lenity, rather than severity. Besides, Dr. Paley's reasoning on this point does not appear to attribute sufficient weight to the inconvenience arising from the discretionary power being practically vested in different persons entertaining very different opinions upon the principles on which the discretion ought to be exercised.

2. The second argument, is, we conceive, stated much too broadly by Dr. Paley.

If it were consistent with justice or policy that the infliction of capital punishment should depend not on aggravations belonging to the very offence, but on mere collateral circumstances, such as the previous habits, conduct and character of the party convicted, it might be very true that such circumstances are incapable of previous definition. It is, however, impossible, we think, upon any sound principle of Criminal Jurisprudence, that any such test can be adopted. Such circumstances are too vague and indeterminate, too remote from the offence, to be made the test of the quantum of punishment to be inflicted in respect of every offence; and Dr. Paley himself, in his enumeration of the aggravations which merit condign punishment, excludes such foreign and extrinsic tests. If, on the other hand, the aggravations are to be such as constitute part of the offence itself, their definition cannot, we apprehend, be attended with any considerable difficulty.

Such aggravations must depend on circumstances of a similar nature with those on which the offence itself depends. They must consist, for example, in acts of force, fraud or malice, or depend on the number of those concerned in the perpetration of the particular crime. If crimes consisting of such elements can be defined, so may their aggravations, which constitute but a higher degree of criminality.

And it may be here observed, that the policy of the Legislature in modern times has been, where it specifies the crimes which shall be punishable with death, not merely to denounce the penalty as a threat to be executed on a small proportion of those who offend, but to be actually carried into execution. Such it may be apprehended is generally the case, either where a new offence is punishable capitally, or where the punishment of death, formerly incident to a large class of offences, is restricted by statute to a few of the more heinous instances, as has been done lately in respect of Forgery. It would be of no advantage to take away capital punishment in respect of the forgery of bonds, bills of exchange, or some other instruments, the forgery of which was previously a capital offence, and yet to retain the punishment of death in respect to the forging of Wills, unless it were intended that the sentence should be actually executed in the latter cases. If this was intended, the alteration

alteration in the law constitutes a manifest departure from the principle of discretionary selection.

So far, however, is the argument founded on the impossibility of definition from being just, to the full extent suggested by Dr. Paley, that he himself states in what such aggravations of offences as might justify capital conviction ought to consist.

In fine, it can scarcely be supposed that capital punishment is in any instance properly inflicted in respect of circumstances which cannot be specified as warranting its infliction; and if they can be so specified, they admit, we conceive, to a practical and useful extent, at least, of previous enumeration and definition. If all cannot be so defined, by far the greater part certainly might, and we think that even the exposition of the general principles by which the selection ought to be governed, would be preferable to the uncertainty resulting from total silence.

3. The third argument is thus stated by Dr. Paley, "If judgment of death were reserved for one or two species of crimes only, (which would probably be the case if that judgment were intended to be executed without exception), crimes might occur of the most dangerous example, and accompanied with circumstances of heinous aggravation, which did not fall within *any* description of offences that the laws had made capital, and which, consequently, could not receive the punishment which their own malignity and the public safety required. What is worse, it would be known beforehand that such crimes might be committed without danger to the offender's life."

This argument is founded on the mere possibility that crimes might exist of such enormous magnitude as to merit death, and yet might not fall within any capital law.

It is impossible to say that this might not occasionally happen, but we think it may be asserted that it would not probably happen in so many instances as to counterbalance the advantages which might be expected to follow from a change of system.

Those violations of public peace and private security which are so dangerous as to call for extreme punishment, are too well known to admit the probability that new and unforeseen modes of transgression can frequently be devised. And supposing that a new mode of injury so enormous as to deserve capital punishment could be invented and practised, the only result would be, that the offender would escape capital punishment in the single instance; but though the particular example might be wanting, the effect might admit of a speedy remedy by the interference of the Legislature, and such warning would be just as likely to prevent repetition as the execution of the offender.

The argument, if carried to its full extent, would render the definition of offences altogether unnecessary; for, if death ought to be inflicted in respect of circumstances not defined, because the Legislature may have been guilty of an omission, so, by parity of reasoning, punishment ought to be applied at discretion in every case whatever, although the particular offence may not have been defined; because it is possible that the offence may deserve punishment.

The law of Homicide furnishes important illustrations of the foregoing remarks. In this instance the law defines Murder or aggravated Homicide; and the penalty of death is almost invariably executed after conviction. There is no aversion to prosecute, and Juries do not usually hesitate to convict, on due proof of the guilt of the offender, although, to signalize the enormity of the crime, the Law directs execution to be done within the brief space of 48 hours after conviction. The crime of Manslaughter is not capital, yet it may be of so heinous a character as to justify the transportation of the offender for life. We are persuaded, however, that it would be impolitic so to alter the Law as to make every Culpable Homicide, including Manslaughter as well as Murder, capital, superadding a discretionary power of selection; yet the distinction between them is far from being certain or definite, and the reasons on which the selective practice is founded being fully applicable, such an alteration would, were the principle of selection a sound one, be an improvement in the Criminal Law. But it appears to us that such a change would not merely be inexpedient, but dangerous; though we think that the objection to the exercise of a discretionary selective power, would be less forcible in the instance of Homicide than in that

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of Burglary or Robbery, inasmuch as offenders guilty of the latter crimes are more likely to be influenced in their conduct by the fear of consequences than in the case of Homicide, where the crime is often the result of violent ungovernable passion.

The result of our observations being, that capital punishment ought (subject to the exercise of the Royal Prerogative) to follow conviction of a capital offence; the next question is, What are the offences to which Capital Punishment ought to be confined?

It is certain that severity of punishment, when carried too far, defeats its purpose, and tends to impunity. It is therefore inexpedient to annex capital punishment to an offence if the actual infliction of it would offend the sense and feelings of the generality of society, and particularly of those members of it on whom, in the capacity of Jurors, the administration of the Criminal Law essentially depends. It is the presumed unwillingness of Juries to convict capitally, where the offence is free from any peculiar aggravation, that commonly inspires the offender with the hope of impunity, and makes him congratulate himself on the capital nature of the charge. The administration of a Law not in accordance with the opinions of society, and shocking their moral or religious sentiments, cannot but be precarious; and without supposing that they break deliberately the sacred obligation of their oath, we may presume that slight grounds will satisfy the conscience of Jurors in acquitting a party accused of infringing it. At the same time it is perfectly true that the public feeling on subjects of Criminal Jurisprudence is not always directed by the most enlightened views, and would of itself be no sufficient ground for determining the measure of punishment.

Considering the general principles which, in particular instances, justify or forbid the resort to so severe a means of preventing crimes as that of capital punishment; considering the opinions on the subject of capital punishment entertained by the bulk of society, and especially by those members of it who are engaged as Jurors in the administration of the Criminal Law; and considering the opinions on the same subject entertained by the executive magistracy, so far as they may be inferred from the actual decline in the infliction of the penalty, we think that the punishment of death ought to be confined to the crime of High Treason, (happily one of rare occurrence) and (with perhaps some particular exceptions) to offences which consist in, or are aggravated by, acts of violence to the person, or which tend directly to endanger human life.*

Capital offences, as thus limited, would be reduced to the crimes of,—

1st. High Treason.
2d. Murder.
3d. Attempts to Murder, accompanied with actual injury to the person, to be particularly defined.

4th. Burning

* We may here refer to our Appendix, to show the progress of public opinion on this subject in America.

"The whole list of capital crimes in this State (Massachusetts) is now reduced to the following: Treason, Murder, including Petit Treason, which is punished as Murder; Robbery, being armed with a dangerous weapon with intent to kill, &c.; Rape, including the violation of a female child under 10 years of age, with or without consent in the *latter* case; Arson, unless when the defendant can prove that there was no person lawfully in the dwelling-house; Burglary, being armed with a dangerous weapon, or making an actual assault upon a person lawfully in the house, or entering with intent to commit a felony, being so armed, or committing such assault

"I have remarked, that I here speak of our own State only; but the habits, institutions and laws of all the Eastern, or New England States, differ so little from each other, that for the purposes of your inquiry, it may be assumed, that the list above given represents the present opinion and feeling of all that part of the United States respecting the cases in which capital punishments ought to be inflicted. I may add that this has been the state of public opinion in Massachusetts, and I think in New England generally, on the subject of capital punishments, for at least 30 years past.

"The opinion of the community has generally made a strong line of distinction between offences against human life and those against property. Accordingly, so far as I am informed, very few persons here would at present abolish capital punishments in cases of Murder, Robbery, &c., and, on the other hand, very few, if any, would restore it in the cases of Forgery, which has long ceased to be a capital crime with us." *See* App. p. 71.

4th. Burning of Buildings or Ships, with danger to human life, and under circumstances to be particularly defined. Punishme

5th. Piracy, accompanied with actual injury to the person, or acts endangering human life, to be particularly defined.

6th. Burglary, aggravated by cruelty or violence to an inmate, under circumstances to be particularly defined.

7th. Robbery, aggravated by cruelty or violence, under circumstances to be particularly defined.

8th. Rape; and violation of a female child under the age of 10 years, with or without consent.

A nameless offence of great enormity we, at present, exclude from consideration.

We are of opinion that in all the cases above enumerated, it is desirable, if it be practicable, that death should be invariably inflicted agreeably to the dispositions of the law, subject only to the exercise of the Royal prerogative of mercy. But if, with regard to any one or more of the above enumerated offences, (as, for example, Burglary or Robbery) it should be found impossible to frame a definition capable of such invariable application, the inconvenience might be remedied by investing the Court with a limited power of reducing the capital punishment to that next in degree.

As to the offence of Rape, it will be seen from the Appendix, that some are of opinion that it would be impolitic to visit it with death, on account of the great difficulty attending conviction of that offence. And we must observe that upon trials for this offence the learned Judge always thinks it necessary to impress on Juries the propriety of proceeding with the utmost caution in deciding upon a charge which, according to Lord Hale, "is easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent.*" Such caution would no doubt be necessary, although a less but still severe punishment were to be substituted; but in such case the repugnancy to convict would certainly be diminished, and conviction, where warranted by proof, would become much more certain. We are able to state from our own observation, that Juries, from apprehension of the fatal consequences of conviction, sometimes acquit on a charge of this nature in the face of the most cogent proofs of guilt. Considering, however, the enormous atrocity of this offence, and its mischief to society, we do not venture to recommend that it should cease to be capital, although it certainly admits of aggravating circumstances; *e. g.* the administration of drugs or the perpetration of the offence by numbers.

On the subject of the punishment of Rape, Mr. Alderman Harmer makes the following observations:

"What would you say to the case of Rape?—I think there would be no sympathy there; the mischief is, that one sees so many instances of charges that would hardly bear the complexion of a Rape, in which the man is to a certain degree culpable, but not to the extent of deserving death; I should say that, upon a decided case of Rape with violence, there the offender would have no sympathy in the public mind. Evidence of Alderman H App. p. 4

"Do not you find in a crime of that nature the evidence is often very ambiguous?—Very much so; no accusation can be more easily fabricated, and more difficult to disprove. I had a case before me, as a magistrate, two or three days ago, in which there was no pretence for the charge, and yet the girl, a young woman of 23, had made out a very plausible case when she obtained the warrant: but by putting a few questions to her, it was evident that the accusation was made with a view of extorting money. I found she had gone voluntarily to the Prisoner's house, where the connexion had taken place, and had friendly conversations with the man upon two or three occasions, almost immediately after the supposed Rape.

"Inasmuch as Rape is a case which, independently of the testimony of the prosecutrix, often rests upon doubtful evidence, and the almost certain consequence of conviction being loss of life, do not Juries frequently avail themselves of the difficult nature of the evidence to acquit where they would convict if it was not for the severity of the punishment?—No doubt of it; wherever the punishment of death is certain to the delinquent, a Jury will hesitate, and they will

* Hale's P. C. 1 vol. p. 635.

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will not convict if they can find any crotchet that will satisfy their own minds to acquit, although the guilt of the accused is irrefragable; they see the person before them, they feel for him; a juryman says, 'Now that man's life is in my hands, I am to be the arbitrator of his fate; why should I send him prematurely to the grave? We are all fallible, and I may do wrong in assisting to deprive him of life, but I cannot do much harm by leaving him to God and his conscience, and I will therefore acquit him.' Such reasons as these I have often heard given by jurymen when they have, to the astonishment of the Court, returned a verdict of not guilty in a clear case of conviction. For myself, I cannot help thinking that public justice would be more often satisfied if a very severe punishment, short of death, were inflicted even for that crime."

In the above list, as it will be perceived, several offences now capital are wholly omitted, and many extensive classes of offences are now reduced, in regard to their liability to capital punishment, to very narrow limits.*

After diminishing the number of capital offences, the punishment of those from which the capital punishment is removed becomes an important object of attention. This subject leads us to notice the existing law and practice as to the infliction of secondary punishments, with a view to forming a scale of secondary punishments, having reference to specified gradations of crime, and upon an uniform system.

The Law, in respect of punishments less than capital, exhibits defects such as naturally result from long-continued neglect and want of legislative supervision. Such inferior punishments are applied indiscriminately, are often disproportioned to the offences in respect of which they are inflicted, unsystematic, and frequently of a description ill adapted to the effectual prevention of crime.

The want of discrimination in punishments arises from different causes, and principally from offences not being properly defined. The want of discrimination in punishments less than capital arising from this cause, so far as regards offences in respect of which capital punishment may be inflicted, necessarily results from the causes already noticed. Whilst crowds of offenders are brought within the exceedingly extensive ranges of capital punishment, few actually suffer, but, with slight exceptions, are liable to discretionary punishments, capable of diminution to the lowest possible extent. Hence it is that the large classes of crime included under the description of Robberies, Burglaries, and some others, are not marked and distinguished in practice by any distinct and defined degrees of punishment. Death may be, but very seldom is, inflicted; and if death be not inflicted, the measure of punishment is mere matter of discretion, and is wholly uncertain. In respect of the two great classes of offences just adverted to, it is even frequently uncertain whether the accused will be tried at all upon the capital charge. It is a common practice, as we have already observed, for magistrates, in cases where the evidence warrants a commitment on a capital charge of burglary or robbery, to commit the offender to the Sessions for a simple larciny only.

We apprehend that this want of discrimination has a prejudicial tendency, not only as uncertainty necessarily diminishes the fear of punishment, but as it confounds the more heinous with the more trivial degrees of crime, in the estimation of the offenders and of the public. "Where men," observes Sir W. Blackstone,† "see no distinction made in the nature and gradations of punishment, the generality will be led to conclude there is no distinction in the guilt."

The charge of want of discrimination from the same cause, is also applicable to the Law in its annexation of punishment to offences less than capital; yet, upon recognized principles of Criminal Jurisprudence, it cannot but be regarded as "absurd and impolitic to apply the same punishment to crimes of different malignity."‡ Although in the instance of the ancient common law of Theft, some peculiar aggravations have been defined by statutes which, in those cases, have subjected the offender to greater severity of punishment, yet the simple offence of Theft, enlarged as it has so frequently been by judicial

* The details of the offences which are now Capital will be found in Appendix, No. 6, to our Report.

† 4 Comm. p. 18. ‡ 4 Black. Comm. p. 17.

judicial construction, still presents an exceedingly large class of offences which differ widely in point of moral guilt and mischievous consequences, but to which the same mode of proceeding and degree of punishment are indiscriminately annexed. Not only are distinctions wanting in respect of the value of the thing stolen, but that which was made by the ancient law between Grand and Petit Larciny has been lately removed. We do not mean to intimate that the distinction made between Theft to the amount of a shilling and Theft to a less amount was worth retaining, but we think it well worth consideration whether the guilt of a boy who steals an orange from a stall, ought not to be distinguished by the law, in point of atrocity and penal consequences, from that of one of a gang of thieves who steal property to the value of a thousand pounds. The law of Theft makes no sufficient distinction in respect of the value of the thing stolen, the age of the offender, the number of offenders, or the manner, time or place of offending. It appears to us that great mischief results from pursuing the technical definition of the crime too far, and subjecting offenders to the same mode of procedure, who must ultimately be visited by punishments differing as widely as their offences do in point of real magnitude and atrocity.

The want of discrimination in punishments often arises from another cause; viz. certain defects in the nature of punishments themselves, which render it impossible to proportion and adjust them to the various degrees of crime.

In the first place, such disproportion sometimes arises from the absolute want of any punishment short of capital, adequate to the nature and degree of the crime. We think that the Law is greatly defective in not providing secondary punishments, next in severity to capital punishments, to be inflicted in respect of crimes which rank next in enormity to such as are capital, and on such offenders as, being convicted of capital offences, are under a remission of their sentence, subjected to an inferior degree of punishment.

Striking instances of disproportion in punishment to the nature of the crime are very frequently exhibited in cases where prisoners charged with capital offences are, for want of proof of the consummation of a meditated capital offence, acquitted, and after great delay, expense and inconvenience, are convicted of the attempt to commit such capital offence. Having narrowly escaped the punishment of death, the offender thus escapes altogether, or is sentenced as for a misdemeanor to imprisonment for one or two years; a punishment wholly disproportioned to an offence so proximate in point of guilty intention to that which is capital. It appears to us that it would be a great improvement in the administration of criminal justice to provide, for the purpose of obviating this inconvenience, that in every case of capital felony, where the intention and attempt were fully proved, but the evidence was insufficient to prove actual consummation of the crime, the jury should be enabled to convict the offender of such attempt, and a punishment better proportioned to the real malignity of the offence should be inflicted.

By these means the punishment of very atrocious offenders would be much more certain than it now is. For, as we have already observed, such as are indicted on a capital charge frequently escape, because the proof is in reality insufficient, and often because persons are unwilling to convict in a capital case. It will be seen from the Tables compiled from the official Returns to one of Your Majesty's Principal Secretaries of State, that out of 134 persons tried for the capital offences of shooting at, stabbing, administering poison, &c., with intent to murder, maim, &c., only 60 were convicted.

It would, we conceive, materially add to the certainty of punishment, if, upon all capital charges, the Jury acquitting a Prisoner of the capital charge, might, where the evidence warranted such a verdict, find him guilty of the minor offence; as, for example, if, upon a Prisoner being indicted for Arson accompanied with aggravations making the offence capital, the Jury might find him guilty either of Arson simply, or of Arson with such aggravations as would make the offence capital.

It has, we are aware, been suggested that this course of proceeding might afford a temptation to Juries to lean to an acquittal of the capital, in favour of a conviction of the minor offence. This might occasionally happen, but as the offender would still be subjected to a certain and severe punishment, we see no sufficient objection to the entrusting them with this power. The great object

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object is not so much severity as certainty of punishment; and we think that it would be far more conducive to the ends of criminal justice, that an offender should occasionally thus escape the severer sentence, provided the inferior were more certain, than that he should so frequently escape, as he now does, with impunity, and in many instances with a punishment totally disproportioned to his offence.

Upon indictments for Murder, Juries at present have very frequently the power of finding the Prisoner guilty of the inferior degree of culpable homicide, and we are not aware that any inconvenience results from this practice, especially as by an enactment in one of the statutes introduced by Sir R. Peel, a power of punishment better adapted to the crime of Manslaughter was entrusted to the Court. On the contrary, we believe that great inconvenience would result, if it were necessary upon an indictment for Murder, that the Prisoner should either be convicted or acquitted altogether. We may also observe, that upon indictments for several capital offences, as Burglary or Robbery, where the whole offence is not proved, but some part, constituting of itself an indictable offence, is proved, the Prisoner may be convicted of the minor offence only.

According to the present practice of Criminal Courts, imprisonment is rarely inflicted for a term exceeding two years, so that a wide chasm in the scale of punishments is left between death and the longest term of imprisonment.

The punishment which in legal contemplation ranks next to capital punishment is that of transportation, but it appears to us that it is one which very inadequately fills up the chasm between loss of life and loss of liberty for two years.

The advantages and disadvantages of particular secondary punishments have been so fully discussed and illustrated in the Reports of various Committees of Your Majesty's Houses of Parliament, and recently in the full and able Report of Mr. Crawford on the Penitentiaries of the United States, that we think it sufficient to refer to those opinions of various competent individuals, which will be found in our Appendix. But we may observe, that a considerable portion of the existing want of discrimination in punishments arising from the cause under consideration, might be removed by a less frequent and better regulated use of the punishment of transportation, by the infliction of longer periods of imprisonment in certain cases, and by a much more frequent judicious use of the punishment of solitary confinement. And we think that the punishment of imprisonment generally, and also that of fines, would be better calculated to answer its object, if it bore some more certain proportion to the nature and extent of the offences which it is intended to repress. We are aware, however, that as the same kind of punishment will affect different offenders with different degrees of severity, a discretion must, within proper limits, be left to the Judges for the awarding of secondary punishments, with a view to the condition and circumstances of offenders.

A third cause of the want of discrimination in punishments arises from their having been imposed or mitigated at various times, ancient and modern, and generally, as Lord Bacon expresses it, upon the spur of the occasion, and without reference to any uniform system.

In some instances Misdemeanors are punishable with greater severity than Felonies, and thus the distinction between the degrees of crime is wholly reversed. If three or more enter lands by night, being armed to destroy game, the offence, though but a Misdemeanor, is punishable by transportation for the term of fourteen years; whilst Theft to the highest amount (Theft which constitutes Felony) subjects the offender to transportation for the term of seven years only. An Assault upon another with intent to take his life, is punishable only as a Misdemeanor, by fine or imprisonment seldom exceeding two years; but to assault another with intent to rob him of a shilling, is a Felony, and punishable with transportation for life. If three or more armed with a gun enter upon land in the night time with intent to kill a hare, the offence is punishable with transportation for fourteen years, but if the same act be done with intent to murder the owner, the offenders would be punishable only by fine and imprisonment, not (usually) exceeding two years.

The penalties denounced by statutes in respect of the stealing of articles adhering to the freehold are, in some instances, singularly disproportioned to the

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Common Law punishment. A distinction between offences merely technical, without reference to the moral guilt of the offender, or the mischief of the offence to society, cannot, we conceive, justify in principle the distinctions in respect of punishment created by statute. Thus, whilst the stealing of a growing shrub of the value of five pounds, is punishable by a mere fine of five pounds in addition to the value of the article, the stealing a shrub of the value of one penny, if severed from the freehold, is punishable as a Felony, by the transportation of the offender for seven years, and by the forfeiture of his whole personal estate.

The punishments for particular offences have often undergone a succession of changes without any apparent reason. For example, the punishment for forging assay marks on plate was, by a statute of King George the Second, pecuniary; by another statute of the same King it was punished with death; by a statute of King George the Third the punishment of death was reduced to that of transportation; by a later statute of King George the Third it was made a capital offence again. By a subsequent statute of King George the Third, the punishment for forgery of assay marks on gold plate is reduced to transportation, leaving the forgery of the like marks on silver plate a capital offence, and as such it remained till the passing of the late Forgery Act.

Although, as we have suggested, a most inconvenient latitude of discretion is allowed by the law in the case of the greater number of offences, yet the law is not uniform in this policy; for in the case of some felonies, the punishment is made transportation for life without any power given to the Court of mitigating the sentence. There does not appear to be any adequate reason for this marked distinction, as to the power of awarding punishment, between these and many other felonies.

It appears to us, that it would be desirable, for the reasons already adverted to, that a scale of punishments should be established by which the different gradations of crime should be more distinctly marked, and settled according to some uniform system:

That the more heinous of such offences as were not capital should subject the offenders to longer terms of imprisonment than are now in use:

That the offences cognizable by the superior Criminal Courts, and by Courts of Quarter Sessions, should be distinguished into four classes:

That the first should consist of such as were capital, in accordance with the principles already considered:

That the second should be punishable with imprisonment for a term of 10 years or more, or transportation for life; and should include Burglaries, Robberies, Arson, Rape, (if it should cease to be capital), together with other offences not capital, but committed under such defined circumstances of aggravation as might render them worthy of the punishment second in degree:

That those of the third class should be punishable by imprisonment for a term not exceeding ten years, nor less than two years, or by transportation not exceeding fourteen years, nor less than seven years; and should consist chiefly of ordinary burglaries and robberies (exclusive of those which are such by mere construction), together with theft aggravated by its extent, the time and place of its commission, the number concerned in committing it, their relation to the prosecutor, or such other defined circumstances of aggravation as might render it worthy of the punishment third in degree:

That those of the fourth class should be punishable by imprisonment not exceeding two years, transportation not exceeding seven years, or fine; and should consist of simple thefts, and of offences not included in any of the three preceding classes:

That with regard to any such of the above-mentioned offences as should be made punishable with imprisonment, solitary confinement and hard labour might be added to the punishment, according to definite rules.

In suggesting the propriety of a scale of punishments, we profess to do no more at present than attempt to sketch a mere outline of the principles on which such a scale ought to be constructed.

We think that benefit would result from the adoption of such a scale, because the process of adjusting punishments to particular offences would be much expedited by referring to such an established scale; and because the referring offences to such a scale would tend to preserve a greater degree of consistency in the measure of punishments than now exists. Whilst it might, as

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a general rule, be convenient to refer to such a scale in apportioning punishments, deviation from it might frequently be necessary in particular instances.

With respect to the period limited by law between the sentence and execution of persons convicted of Murder, we think it too short, and that the time ought to be left to the discretion of the Judge who tries the Prisoner, and who is most competent to determine the validity of the reasons which may render a greater or less interval expedient. We are led to this conclusion by considering the instances in which Courts of Justice have occasionally committed mistakes in consequence of erroneous inferences drawn from circumstantial evidence or false testimony, or of other causes, especially where the minds of the Jury have been operated upon by popular prejudice against the criminal, or by antipathy to the offence. Such a discretion will appear the more necessary, when it is considered that the punishment is irremissible; that the prisoner often finds it extremely difficult, from poverty and destitution, to prove his innocence; and that although a conviction may have been founded on mistake or perjury, which he could not anticipate at his trial, he has no means of obviating the consequences. We think that these considerations greatly overbalance any benefit arising to society from the terror supposed to be inspired by a speedy execution. We may also remark that the practice of trying capital cases on Fridays, (a practice probably originating, in some measure, from a desire to prolong the interval allowed by law), frequently occasions inconveniences which are not to be altogether overlooked in the disposal of the business in Criminal Courts. We refer to the opinions, to be found in our Appendix, of several Gentlemen examined by us upon this subject, and particularly to those of Mr. Alderman Harmer and of Mr. Wilde, formerly Sheriff of London.

THOMAS STARKIE. (L.S.)
HENRY BELLENDEN KER. (L.S.)
WILLIAM WIGHTMAN. (L.S.)
ANDREW AMOS. (L.S.)
JOHN AUSTIN. (L.S.)

Received the 9th day of June 1836.

COTTENHAM, C.

APPENDIX

TO

SECOND REPORT.

Appendix, No. 1.

Saturday, 14th February 1835.

John Thomas Barry, Esq.; Examined.

Appendix, No. 1.

Examination of *J. T. Barry*, E

YOU are engaged in mercantile business in the City of London?—Yes, of the house of William Allen & Company.

Have you attended to the subject of Criminal Law?—I have for some years taken a deep interest in the question of Capital Punishment, from entertaining an opinion which is fast gaining ground, that we are not warranted in inflicting it under the Christian dispensation; but I have also paid some attention to the subject of the expediency of it, and I have found by various statistical facts, that it appears to be highly inexpedient.

Do you consider it generally inexpedient, or think that it ought to be limited to certain crimes?—My opinion is, that it is generally inexpedient for every offence.

Do you mean, that, setting aside all question as to the right to inflict capital punishment, you think it impolitic?—Setting aside entirely all questions of that kind, I think it is impolitic; that it works ill. I think we are warranted in drawing that inference by statistical returns well authenticated.

Will you state generally your grounds for considering capital punishment to be inexpedient and impolitic?—I think it is found by the returns to which I shall refer, that under similar circumstances, crime has been more frequent where capital punishments have been frequent, than where they have been unfrequent or abrogated. The instances are but limited certainly where they have been altogether abrogated, but in no case am I aware that its abrogation has not been followed by a diminution of crime. The contrary has been asserted with regard to Tuscany, but I have good reason to believe that the assertion is not true, but, on the contrary, that during the period of about twenty years in which capital punishment continued abolished in Tuscany, it was attended by a great diminution of crime in general, and almost an entire disappearance of crimes of violence. I have not seen any statistical returns for Tuscany, but I have been informed that such was the result. The following is an extract from the answer of the Tuscan Minister, (le commandeur *Berlinghiéri*) addressed to *Charles Lucas*, Avocat à la Cour royale de Paris, in reply to his inquiry as to the effects produced in Tuscany by abolishing entirely the punishment of death:—

> "Il n'y a pas de doute que l'humanité de la législation pénale de Léopold, et en particulier l'abolition de la torture et de la peine de mort, n'ait été suivie pour la Toscane des résultats les plus satisfaisans. Je ne sais pas si sous son règne il ne s'est pas commis plus de cinq assassinats; mais, ce que je sais bien, c'est que ces délits de tout genre ont été beaucoup plus rares alors qu'avant et qu'après.
>
> "Sous le règne de Ferdinand commença la Révolution de France, et les effets desastreux s'en firent bientôt sentir dans les autres pays. On crut nécessaire de rétablir en Toscane la peine de mort, seulement pour les crimes directs contre l'état et pour les assassinats prémédités. Je ne crois pas cependant que personne ait été exécuté avant l'occupation de la Toscane par les Français, et pas plus d'une ou deux fois après le retour de Ferdinand. Pendant l'occupation française ces exécutions ont été assez fréquentes. La menace de la peine de mort dans les deux cas indiqués subsiste encore; mais l'application est très-rare, quoique les crimes ne le soient pas tant qu'autrefois, et il faudrait des cas excessivement odieux pour que la grace n'intervînt pas."—(*Vide Lucas, du Système pénal et de la Peine de Mort, p.* 359.)

With regard to one or two other countries which might be mentioned, similar advantages will be seen to have resulted by examining the numbers of executions at different periods.

Will you refer in particular to those instances?—Sir James Mackintosh furnishes a very decided instance, though to a limited extent. During the time he was in India, while Recorder of Bombay for seven years, he states, upon taking his departure, the result of the trial he had made of the disuse of capital punishments for the whole period of seven years. That I find mentioned in the second volume of Montagu's "Collection of Opinions of different Writers upon the Punishment of Death." After having examined the records of the country for many years past, Sir James Mackintosh states, that capital punishments had been rather numerous some years before, but that they had gradually diminished, and at last had been altogether discontinued for seven years, and with the gradual diminution and ultimate discontinuance of them, that capital offences had greatly diminished, and in particular the crime of murder, notwithstanding the increase of the population to nearly double, and notwithstanding the introduction of European troops into Bombay to the amount of 4,000.

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Examination of *J. T. Barry*, Esq.

Giving the numbers, he mentions, that in seven years ending with the year 1763, there had been 141 capitally convicted, of whom 47 had undergone the sentence, being at the rate of seven executions every year out of twenty capital convictions every year. He states generally the gradual reduction of capital punishments from that period downwards, and also a gradual reduction of capital convictions, and then passes on to the seven years ending with 1797, in which he says that the executions averaged four every year. He then states, that in the next seven years, ending with 1804, under the presidency of Sir William Syer, the convictions for murder had been 16, and the executions 12, being, on the average, nearly two executions every year. He then passes on to the next seven years, during which he himself presided, ending with 1811, when the convictions for murder were altogether six only; and the capital convictions altogether in the same seven years were 109 only. During that period *no execution* took place, and yet the number of convictions for murder in those seven years as compared with the preceding seven years, were as six only to sixteen. He makes some remarks upon the subject, which will be found in the work I have mentioned.

Does he draw any general inference from the facts stated?—His general inference is, that there had been "no diminution in the security of the lives and properties of men" by the experiment.

Is the suspension which he speaks of any alteration in the law, or only in the administration of it?—Only in the administration of it. That is the substance of what is stated by Sir James Mackintosh in his charge to the grand jury on taking his departure from India in the year 1811, and which is also to be found reported in the Bombay Courier, dated July 20, 1811.

Will you state any other authorities upon which you rely upon this subject?—I have a short abstract that I have made of the Criminal Returns printed in 1834 for the Chamber of Deputies in Brussels, giving the number of condemnations and executions in Belgium every year for the preceding 38 years. Those Returns give the number of murders (assassinats, as they are designated). They also give the other capital convictions, such as those for poisoning, parricide, infanticide, homicide with robbery, robbery with the five aggravating circumstances (capital according to the yet existing code), incendiarism, and some other crimes. I will state, for each period of five years, the executions, then the convictions for murder separately, and then the total convictions for the other capital offences separately. I shall begin with the first period of five years, ending with 1804. The executions for various offences were 235. The convictions for murder in those five years were 150, and for the other capital offences, 203. The next five years, ending 1809,—total executions, 88; total convictions for murder, 82; total convictions for the other capital offences, 70. The next five years, ending 1814,—total executions, 71; total convictions for murder, 64; the other capital convictions, 49. For the next five years, ending 1819,—total executions, 26; total convictions for murder, 42; total convictions for the other capital offences, 29. The next five years, ending 1824,—total executions, 23; total convictions for murder, 38; convictions for the other capital offences, 23. The next five years, ending 1829,—total executions, 22; total convictions for murder, 34; convictions for the other capital offences, 40. The next period is only *four* years; it comes down to the end of 1833. *No execution* took place. The total convictions for murder were 13; for the other offences mentioned, 23.

ABSTRACT as just quoted:—BELGIUM.

PERIODS.	TOTAL EXECUTIONS for the various Capital Crimes.	CONDEMNED for Murder, Poisoning and Parricide.	CONDEMNED for all other Capital Crimes.
Five years ending with 1804	235	150	203
— 1809	88	82	70
— 1814	71	64	49
— 1819	26	42	29
— 1824	23	38	23
— 1829	22	34	40
Four years ending with 1833	*None*	13	23

When I was at Brussels, a few weeks since, an opinion existed there that notwithstanding the new draft code retains the punishment of death for several offences against human life, of which I have a list, yet that it would never be enforced. I was told so by a gentleman holding office; and the wish of the Government, he said, was that capital punishment should be entirely got rid of, it being considered to be of no use.

The code you speak of was an alteration in the law?—It is the draft of a new code not yet adopted; it is still under the consideration of the legislature.

Have you any minute of the mode in which it is proposed, in Belgium, to restrict capital punishment?—I have a memorandum, hastily made, which I believe is substantially correct, of the offences for which the punishment of death is proposed to be continued in the draft code. The capital punishment appears to be abolished for all political offences. It is abolished for some species of arson, for pillage, coining, forgery, and wounding in most cases. It is abolished in the case of rape. In the case of burglary, which had been made capital with the aggravating circumstances by the Code Napoléon, it is altogether abolished.

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It appears to be retained by the draft code in the case of regicide, or attempts; of massacre of the people, and treasonable explosion of forts, &c.; wounding a magistrate with intent to kill; murder and poisoning; barbarity in committing other crimes (being here very indefinite). It appears also to be retained in the case of homicide happening in the riotous destruction of buildings, and in the commission of other crimes. In the case of false arrest, with torture (here undefined again); incendiarism of inhabited houses, or when the fire occasions the death of any person. In all these capital cases the jury are to have the power to state when there are extenuating circumstances, and then the punishment is not capital, but hard labour, perpetual or otherwise, according to circumstances.

What do you conceive to be the general principle upon which these alterations are founded?—The general principle is, that the code retains the capital punishment in certain cases where human life is affected. The Returns, however, which I have already read from, show very distinctly the diminution of the occurrence of murder, as capital punishments have diminished in number, and especially when they were wholly discontinued.

But the laws remained the same?—The laws remained the same.

Then the number of executions has been diminished, although the capital punishment has remained in the statute book?—Yes.

How then do you apply that to show the policy of taking it from the statute book?—We must recollect that capital punishment has been practically abolished for the last five years; and besides, I think we must all acknowledge, who have paid any attention to the effect which executions have upon the crowds who witness them, that they have, upon the whole, a very ill effect. They seem to reconcile the feelings of depraved characters to the destruction of life through passion or revenge.

Will you state more particularly what inferences you draw from the facts you have stated with respect to the Netherlands; may not the diminution in the number of offences depend mainly upon the fear of capital punishment?—The criminal returns show that capital punishment not only does not repress great crimes, but has an obvious tendency to increase them; and that the contrary effect follows from the judicious mitigation of the law.

Do the tables show that the number of capital punishments has diminished as compared with the number of crimes committed, or merely that both have been diminished?—That both executions and capital offences have diminished, and especially cases of murder.

Has there been any change of policy with respect to punishing upon conviction during that period; that is to say, have they not punished upon convictions for murder in cases where previously they were in the habit of doing so?—There is decidedly a difference in that respect, because, as I have already stated, in the four years ending with 1833, no execution whatever took place. Now in former years there were executions for murder. It is also to be remarked, that while there has been this decrease in capital crimes, the population has been very largely increasing, so that the proportionate difference is, on that account, even greater than it appears by the table.

Have you any knowledge what punishment was substituted for the capital punishment?—Confinement with hard labour generally; I believe that in Belgium the punishments are the same as they are on the Continent generally.

That would be under the Code Napoléon, which goes to a considerable extent as to the length of imprisonment?—Yes; but the new draft code for Belgium proposes to abolish confiscation, branding and the carcan; the same code also proposes that minors, when capitally convicted, shall not undergo execution; but I do not know the exact age minority extends to.

Have you any other records?—We have in our own country Parliamentary Returns for many years, and I have with me an old document of the kind, going back to the middle of the last century, with regard to the executions and capital convictions in London and Middlesex, giving the number of executions every year. Some of the particulars it contains were alluded to by Sir Samuel Romilly in the year 1810, in order to show, in opposition to the views adopted by Archdeacon Paley, that these laws when first enacted were intended to be rigidly enforced. Paley in his writings had asserted that it was intended they should only now and then take effect, but Sir Samuel Romilly showed, that soon after their enactment, generally speaking, two out of every three convicted capitally suffered the extreme punishment, even for minor offences. This Return gives us the average number both of capital convictions and executions in London, from the middle of the last century down to the year 1817. It appears that 1,958 persons suffered death out of 5,727 convicted at the Old Bailey alone in 69 years, ending with that year. The Parliamentary Return is dated June 5, 1818, No. 419.

What is your opinion of the general principle upon which Sir Samuel Romilly and Archdeacon Paley differed?—Looking at the facts stated in the numerical Returns to Parliament, I cannot entertain any doubt that a moderate and proportionate punishment uniformly inflicted is more efficacious in deterring from crime, than the severest punishment only occasionally carried into effect. As to which is the best for the repression of crime, the opinion I have formed is I think fully warranted by every fact that has come under my observation. Allow me to observe, that the same Return exhibits great fluctuations in the numbers executed, as well as in the convictions.

Are you able to say whether the number of executions bears generally a large proportion to the number of convictions?—It seems to have decreased greatly; it continued a considerable time at the ratio of about half or two-thirds of the convictions, but in later years it rapidly diminished.

From what time should you say it rapidly diminished?—In the table there are great fluc-

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tuations. In the year 1750, there were 84 convictions and 56 executions in London. In the year 1759, only 15 convictions and 6 executions. Then taking another year, where there was a much larger proportion executed, but nearly the same number of convictions, namely the year 1774, there were 87 capital convictions and 32 executions. In the 1785, there were 151 capital convictions and 97 executions (I still speak of London). In 1787, there were 113 capital convictions and 92 executions. The next year, out of 83 capital convictions there were but 25 executions. The year following, out of 97 convictions there were but 26 executions; and in the year 1794, out of 71 capital convictions there were but 7 executions. In the next year they increased, but upon the whole they seem to have decreased from that time to the end of the period. The average number also of executions is stated in this table for every seven years from the commencement.

Can you state in round numbers what the late average has been of the executions, as compared with the convictions at the Old Bailey?—Last year there was not one execution; there is of course no Parliamentary Return yet made, but I have ascertained the number of convictions for offences capital till of late, and from that it appears that there is rather a diminution as compared with former years. In forgery there is a great decrease; it is said there were only nine convictions for forgery.

Are there any other statistical returns, either in this country or in foreign countries, which support your original position of the inexpediency of capital punishments?—I understand that the criminal returns for France are in favour of the same views; I have not seen them, but I have seen some results; prosecutions for murder have diminished there also, latterly, there being an extraordinary diminution at the same time of capital punishments.

Within what period has that taken place?—Within the last six or seven years.

Do you attribute that to any change of policy upon the subject, or to other collateral circumstances?—Principally to a change of policy forced upon the Government by the growing aversion of the public in France to the punishment of death. I have the same opinion as to its effects there as stated with regard to Belgium. The less frequently capital punishments are inflicted, the less do criminals seem disposed to crimes of violence.

You attribute it to the policy of those who have the administration of justice, of not executing so many out of the number convicted?—In part; no doubt other circumstances have co-operated.

Do you think that the progress of education would to some extent prevent the perpetration of crime?—No doubt it would have that tendency, and particularly as to crimes of violence.

Are you able to state at any particular time what was the proportion of executions in France as compared with the number of capital convictions?—I am not able to state that; I have not the Returns in my possession.

Are you able to say whether it differs very widely from the proportion which obtains in this country?—Very widely indeed.

In what respect does it differ?—It is owing to the power which the jury have, by the late alteration of the French laws, of bringing in a special verdict that the prisoner is guilty, but that there are extenuating circumstances by which his punishment should be mitigated; in fact to an amelioration of the law itself.

That would reduce the number of those capitally convicted in proportion to those capitally charged; but can you state the comparison between the number capitally convicted and the number executed?—I have not seen the tables, but I am informed that executions take place now very seldom. I was lately told by a Frenchman that executions are exceedingly rare, even in the worst cases of conviction; and he also added, that the juries are so anxious always to avoid capital convictions, that they exert themselves to discover the slightest extenuating circumstances.

In those cases is not the less aggravated punishment to which the prisoner becomes liable usually a very severe one?—Yes, the next in degree.

Have you any other facts to state bearing upon this subject?—I have some other facts regarding the administration of the law in this country, as shown by the Returns to Parliament, which I think bear upon the subject. Here is, first, a Parliamentary Return made last year, Paper No. 141; I have examined this particularly with reference to the effect which the recent instances of mitigation of our law might have had upon the number of commitments in England and Wales, and the proportion of convictions; I have done that by taking the first three years, and comparing them with the last three years of the seven included; thus getting the total of commitments before the change, or while the punishment of death was retained and frequently inflicted, and comparing it with the total commitments when that punishment ceased to be inflicted for those offences. I have also ascertained the same thing with regard to all the other offences in the calendar.

Will you state generally what the result has been with respect to the mitigations of punishment?—There is one preliminary remark to make in considering the effect of the change in the punishment as it regards housebreaking; it is necessary, in order to judge of the effect on that particular crime, to take burglary along with it, because burglary was, before the change, frequently prosecuted as housebreaking; we are therefore obliged to take these two offences together. Now it happens that in the last year to which this Return refers there is no execution for burglary; in this comparative abstract, for these two reasons, burglary is put along with housebreaking in the column of crimes with mitigated punishments. Then classing the whole offences of the calendar under three heads; first, non-capital in either period; secondly, capital in the first period only; and thirdly, capital in both periods; we have, first, those that were not capital in either period, and comparing the total commitments of the last three years with the total commitments of the first three years, there

there appears to have been an increase in the latter period of 13 per cent. upon *non-capital* or minor offences. The second class consists of offences from which the punishment of *death has been removed* by statute (including burglary, for the reasons I have stated). It appears that the commitments for these offences have increased two per cent., but this is virtually a decrease, considering the diminished reluctance to prosecute, which actuates the public since the removal of the capital punishment. Besides, the increase upon the first class, or minor offences, was much greater, being 13 per cent., as I have stated. In the third class we have those offences that are *still capital*, and were so in both periods. The commitments in the first period for these were 1,861, in the second period 2,694; the increase was therefore 44 per cent. The executions that took place for these offences were in the first period 110, in the second period 126, so that not only the denunciation continued, but was inflicted in a larger number of instances. In spite of that, the increase of commitments for these capital offences, as I have said, was 44 per cent. I think the reason of that increase may in some degree be found by referring to the table of *convictions*. By taking the total convictions for each offence in the last three years of the period, and (distributing all the offences as before into three classes) we get these results; first, the total for non-capital offences gives an average of 72 convictions (and a fraction) in every 100 commitments. There will be found a remarkable coincidence if we take the first three years for the same non-capital offences, for in that period also we get 72 per cent. (within a small fraction), so that there seems to be an almost uniform proportion of convictions to commitments (in the aggregate) on *non-capital* charges at different times, when calculated upon these large numbers. Secondly, the convictions for the offences of the second class, the punishment of which was formerly capital, average altogether exactly 73 in 100 commitments. Thirdly, the average proportion of convictions for the third class, or those offences that remain capital, is only 47 in every 100 commitments. Now the total number of convictions for capital offences in the last three years is 1,279; but if we had obtained the same ratio of convictions as in non-capital cases, there would have been perhaps 500 or 600 additional persons subjected to punishment who have now escaped with impunity by verdicts of acquittal (excepting persons found guilty of a minor offence). As to the number of executions that took place for offences that have since *ceased* to be punished with death, in the first three years there were 96 executions; in the last three years of the period there were only 13 executions, which, of course, took place early, before the capital punishment had ceased; yet those crimes, as just now mentioned, were virtually fewer under the mitigated law. Upon this subject, the proportion of capital convictions to commitments, there were some highly interesting, conclusive and most useful results obtained two years ago by a gentleman at present visiting some of the courts of Europe, who has devoted much of his attention to the subject; I mean the Tables of T. B. Wrightson, contained in a little work on the Punishment of Death (generously printed at his own expense for circulation among Members of the Legislature). His Tables embrace the three offences of robbery, burglary and housebreaking, and are founded on our own Parliamentary Returns for the 21 years, ending with 1831. The whole term he divides into three periods of seven years each; and as the numbers are all given in centesimal proportions, his Tables are exceedingly perspicuous. They show the septennial average numbers, first of executions in every 100 of convictions; and, secondly, of corresponding acquittals in every 100 of commitments. In this way the several offences are contrasted with each other, and the periods likewise with each other, as they regard the individual offences.

Will you state generally what is the result?—The general results, which the Author demonstrates in the most satisfactory manner by these statistical proofs obtained from our own Parliamentary Returns for the long period of twenty-one years, are, first, that juries are reluctant to find guilty on capital charges; and, secondly, that their disinclination to do so, varies just in proportion as the infliction of death is the more or less likely consequence of their verdict. These positions he further supports by adducing statistical proof of the excess of acquittals on capital, over those on non-capital charges; and by the larger number of acquittals in London and Middlesex, while executions were frequent, than in the country, where they were comparatively rare.

Is it then the general object of Mr. Wrightson's publication and his calculations, to show that the tendency of severity of punishment is to produce acquittals?—Yes, the tendency of capital punishment in particular. I consider these Tables of very great value; and having gone over the calculations minutely, I can speak to their accuracy.

And you agree in Mr. Wrightson's general result?—I do.

Is Mr. Wrightson a gentleman who has paid great attention to this subject?—Yes, for some years past.

Is there any other statement which you think of importance in support of your general position?—I have some Parliamentary Returns upon the subject of forgery. It appears that we had as many as seventy-seven capital convictions for forgery in one year, the year 1820. The number of capital convictions varied exceedingly at different times, from five or six up to sixty or seventy per annum.

Does it appear that there was much variation in the proportion between the convictions and the executions?—I cannot fully answer that question, for it is stated at the foot of this Parliamentary Return, that "the Bank of England does not possess the means of stating or distinguishing the punishments inflicted." It appears, however, that in the year 1820, there were 275 convictions of the minor offence alone, that is, of having forged notes in possession, being the same year in which there were seventy-seven capital convictions. The *capital* convictions for England and Wales alone, in the period which this Return embraces, is 618.

Is that document confined to the Bank prosecutions?—It is; it was printed in 1830, Paper

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Paper No. 442. I have also a return of the number of executions for forgery for a limited period. A motion has indeed been made in Parliament two or three times over for a Return for a longer period; but though it has been ordered, it has never been forthcoming. The one I hold was published in 1830, No. 417. The highest number of executions, exclusive of Scotland and Ireland, in any one year, included in this Forgery Return, appears to have been only 20; 18 of them being for Bank of England prosecutions. I know the executions were more numerous in some other years. In 1809, at Lancaster alone, there were 27 for trial, 13 were convicted, and every one of them suffered the extreme penalty.

Is there any other document you wish to refer to?—I have here a Parliamentary Return for 1832, printed in 1833, No. 67, being a Report upon the Prisons of Ireland, containing also the Criminal Returns, the number committed, convicted, and so forth. From this Paper it appears that the executions in Ireland are confined to very few offences indeed; and by another Paper of the same kind, published in the following year, it appears that in the year 1833, the total number of executions in Ireland was 39, the same number it had been the year before, and that was generally about the annual number of late. Those executed in the year 1833, appear to have suffered almost exclusively for murder or attempts at murder. They consisted of one for assault with intent to murder, 26 for murder, 10 for shooting at persons, and two for robbery of arms; making a total of 39. There are some offences punished in England with death, which are not so punished in Ireland. For instance, robbery on the highway appears not to have been punished in Ireland with death for several years past; and what deserves remark is, that if we compare two periods, the offence of highway robbery is found to have been considerably more frequent in the first four years when it was punished with death, than in the last four years during which it has not been so punished in any instance. There is another important fact in the English Returns. It appears that the convictions for arson bear a very small proportion to the committals for the offence. The convictions are only about 28 per cent. on the commitments. It may be recollected I have stated this morning, that for offences which have lately ceased to be capital, the average of the total convictions is 73 per cent. on the commitments.

Do you attribute the small proportion of convictions on charges of arson in any degree to the severity of the punishment, and the probability that it would be carried into effect?—Yes; to the probability of its being carried into effect, connected with the nature of the evidence, which is extremely equivocal sometimes. It must often be difficult to satisfy a jury, and we have repeatedly known cases of arson in which the jury have brought in a verdict of guilty, with a recommendation to mercy. If a prisoner in such case suffer death, as they generally do for this offence, then acquittals follow. In Norfolk and Cambridge some time since, there were no less than eight indictments preferred at one assize, seven of which were thrown out by the grand jury, and the eighth prisoner was acquitted. If the punishment of arson were of a different kind, I think a much larger number of convictions would be obtained.

Then although the small per centage of convictions in cases of arson, may in part be attributable to the nature of the evidence, which is usually circumstantial, and therefore may fail to convince the jury, are you of opinion that it in part arises from the severity of the punishment?—Not so much from the severity of the punishment, as its irreparable nature, where an erroneous conviction happens. I believe that juries wish in this case a severe, though not a sanguinary punishment, which places them sometimes under the apprehension of taking the prisoner's life unjustly—of inflicting a punishment which cannot be recalled. The evidence on charges of arson is often such as to leave some doubt in the case.

Do you conceive that that fear operates to an unreasonable extent?—In charges of arson, as well as some other capital charges, I believe that jurors more readily allow circumstances of doubt to operate on their verdict, than in charges which are not capital; therefore it happens that many persons who are really guilty escape, and the repetition of the crime is thereby encouraged.

And you attribute that in part to the apprehension on the part of the jury of becoming the instruments of the party's death?—Certainly; I may here add that the executions for arson have increased very much; there have been 41 executions for arson in England and Wales in three years out of 78 convictions, according to this Return; whereas in the former period of three years there were only three executions; and yet the commitments for the offence have increased from 65 in the first three years, to 277 in the last three years ending with 1833. The crime has increased very much indeed, notwithstanding that the executions have increased from three to forty-one. The number of convictions, as compared with the commitments in the last three years is 28 per cent., as already stated. In the former three years they were only 20 per cent. In Ireland I see that the proportion of convictions is even smaller than in England on charges of arson. With regard to another capital offence which appears in these Returns, it is remarkable that the proportion of convictions on charges of rape is exceedingly small. We had several charges of that description tried at the Old Bailey some time ago, where the jury made up their minds to acquit them all. For England and Wales the number of convictions for that crime appear to be only 20 per cent. for the three years ending 1833. Out of 159 commitments there were but 32 convictions. In the former three years only 16 per cent. So that *certainty* (that essential quality) of punishment is greatly diminished, and the law in the same proportion rendered inoperative for personal protection.

Do you attribute these results to apprehensions in the minds of the jury?—Yes, in a degree; as in the case of arson the jury appear to have some misgivings, which probably they would not have if the punishment were of another kind—were not irreparable.

Is

Is it your opinion, generally, that the number of acquittals increases with the probability of execution?—Yes; I am quite borne out in that view of the case by a very particular examination of the Returns.

Is it your opinion that the administration of justice would be more certain if the number of capital offences was diminished?—Decidedly. I am afraid that a great many now escape with impunity who should not escape.

In your judgment, has the probability of capital punishment in cases where it is only inflicted, upon the average, once in fifty or sixty times, any material effect in preventing crime from fear of that punishment?—I think not; because by removing the punishment altogether, there has been no increase of those offences; but we have more prosecutions in proportion, and more convictions.

What, in your judgment, would be the result as to any particular offence if it were known that upon conviction death would certainly follow?—We have no experience of the effect of such a law in any offence, because, even in the case of murder, there are some instances of commutation, but, in looking at these facts, we are borne out in the opinion that as the infliction of death becomes more certain upon conviction, in that proportion is the chance increased of acquittal and escape without any punishment, supposing a prosecution is commenced.

Do you think that is a principle which would apply in the case of very heinous offences, like murder; that is, do you believe that in case of charges of murder, more persons would be convicted if the punishment were not capital?—I feel warranted in thinking there would be more, from this fact, that the proportion of convictions to commitments for murder generally does not exceed 25 per cent. Doubtless a great many are convicted of manslaughter.

May not that disparity in a great measure arise from the want of any definite rules distinguishing the crimes of murder and manslaughter, in consequence of which many people are subsequently convicted of manslaughter that were acquitted for murder?—It may in some degree, but the whole cannot be ascribed to that cause.

You think it is to be ascribed to an unwillingness or apprehension arising from the idea of subjecting a fellow-creature to the punishment of death?—I think it is in some degree owing to that; where the evidence is of a sufficiently conclusive character, the jury would wish, in some instances, to bring in a verdict of guilty, and they would do so if the punishment were short of death; that is, were it not such as could not be recalled in the event of the conviction afterwards proving erroneous.

Have you formed any judgment upon the question, whether the probability of the capital punishment has any effect upon prosecutors in prosecuting or forbearing to prosecute?—I have frequently made it a subject of conversation with many persons, and have found it very generally the case, that persons will not prosecute. I have no doubt that with regard to those offences from which the punishment of death has lately been removed, that many more have been prosecuted than would have been prosecuted had that penalty been retained. It is particularly the case with respect to forgery. I do not know any instance lately of a detected person escaping prosecution for forgery; but formerly, it is well known that multitudes escaped altogether, although detected. The statement of Alderman Harmer, whose experience in criminal law was so extensive, was very important upon that subject. While forgery yet remained a capital felony, he stated, in a published Letter to the Marquis of Lansdowne, that he could not say, even within a hundred, the number of compromised forgeries which had come to his own knowledge.

Is not that a principle that would operate more strongly in case of forgery and other cases of felony not attended with violence, than in the cases of outrage against the person?—Certainly.

Have you ever known a person who has forborne to prosecute in case of murder?—I have not known any particular instance in which it has happened, but I have known many persons who have said they would not prosecute.

You think it would be most politic to do away with capital punishments altogether; have you considered, supposing the Legislature were willing not wholly to abolish capital punishments, but to restrict them within narrower limits, what limits would be convenient and useful?—I have had an extensive opportunity of ascertaining what the general opinion is by a large correspondence. The opinion which I individually entertain is not that which society at large entertain with regard to the punishment of death. The great majority of persons seem to go this length, that they would retain the punishment of death for murder, and for no other offence. That is what I find to be the general inclination; it is generally the first answer they give upon the subject if their opinion is asked.

They would not extend it to unsuccessful attempts to murder?—I think not generally.

Have you heard any limitation of this kind advocated by any class of persons, that the capital punishments ought to be restricted to offences attended with violence to the person, or such offences as bring life in danger, such as setting fire to an inhabited house?—I have heard such opinions, but that is not the general reply one gets upon the subject. The general reply is, that they would never have a man punished with death for any thing but murder. I believe that many of them, if one descended to particulars, would grant that there were worse offences than murder; for instance, that there are very aggravated cases of adultery, which kill a man by slow degrees, and which merit the severest punishment if measured by their moral turpitude. People, however, do not in general appear to draw these distinctions. I think there are many persons whose opinions are influenced by the language addressed to Noah as recorded in Scripture, upon the shedding of blood.

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Do you happen to know whether the large class of persons who are of the opinion you mention, that capital punishment ought to be confined to cases of murder, found their opinions upon general views of what may be called temporal policy, or whether some religious considerations are mixed up with it?—There appear to be two classes of persons, neither of them founding their views upon the policy of the question; one class who rest their opinion upon religious views, do so upon one construction of that passage of the Old Testament, by which it is understood as a command. The other class seem to decide, by the first impulse of their own feelings, that the offender having taken away the life of another, his own life should be taken; that he deserves to die.

Then they do not found it upon the general principle of policy, that punishments ought to be of such a nature as to the greatest possible extent to prevent the commission of crimes?—I do not think they enter so much into the subject in general. Their opinion seems formed upon their first view of the question; and they still retain that opinion whenever they come to be in the situation of those who should be prosecutors or witnesses or jurors; for they appear to carry the same feelings with them which bias them to a considerable extent in preventing prosecutions, in making them colour their evidence as witnesses, and sometimes in bringing in verdicts of acquittal that are not warranted by the evidence.

Do you think those opinions have an extensive influence?—I think they have a most extensive influence.

Do you consider that the possibility of death does operate to repress crime to a certain extent?—Not upon the whole; it no doubt operates with some, but I think there are others who would be more effectually deterred from crime by other punishments. The class of criminals who are guilty of murder, are men with whom the personal suffering which attends the taking their lives, has but little influence; they are often desperate characters, who conceive their punishment will soon be over. In cases of that nature, the punishment should be characterized rather by duration than intensity.

With what kind of punishment short of death do you think it would be politic to visit atrocious crimes upon the person?—I should think that seclusion, by which I do not mean absolute and perpetual solitude, would be a greater punishment to offenders of that description. I lately inspected the Penitentiary at Lausanne, Switzerland, and put some questions upon the subject. The officers of the prison were not aware of my own opinions. I found that for about twelve years the punishment of death had not been inflicted in Lausanne; the prisoners are confined by day at labour in companies, but in silence, as in the New York prisons, and by night they are shut up in solitary cells. I inquired whether serious offences had increased? they told me no. I asked these questions of the medical attendant and the clergyman of the prison, and received from each the same answer. If the offenders in the gaol became disorderly, their diet was reduced, or their work *taken away* as a punishment, and they were shut up in solitude, or in very aggravated cases, (of rare occurrence, because the prisoners have a great dread of it,) they were shut up in both solitude and darkness for two or three days, and their privations increased. The behaviour of the prisoners in general was very satisfactory. At the penitentiary in Geneva, the answers to the inquiries I made were similar.

Had that kind of punishment been substituted by the law for capital punishment?—No; the law hitherto has continued the same, but in practice they have not inflicted capital punishment for many years; and I learned that the Swiss were about to revise their criminal code before long. I lately heard of a gang of convicts working in chains at Munich, who were all convicted murderers; I do not know whether the punishment of death is entirely abolished in Bavaria, but if not, it appears at least that the greater number convicted of murder undergo a different kind of punishment.

Have you formed any judgment upon the question as to the extent of imprisonment as a substitute for capital punishment, and whether in any case it ought to be for the life of the offender?—It should be for life in some few atrocious offences.

You think there would be no general feeling against that in society?—I think not; in the case of murder, for instance.

Upon the general principle that it was dangerous to society to allow such a person to go abroad, as well as for the sake of example?—Yes, upon the same ground that you would prevent a madman from being at large; I think upon the subject of punishments it is necessary to vest a great discretion in the Court.

With respect to such punishments, would you not have a scale varying from imprisonment for life, down to imprisonment for the shortest period, within certain limits giving a discretion to the Court?—I should be glad to see ample discretion given to the Court, in the same manner, though not to the same degree, as in the case of manslaughter, which is there, very properly, extensive; circumstances of crime vary exceedingly; and moreover it would have the good effect of informing the bye-standers the reason of the severity or of the mitigation of the sentence. This is not now the case as to the offences under two recent statutes. The Bills were originally framed otherwise, but subsequently received alterations in the House of Lords, by which the discretionary power of the Court was taken away as regards the offences they embrace. The consequence now is, that very frequently the convict's punishment is kept from the public, and if it is mitigated, the ground of mitigation is not publicly stated. In further proof of the necessity for such discretionary power in the court, I may mention that by a Return, not in my possession, but which I heard quoted in the House of Lords on the 7th May 1833 (by the present Lord Chancellor), it was proved that out of 300 persons sentenced under one of those Acts to transportation for life, only 10 had their sentences commuted to a shorter term.

Would

Would it in your judgment be desirable that offences, with a view to the adaptation of punishment to them, should be more clearly defined by statute as to the aggravating circumstances?—Decidedly, so far as practicable, which it is to a considerable extent; on that head I quite agree in the views expressed by Sir Samuel Romilly in the Commons in 1810, which will be found in Montagu's Collection of Debates on the Punishment of Death.

For example, making a distinction between setting fire to a house with inhabitants, and a building without inhabitants; and in the case of burglary, distinguishing between the mere breaking into a house by thrusting an arm through the window for the purpose of pilfering some chattel, and the crime of a number of persons coming in armed, using violence to the family; in your judgment, would it be desirable that such aggravation should be specified?—Yes, and a greater punishment assigned to the aggravated offence; on that subject, it is of great importance to pay some attention to the views of the jury, otherwise it produces future acquittals in cases of undoubted guilt.

Do not you conceive that the feelings of the jury would be consulted by the law assigning the heavier punishment to cases of aggravation, and leaving it to them to say whether those circumstances of aggravation exist?—I think in that way they sometimes have been led to give a verdict contrary to evidence. To explain what I mean, let us take a case which bears some analogy: while shoplifting was capital, the required amount was 5*s*., and the jury, in order to evade the capital law, frequently brought in a verdict under that amount. But as to recommendations of juries to mercy, my own opinion is, that where they are not attended to by the court, it has the effect of producing verdicts of acquittal in many cases, where otherwise the jury would have felt sufficiently satisfied to bring in a verdict of guilty with a recommendation to mercy; this encourages the repetition of crime.

Do not you conceive that in cases like that of shoplifting, the straining the consciences of the jury arose from the great severity of the punishment of death, if carried into execution, as compared with the nature of the offence?—No doubt of it; but with respect to the punishment of transportation for life, without any power in the court to mitigate that punishment, I have seen a man tried, who, I was persuaded, would not have been acquitted if there had been a discretionary power; there was complete evidence, but the man had eight children, and the jury evidently felt his case a hard one; he had stolen a lamb while in a state of distress; it was known that, if convicted, he must be transported for life, though his was one of the least aggravated cases, and he was brought in not guilty; he would have been convicted, I think, if there had been a discretionary power in the court, upon the jury recommending him to mercy. Another case I recollect, of a youth indicted for arson; he bore, unhappily, a bad character; the foreman of the jury afterwards mentioned privately that they would not have convicted him but from the bad character they somehow learned he bore, but which was not spoken to on the trial; they were not, however, fully satisfied with the evidence, and they therefore recommended him to mercy, wishing him to be transported; but that recommendation had no effect; representations were made to the judge, and to the Home Office, but in vain; there is reason to believe now that he was innocent. I went down to inquire into the case, and I believe that if he had had counsel he could not have been convicted; his friends did not provide him with counsel, not believing that he could be found guilty. The jury hearing, as before stated, that he was a bad character, brought in a verdict of guilty, desirous that he should have some punishment: he was hanged.

Do not you think there is a considerable disparity between the sentences pronounced upon conviction in different counties, from the different characters of the judges by whom the cases are tried?—No doubt there is; I remember an instance of a judge who, the first time he went the circuit, left many more than usual for execution; there had not been one executed at the two previous circuits, but upon that occasion he condemned eleven, and ten of them suffered.

Do not you think it is also desirable that offences should be defined by the law, with their aggravations, in a view to the infliction of the more aggravated punishment, rather than that the more severe punishment should be applicable to the whole at the discretion of the judge, by which means a judge in a slight case might if he chose inflict a very severe punishment?—It is very desirable that there should be such definition in the statute book, so far as practicable.

Do you think that some improvement might be made in that respect?—Certainly; for at present, crimes of the most different shades are threatened with the one punishment.

And the punishment inflicted depends very much upon the character of the judge?—No doubt.

Have you ever considered the subject so far as to form any opinion of the number of degrees which it might be convenient to introduce into the scale of punishments?—I have thought that it would be desirable to make the degrees as few and simple as might be, so that the persons whom it was intended to deter from committing crime might bear them in mind. As to degrees of punishment, the most important distinction should be made as to persons who may be guilty of *completing* the crime of murder, in order that others should bear in mind, that if they deprive the victim of his life, they are subject immediately to a much heavier punishment. It has often happened that burglars and others have had the person whom they robbed in their power; they might have taken his life had they thought that such person would afterwards give fatal evidence against them. I recollect an instance of the kind, not three years ago, in Berkshire; there were three men convicted of burglary, named Lincoln, Green and Morris; they broke into the house of a lady, whose daughter and herself were together in bed, near midnight. These burglars went up to the room, forced the door with an axe, and took it in with them, and a lantern. This was given in evidence against

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against them by the daughter of the lady. At the foot of the bed they appeared in this intimidating manner, and the ladies appealed to these burglars whether they had not been always kind to the poor who had applied to them for relief. The prisoners answered, "We do not come to shed blood; we only want money;" the ladies directed them where to find the money, and then the men retired to the kitchen, called up the servant, took a supper, and remained there about an hour. The principal facts were given in evidence by the young lady. They then went away; they were afterwards captured, tried, sentenced and put to death. Now in that case it is probable they would have murdered the inmates of the house, and thus prevented any evidence of their guilt, if they had had an idea that they would upon conviction have suffered the same punishment for robbing the house, as if, in addition to that robbery, they had murdered its inhabitants. There is not a sufficient motive at present held out by the law to spare the life of the person who is in their power; or rather, the inducement is to commit murder to put the witness out of the way. There should be a line drawn where murder is actually committed; the motive often for the murder in cases of robbery, we should recollect, is to get rid of evidence of a crime, the punishment of which is *the same*.

Do you think they would stop to consider whether the punishment was of a more or less aggravated nature; would they consider nicely, if they were prepared to commit murder, what the ultimate punishment was in the one case or the other?—I cannot but think so. An offender has gone a certain length in the commission of a crime, he recollects that he is subject to be hanged for it, and perhaps suddenly feels his situation a desperate one; in what some persons would call self-defence, he puts the other to death who might be a witness against him.

Have you considered what number of gradations in the scale there might be between imprisonment for the shortest and imprisonment for the longest time?—Perhaps about three gradations; it seems to me that a scale of punishments would be a valuable improvement; imprisonment for life being the extreme.

Are you of opinion that seclusion is one of the most effectual punishments, both as a punishment and as preventing contamination?—On both accounts, especially to prevent the contamination of young offenders. Under our present system we have what may be called a nursery for crime.

Have you turned your attention to the subject of transportation as a punishment; what is your opinion as to transportation?—I understand that its severity has greatly increased of late. I have seen some private letters from New South Wales. The writers had investigated the subject closely, and they were of opinion that transportation is rendered much more severe of late.

Do you think it is effectual, and that it has great power over the minds of the generality of the people as a preventive of their committing offences?—Perhaps we should be justified in that opinion from the fact that the punishment of transportation being now substituted for those offences from which the punishment of death is taken away, the prosecutions for those offences have increased upon the whole only two per cent. in the last three years, while other offences have increased in a much greater ratio.

Which should you consider the more effectual punishment, that of imprisonment with seclusion or transportation?—I believe imprisonment with seclusion would be considered the greater punishment.

Do not you think that the dread of transportation amongst the lower classes of society is much lessened by the probability which presents itself to their hopes of bettering their fortunes by being sent to another country, and the hope of prospering there?—I should think that has some effect upon their opinion of that punishment.

Do you know whether it frequently happens that prisoners convicted ask to be transported rather than imprisoned?—I do not know that as a fact; I have heard of it.

In your judgment, is the imprisonment of young persons for trivial offences too frequent at present; do you think it is attended with ruinous consequences to themselves?—When they come into contact with older criminals it must be so; the proper treatment of young offenders is a most important consideration.

Are you aware of the degree of punishment which is generally inflicted at the quarter sessions upon young offenders?—I am not much acquainted with it.

Supposing it is usual for the first offence for stealing an article of small value to sentence them to imprisonment for a few days, or at the most for a few weeks, should you conceive that to be such a punishment as would deter a young person from committing the offence?—It appears to be important when a young offender is first punished that it should be a kind of punishment that he really suffers from, that he should feel the labour or the seclusion. I am afraid that flogging rather tends to harden and make offenders more desperate.

Have you considered the effect of such imprisonment, particularly with respect to young offenders, as usually takes place now in the house of correction in large and populous districts?—I have not had a sufficiently extensive opportunity of forming an opinion to answer the question.

What do you think should be done with young criminals of 14 or 15?—It is very difficult to say, but seclusion should form part of the punishment. I think that the punishment upon the *first* conviction should be rather severe.

Would it not be desirable that seclusion should be a prominent feature in the punishment, both for the purposes of punishment and also to prevent contamination?—Undoubtedly so; there is a difference of course between seclusion and absolute solitude; to seclude them only

only from their bad companions is a great punishment to such persons, and to cut off correspondence with their friends out of the prison for a time.

Do you know whether in point of fact it often happens that young offenders, having once been imprisoned upon a charge of felony, are ever reinstated in the world so as to gain an honest livelihood?—That has been the case with regard to some individuals, I know upon good authority; but I can only answer the question in a general way, not from personal observation.

Where crimes are committed against property, and a conviction takes place, do you think it desirable that the prisoner, if able, should be obliged, by hard labour or otherwise, to make reparation to the party injured, if not to the full extent, at least partially?—If that feature could be given to our punishments it would be a very valuable one.

Do not you think it would tend to instil a proper notion of the nature of the injury to property and the necessity of making reparation for the injury?—The offender in such a case would feel that he was inflicting punishment upon himself.

Do you know any country where that principle is put in execution?—I am not aware of any country except America. In the code of Louisiana the principle of restitution or reparation exists, I rather think.

Suppose the prisoner had no property, might it be desirable that his imprisonment should be made to depend in part upon the value of the property stolen, so that it would be longer or shorter according to the degree of the partial compensation to the owner, provided it were within such limits as not to operate as imprisonment for life?—I think it would; and it would have another good effect upon the prisoner, imperceptibly inducing a habit of labour, and perhaps a love of labour.

And to make the speediness of his liberation depend upon the earnestness and amount of labour?—Yes; the principle appears a very sound one; restitution and reparation seem too much lost sight of in our system.

Supposing the prisoner to be possessed of property, do you conceive that in that case part of his property should be made available to the party injured?—Unquestionably so; and I think the principle which has been referred to, would be particularly applicable to the crime of forgery, which is generally committed by a class of persons to whom hard labour would be a punishment.

You are aware that in the case of felony, the whole of the personal property is forfeited to the Crown; would you say then that the right of the Crown should be subject to that exception, namely, that the prosecutor should be reimbursed to the amount of the injury done him?—Yes; if the right of the Crown to the property still continued; but it appears to me that the sweeping away the whole of the property, whether the offence is greater or less, is not a just principle.

Why do not you think the principle just, that the whole of the property should be swept away by the Crown?—The punishment falls very unequally, because some offenders that have no property, in that respect suffer not at all, while others that have property do; but it would also affect the family of the criminal much more than himself, and I think they ought not to suffer to such an extent; indeed, that the innocent should never suffer at all, where it can be prevented. In providing that he should make restitution, it seems desirable to frame a provision to prevent his frustrating the object by making over his property, as is now done, except for the requisite support of his family.

In your judgment, do you think that reparation should be made from the prisoner's own goods where restitution is impossible?—Decidedly so; for often the identical property cannot be restored; it would be well if in petty thefts the prisoner had to work out four or five times the value of what he had taken, (but of course not all for the prosecutor's benefit); and in aggravated cases more; it would be an excellent punishment; it would tend strongly to discourage the offence, and the effect of such moderate and equitable penalties would be, that society at large would feel disposed to assist in the detection and punishment of offenders, instead of promoting their escape with impunity, as too often happens when penalties are excessive.

Do not you think it would practically teach the doctrine of *meum* and *tuum*, if a man knew that if he did meddle with another's goods he would have to work it out in such an unpleasant way?—Yes; for instance, take the case of sheep-stealing; if the offender had to restore the amount, and further to work out ten times the value, or even more, it would be a reasonable punishment; so that the whole mass of society, even those in the same class of life with him, self, would concur in its propriety.

You just now observed that in our law compensation to the injured party seems to be lost sight of; do not you think that that may have had a bad effect upon morals in general?—I think so.

Have you considered the subject of the trial of offenders with reference to the question, whether a counsel should be allowed or not?—The opinion I have formed upon that subject is, that counsel for the defence should have the same opportunity of addressing the jury, as the counsel for the prosecution.

In your judgment, does there seem any difference between the right to have it, and the policy of allowing it, in the case of a felony, and in the case of a misdemeanor or any other fraud?—I cannot see why it should be allowed in the one case and denied in the other, and again allowed in the still higher crime of treason.

Has your attention been more confined to the practice of the higher criminal courts than to those of the quarter sessions?—It has.

So that you have not much attended to the difficulty that exists at the quarter sessions of

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of having a new trial, or having the opinion of a higher court?—I have not; but I do not see the propriety of certain offences which have ceased to be capital, being now tried at quarter sessions.

Do you think that in case of murder the necessity of executing a man within 48 hours after the trial, makes the time too short?—Much too short: we know it is generally lengthened to three days by contrivance, and in consequence of the general consent that it is too short. This subject was adverted to in a public meeting at Stockton some years ago. The effect of the time being so short has been, that some persons convicted have suffered, who have, a few days afterwards, been proved not to have been guilty.

Do you think that upon the ground of mere policy, in order that a person may not be executed who has been convicted under a mistake, it is necessary that there should be a longer time given?—Yes, even on the ground of mere policy. Every instance in which an innocent person suffers is calculated to set the public against the law as it is.

And may operate to prevent juries from convicting?—No doubt of it.

You are aware that there can be no new trial in a case of felony, although there may in a case of misdemeanor, upon an indictment in the King's Bench; would it in your judgment be desirable that there should be a new trial grantable in case of felony as in cases of misdemeanor?—If the punishment of death be retained, it appears to me proper that a new trial should be granted by some higher tribunal, as in France, in the Court of Cassation, whenever a prisoner appeals.

Would it not be also desirable in cases where the consequence might be imprisonment for life?—There is this difference between the two; the punishment of death can never be recalled, the other can, and of course would be recalled by proper representation to the Home Office, upon its being shown that the prisoner was innocent.

Is not there this difficulty attending that case, that it must be tried in a manner much less satisfactory than an open trial by affidavit, or even upon communications made not upon oath?—There is that difficulty.

Might not it, especially in favour of a prisoner, often be more desirable that a new trial should be had?—Yes, at the same time the injustice to the individual is infinitely less where he suffers a punishment of that kind than where his life is taken. With respect to the question of allowing prisoners' counsel to address the jury in charges of felony, I have a very decided opinion. One objection raised against it, is the occupation of more time; but the time of the court is already very much occupied by the cross examination made necessary from the want of a speech to evidence by the prisoner's counsel; and I think it is a mistake to suppose that so much more time would be occupied. The present Attorney General stated in Parliament last year, that he did not conceive the time of the court would be consumed to the extent supposed, or that much time would be lost by it.

Saturday, 21*st February* 1835.

Stephen Lushington, Esq., L.L.D. M.P.; Examined.

Examination of *S. Lushington*, Esq. L.L.D. M.P.

YOU are Judge of the Consistorial Court of London?—I am.

Have you paid attention to the administration of the Criminal Law?—Certainly, for above 30 years, but more especially till within a few years last past, when I have been otherwise so occupied as not to have it in my power.

Have you formed any judgment upon the question whether capital punishments are too far extended by our present system of law?—I certainly have been very clearly of opinion that the extent to which capital punishment is carried by the English Criminal Law has produced effects the most injurious to the suppression of crime, because I have observed in a variety of instances that the severity of the punishment has prevented prosecution and conviction. I might also add, that even after conviction I have seen so many instances of escape from capital punishment which certainly were not warranted, upon any principles that I have been able to understand, that I think the whole was thrown into a state of great uncertainty, and, of course, thereby diminishing any terror which any offender might feel at the prospect of punishment for the offence he was about to commit. I could give many instances of what I have seen in that way.

Do you conceive that the severity of the law is in a great measure obviated by the non-infliction of the punishment, except in a few selected cases?—My own opinion is that the punishment of death ought to be affixed to very few cases indeed, and then, except under very extraordinary circumstances, uniformly carried into execution.

What do you conceive to be the particular mischiefs in the present system by which the denunciation of capital punishment is so extensive, and the infliction of it so rare?—My own notion is that there are very few criminals deterred from the commission of crime by any fear of the punishment of death; the chances are so much in their favour, taking the whole from the commencement of a prosecution to the period of execution, that I verily believe, and I am quite satisfied, I could show by a variety of examples that that is the general feeling.

Then you think that the rarity of the capital punishment diminishes the efficacy of the capital laws?—Not the rarity of capital punishment, but the uncertainty of its being inflicted in any particular instance. I have been into the gaol at Newgate before the order came

came down for executions to take place, when there were 35 persons capitally convicted; such has been the uncertainty that the then governor of the gaol has pointed out to me as the persons likely to be executed certain four or five individuals, and that same night came down the order, and not one of them was ordered for execution, but other four persons.

Is that uncertainty also attended with this ill effect, that juries not knowing whether the sentence will be executed or not, and if executed, upon what grounds, they are unwilling to convict of capital offences?—Certainly they are unwilling to convict. I have had strong remonstrances made to me by persons who have served upon juries against having so odious a duty imposed upon them. I am now alluding especially to the period when the prosecutions for forgeries and uttering forged bank notes were so frequent.

You do not entertain the opinion that no capital punishment should be inflicted?—I do not go that length.

Have you considered the general principle upon which you think the number of capital punishments ought to depend?—I think the punishment ought always to be in unison with the general feelings of society, and therefore I think whatever may be the nature of the crime, if you impose a punishment which gives offence to the general feelings of the people, the inevitable consequence will be that that punishment will not be inflicted, and consequently the offence will not be repressed.

What do you conceive that feeling to be; to what class of offences should it apply?—I think that the offences of murder, treason (perhaps upon other principles), and aggravated cases of burglary, attended with actual force upon the person—

Perhaps also to robbery, under particular circumstances of force?—Not except actual force upon the person; I draw a clear distinction between money being obtained by fear, and actual force used.

Between constructive force and actual force?—Yes.

Then you think it might be applied in some defined cases of robbery where actual force had been used against the person?—Exactly; I should say expressly that; I think it ought not to be used in case of rape, because I am of opinion that impunity is the inevitable consequence from the difficulty of proof.

Have you ever considered what kind of punishment in the case of rape you think ought to be substituted for the capital punishment?—My notion is that it should be imprisonment with hard labour, and with solitary confinement, under certain limitations.

That is with certain limits as to the maximum and mininum?—So as not to bring the solitary confinement to the extent as to deprive men of their understandings, which is the case wherever it has been carried too far.

What would you say as to offences against the person where actual force is used with intent to murder, but where the crime is not consummated?—I confess that I have never been able to draw the distinction in the way that some persons have done between the attempt and the actual commission of the offence; and I do not say that it would be contrary to my principles to inflict the punishment of death where there has been an attempt to murder with actual force—suppose a man goes into a room at night and strikes as hard as he can with a hatchet.

Where, as far as moral guilt is concerned, the crime is consummated?—Yes.

What should you say with respect to arson of inhabited houses, where the lives of the inhabitants are put in jeopardy?—Every person must feel that there cannot be a more aggravated offence, or one more mischievous; but then, again, arises the great objection of the difficulty of the proof, and the frequency of acquittal, if you continue to make that a capital offence.

You think that the law would be more efficaciously administered if it was not capital?—I believe the offence would be more likely to be repressed and restrained.

Do you conceive that in those cases in which capital punishment is inflicted, it ought to be inflicted by reason of circumstances of aggravation defined by the law?—Certainly.

Then you do not approve of the principle upon which so many of the laws defining capital offences now depend, that they include a vast number of offences differing widely in degree, leaving it afterwards to the judge, or those whose duty it is, to decide, upon circumstances of aggravation, whether the capital punishment ought to be inflicted?—There is no principle that I reprobate so strongly, and of the mischievous consequences of which I have had ample means of forming a judgment.

One of the mischiefs, of course, would be, that if the circumstances of aggravation are undefined, they cannot operate by way of example?—Exactly; it is a perfect uncertainty.

Do you conceive it possible, or probable, that different judges, both equally well intending to do their duty, would come to very different conclusions upon the point whether the circumstances were sufficient to warrant capital punishment?—It is perfectly obvious that that has been the case every day.

Would you not, within certain limits, allow a discretion?—Certainly; I am satisfied that it is impossible to lay down any code of Criminal Law so perfect that there ought not to be a power of mercy in the Crown, under particular circumstances which no man can foretell.

Have you ever considered the question of a new trial in Criminal Law?—I have considered it incidentally; but it has always appeared to me that there are so many difficulties attending it that I should not myself venture to suggest any such proposition.

Do not you think that the law which makes execution follow so immediately after murder is in fact inexpedient?—I am clearly of that opinion; the great evil is, that with respect to poor persons who have been prosecuted, the circumstances in their favour are frequently never disclosed till after the trial; I have seen instances of it; and in some instances a person is found guilty who is perfectly innocent. I remember at one time two persons

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selected out of a large number at the Old Bailey of capital convicts, and the order for their execution coming down, they both received a free pardon. The offences were wholly distinct.

In your judgment, would it be proper to have a scale of punishments, consisting of a certain number of gradations, of course leaving limits for the exercise of discretion between, to which different crimes should be referred; as for instance, to the highest punishment, to the second in the scale, and the third in the scale, and that those punishments should be invariably inflicted, except where the discretionary power of the Crown interfered?—That is my own opinion.

Have you ever considered to what extent it might be proper to go, especially if capital punishment were now abolished in many cases, in imprisonment by way of secondary punishment?—I think in very aggravated cases you must go the extent of imprisonment for life.

The number of intermediate degrees between imprisonment for life and the shortest period of imprisonment would of course be matter for consideration and inquiry, and probably five or six degrees would answer the purpose?—Perhaps fewer than those; I wish it to be understood that I have no objection to capital punishment in particular cases upon the same ground that some persons have. I have no objection to it upon religious grounds solely, when a strong necessity exists; but at the same time I think it ought to be confined within the narrowest limits; I think myself that you need have very few capital punishments in order to answer the object.

You are clearly of opinion that you would repeal the capital punishment, so far as it is left, with respect to forgery?—I am perfectly satisfied upon that subject.

You are aware of the practice at Quarter Sessions of inflicting slight punishment upon young offenders; have you formed any opinion whether that is prejudicial or not?—That is mixed up with so many considerations; it embraces the whole question of prison discipline; the repugnance of sending youth to prison is so great, that I am afraid the magistrates are frequently induced to mitigate their sentences in order to prevent that painful feeling. I have no doubt that the making light of the offence in the first instance, by attaching too light a punishment to it, is attended with great evil.

Do not you consider that in order to add to the terrors of punishment, partial seclusion would be desirable?—Certainly.

Have you considered the efficacy of transportation as a punishment?—Yes.

What are your sentiments upon that subject?—Generally speaking, that it is perfectly inefficacious; that it is efficacious only in first crimes committed under particular circumstances, and with people of education.

When you speak of it as inefficacious, have you any particular reason for forming that opinion?—The experience of having so frequently visited the gaols in former days, and seen the persons about to be transported, and seeing their total disregard of the punishment.

Are there not means taken, or about to be taken, in order to make the punishment more severe?—I doubt whether the state of persons in the colonies would for a length of time transpire so completely in this country as to create much alarm; and it unfortunately happens that in those penal settlements in the colonies it is very difficult, except under very revolting circumstances, to enforce a just severity.

In your judgment, would a person be as likely to be deterred from the commission of offences by the apprehension of transportation as by the apprehension of imprisonment for a considerable duration, with hard labour, in this country?—My own opinion is, that the apprehension of confinement in this country, with hard labour, would produce a considerably greater effect. The fact is, that all these considerations are balanced considerations. I have no doubt that the fear of death always produces considerable effect; but you must balance it against other considerations which operate so as to throw the preponderance the other way.

You think that they choose to run the risk for the purpose either of livelihood or of present enjoyment, just as a person, notwithstanding he may fear death very much, if he have a fall from a horse, is still to be found venturing upon that amusement?—Just so. I am aware of one remarkable instance, of which I know the particulars most accurately. There was a person executed at Newgate for forgery; there was a boy, respectably brought up, passed by, who for the first time saw an execution, and he went home, and that very day he forged upon his master, and he was left for execution. He was not executed, because the Ordinary of that time refused to administer the Sacrament to him, upon the ground of his youth, and that was considered a sufficient ground to let him off, though at that period the executions for forgery were uniform.

Are you aware to what an extent the commitments for thefts have increased of late years in Lancashire, particularly in the populous towns?—I cannot from recollection state the exact account of the Tables; I have looked at them.

In your judgment, is not that attributable in a great measure to the slightness of the punishment in the first instance, which does not operate as a preventive to the commission of crime?—I can entertain no doubt that one cause of the increase of crime is inadequate punishment; at the same time, if I am to speak of any particular place, I must be apprised of other circumstances, because I know from experience, that poverty pressing with great force throughout a particular district creates crime to a great extent.

Do you think it would be desirable, with respect to persons under a certain age, that magistrates should have the power of inflicting a punishment in the first instance, leaving to the defendant an election to be committed and tried in the regular course?—Provided you give that option; but not without. I have seen many instances in which it would be desirable.

desirable. I have seen a boy in Newgate, at nine years of age, for highway robbery, for taking a basket from a little girl upon the footpath.

Where thefts are of trifling magnitude, might not that discretionary power be extended to such cases, giving the offenders an option to take the regular course of commitment and trial at the sessions?—I am inclined to think that, giving that option, it might be carried to a certain extent. It would tend to remedy one of the great evils, which is the waiting till the trial comes on, and all the mischief consequent upon the so waiting.

In your judgment, would it be desirable that offences in general should be better defined than they are now?—I am most clearly of that opinion, and it was with a view to affording some remedy that I turned my attention to the question for some years before the year 1822, and that I moved for a Committee of the House of Commons, in order to consider the possibility of consolidating our Criminal Law. I was greatly assisted in that undertaking by Mr. Anthony Hammond. That Committee sat and reported in favour of the consolidation of the law. As soon as that Report was made, Sir Robert Peel, who was then Secretary of State for the Home Department, took it into his own hands, and I was of course too happy to leave the task to him. In order to prove the possibility of consolidation upon a small scale, I brought into the House of Commons the Slave Trade Consolidation Bill; that was the first instance of a Consolidation Bill, to my knowledge.

Did you ever consider the consolidation of the common Criminal Law independently of the Statutes?—I would not wish to venture an opinion upon codification generally; but as far as the Criminal Law goes, my own judgment is, that it is practicable, and not only practicable, but that it ought to be done.

Have you ever considered the subject of the treatment of discharged offenders when they are sent out of gaol?—I am perfectly aware of the very serious mischiefs which arise; I am perfectly aware that when a man is turned out of prison, after having undergone his punishment, unless some means are afforded him, at least for the present, of obtaining an honest maintenance, he is almost driven by necessity to the same practices; but it is a very difficult thing to find a remedy for that evil in a country where labour is so scarce compared with the population.

Do you consider that it would be desirable, in a moral as well in a legal point of view, in cases of theft, that the offender should be obliged to make some kind of restitution to the person injured, by working, and that his confinement should be governed in part by the extent of his earnings for that purpose; would not that be an every day lesson to induce people to regard more strictly rights of property?—My own opinion is this, that in every case where the offender is capable of indemnifying the person robbed for the loss he has sustained, he ought to be compelled so to do; but the difficulty I have in saying that you could apply the principle in all cases is, that the labour of such an individual may be so inadequately paid, that I can hardly see an end to the period of imprisonment which he would have to undergo if he had to make compensation. Perhaps there might be some regulation established that would prevent its being carried to an extravagant or oppressive extent.

Might it not be desirable in all cases that it should in part depend upon restitution?—I think that would be a very desirable principle.

Do not you think that that principle may in some degree be open to the objection that the plaintiff or the accuser's evidence may be in some degree biassed by the desire of gain?—To a certain extent; but yet I believe it to be the law of other countries, and I believe it to be beneficial. It is open to another objection, because you diminish the amount of punishment to the man that happens to have more ample means; but you cannot get any pure unmixed good in any of these matters.

Is there any other suggestion that you would think it proper to make with respect to the definitions of crimes, and the punishments to be annexed to them?—I do not know that I have any particular suggestion further to make upon that subject; but there is one suggestion I will take the liberty of making, which is the great importance of considering whether there ought not to be some public prosecutor. I should say that one great cause of impunity, and consequently of the increase of crime, is the expense and trouble attending prosecutions. Numerous instances might be stated in which such prosecutions have entailed a very severe hardship upon the individuals. I am well aware that the habit is to allow what is called the expenses of the prosecution, but at the same time that allowance for expenses is so inadequate to remunerate persons for the labour they undergo, that they frequently are deterred on that account from prosecuting, and again they are deterred frequently by false considerations of lenity, and by applications from the relations of the party and so on, and a vast variety of other causes, which tend to prevent prosecution, which I think, where a man is guilty, is a great evil. I should add to that, that I certainly am of opinion that it would be very desirable if you could simplify and render the law more plain and avoid technicalities. I myself have seen in former days grievous cases of acquittals from technicalities.

Ought the office of public prosecutor in your judgment to be confined merely to seeing that the prosecution was carried on, or should the public prosecutor be more actively employed in looking to the evidence?—I think unless he looks to the evidence and sees that the case is properly brought before the court, it would be, comparatively speaking, inefficient.

In the case of a public prosecutor would you give him any authority to pay or to contribute to the expenses of the witnesses of the prisoner?—I am not inclined to say that I should; that subject is not one upon which I have bestowed previous deliberation, and I am

I am not prepared to say, without an opportunity of looking at it in all its various ramifications and effects, whether I could approve of that.

Would it not be desirable that in large and populous counties the assizes should not be held at a great distance from the populous parts, on account of the great expense to which defendants may be put in bringing their witnesses?—Of that I have no doubt whatever.

Do not you conceive that the inability of a poor person to procure the attendance of witnesses on account of the distance, and the complaints which he makes of that before the jury, frequently lead to acquittals when the complaint may be ill founded?—It undoubtedly is a great evil both ways, it is one of the misfortunes attending poverty, and it is one of the evils attending the administration of justice, which must be admitted; at the same time it is exceedingly difficult to discover an adequate remedy.

Would it not be a *pro tanto* remedy, that the assizes should be held near the populous districts?—Certainly, and I do think that under certain circumstances it ought to be in the power of the judge, even after the trial has commenced, at the instance of the party accused, to postpone it, if he thinks fit, on such grounds as make it in his judgment necessary for the justice of the case. I think that is a discretion which might safely be intrusted to the judges of the land.

Have you known any particular cases of inconvenience which lead you to that opinion?—I cannot from recollection at this moment state any particular case, but I am satisfied that I have known instances of the kind. I have known instances of this kind, that a person who has been accused has said "such and such a person if here would prove my innocence," and the evidence of that person has been taken after the conviction, and a remission of the punishment has followed.

Have you considered the effect of the technical distinction between the different classes of crimes, particularly felony and misdemeanor, and do you conceive that distinction to be an advantageous one, or is it attended with disadvantage; for example, one consequence of the distinction between felony and misdemeanor is that counsel are allowed to address the jury in the one and not in the other; do you consider that to be advantageous?—Decidedly not; I cannot conceive any thing more contrary to all principles of justice than that a man who is indicted for an attempt should have the benefit of counsel, and that when he is indicted for the offence itself he shall be deprived of that benefit.

Are you aware whether it is warranted by the practical proceeding in any other code of laws?—In no other that I have had an opportunity of examining.

If the exclusion of counsel be advantageous, would you think it ought to be extended to misdemeanors?—Certainly.

And at all events that, whichever opinion prevails, it should extend to both classes?—I think it is impossible to find any reason why either the having of counsel or the exclusion of counsel should not be equally applied to both; indeed I should almost say, *a fortiori*, that it ought to be granted to the man whose life is in danger, or whose liberty is more likely to be put in peril for a longer period.

Do you conceive that there are any advantages to be gained, or inconveniences to be avoided, which can at all be put in competition with such an exceedingly great anomaly in the law?—I certainly think not; and I have often been astonished at hearing it so argued, and the time which would be necessarily occupied in trials so conducted urged as an objection, when at the same time in a trumpery action at *nisi prius* you might have the same time consumed; it seems to me to invert the comparative value of personal liberty and of mere property.

Do not you think that the supposed principle that the judge is counsel for the prisoner is a greater anomaly, even than that of excluding counsel altogether?—My own opinion is that the judge ought to be counsel for nobody.

You are aware of the niceties that frequently arise from another distinction incident to felony, namely, between principals and accessories, which does not obtain either in treason or in the case of misdemeanors; do you consider that the retaining that distinction is attended with any advantage?—None at all.

Would there be any inconvenience in allowing in the case of felony as in treason the maxim "*qui facit per alium facit per se*," so as to make the act of one man done by direction of another, though absent, the act of the other?—As far as my judgment and means of knowledge go, I should say decidedly that the change proposed would be advantageous.

Do you conceive that, considering how nearly connected in point of fact the offences are which still are distinguished by the law into felonies or misdemeanors, there ought to be so great a difference in point of practice that the one should be entitled to a copy of his indictment and the other not?—I think that is not a proper distinction.

Do you think it reconcilable with any principle that while the law takes care to allow the benefit of a new trial for the one species of offence there should be none in the case of the other?—With respect to criminal offences it is my own opinion that there ought to be no new trial in either.

Do you conceive that the discretionary power of pardon is a good substitute?—My principal reason is, that I cannot bring my mind to limit the inconveniences which would arise if you granted new trials in criminal cases, because I think, in almost every case, the individual would be desirous of taking the chance which might turn up by a new trial, whether there was sufficient cause or not; that it would be very difficult to make it purely discretionary in the judge, and still more difficult to define any rules upon which the granting of a new trial should depend; and therefore upon the whole I think there ought to be no new trial in criminal cases.

With respect to the inferior courts of criminal jurisdiction, such as the Quarter Sessions, do

do you think it desirable that where doubtful points of law arise there should be some legal and systematic mode of deciding them?—Certainly; if possible they should have the benefit of legal advice upon the points of difficulty that arise.

For example, suppose the question arises whether a particular taking of goods under particular circumstances was felonious, would it not be desirable that there should be some regular and systematic mode of taking the opinion of a higher court upon the subject?—I think so, provided that could be done without much delay.

But even though delay did occur, would it not be better that delay should be incurred rather than that a violation of law should take place from error on the part of the inferior judges?—I am of opinion that there had better be delay than error; but at the same time in making new regulations you might frame such as to prevent the recurrence of any mischievous delay.

Do you think it might be regulated by allowing the court to have a check upon the further proceedings; for example, suppose in a criminal case the transportation of a person for life depended upon the solution of a question upon which the court entertained doubts, should they be able to obtain the judgment of a higher court in a systematic way?—That exactly embraces my own notion. I conceive that if a person has been convicted, if a serious doubt arises upon a question of law, whether he has been convicted according to law or not, the majority of the Justices at Quarter Sessions ought to take it into their consideration, and it should depend upon that majority whether application should be made for better legal advice or not.

Have you considered to what court that application should be made?—I have not.

With respect to another distinction, between felony and misdemeanor, do you conceive that the law, as it regards the forfeiture of property, which is incident to a conviction for felony, depends upon any just principle?—I have always thought that there are gross anomalies there. I have always thought that a man might be convicted of many misdemeanors infinitely worse than some minor felonies, and, therefore, I could never conceive why in one instance he should be deprived of all his property, and in another instance his property should not be affected, except by a fine imposed upon him.

Independently of that, do you conceive that it is consistent with sound principles of criminal law, that forfeiture of goods or chattels should be retained?—I believe it has little or no effect whatever in deterring from crime, for I believe that an immense majority of offences are committed by persons who have nothing to forfeit; in a few individual cases it may operate as a hardship upon the persons connected with the person convicted; but as a means of preventing crime I believe it to be utterly inefficacious.

Would you be disposed to give any legal effect to the jury finding that there are extenuating circumstances?—I am inclined to doubt that, and especially if you were to allow counsel to the accused, for I think it would frequently be a means of compromise amongst the jurors, and that they would say, "We will agree among ourselves to recommend him to mercy."

Do you think it might be desirable, in any cases, or generally where jurors disagree as to the verdict, that there should be something intermediate between absolute conviction and absolute acquittal, such as in the Scotch law, "not proven," where a certain number dissent?—I cannot say that I think there is any necessity for introducing that distinction; I doubt whether it produces any good in the Scotch law, for the result is this, that if the jury find that the offence is not proven, the man goes away with his character considerably deteriorated, and I think that the having persons at large of a very marked bad character is productive of evil.

Have you considered the subject of corporal punishment?—I have thought of it a great deal; I have been one of the Committee of the Refuge for 30 years, though of late years I have not been able to attend. I certainly am strongly opposed to corporal punishment in every way; I know that a great distinction has been taken between the infliction of corporal punishment upon persons grown up and upon children, and I have known children occasionally come in a state that it was horrible to think of; at other times, from the different mode in which it was inflicted, the same punishment would be very slight; but as for its producing any benefit or any good, I think it certainly produces none.

Do you conceive it to be a punishment which is apt to render the party callous and indifferent as to character?—It is my perfect conviction.

Do not you conceive that the present practice, as to the appeal to the Secretary of State from convictions in Middlesex, and upon the circuit, is not only an inconvenient anomaly, but one which should be altered?—It is perfectly obvious.

You stated that you thought the punishment of death ought to be more certain, and the discretion to be confined within narrower limits; do you think that those limits should be equally narrow in their application to secondary punishment, or would you make the discretion larger?—The discretion should be as little as possible, considering the nature of the crime and making allowance for certain circumstances that no human foresight can possibly foretel. There are combinations of circumstances which it is impossible for any human mind to foresee.

Do you disapprove of the practice of recording sentence of death, leaving it quite uncertain what punishment a man is to have, by which the example is altogether lost to the public?—I think that practice is one of the most mischievous possible. I cannot conceive any thing more absurd than that a sentence of death should be recorded, every human being knowing at the time that it is not to be executed; it takes away, in my humble judgment, from the effect of pronouncing a sentence of death where it is to be executed.

Your opinion upon the punishment of death mainly involves the assumption that there will

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Examination of *S. Lushington*, Esq. L.L.D. M.P.

will be a better arrangement made as to secondary punishments, which you consider to be imperiously called for?—I do, decidedly, and I have long been of that opinion.

Do you think that an advantage would be gained by the substitution of private for public executions?—No; I doubt the possibility of that being done in this country, or the advantage of it, if it could be done.

Do not you think that the alterations and improvements that have been made in the Criminal Law of this country within the last 15 or 20 years, completely show that a great deal more may be done, without the fear that professional men seem to entertain of the risks arising from alteration?—That is certainly my own opinion; but I wish to add, that my judgment upon that point will not be affected by any Tables that may be produced by the increase of crime here and there, and for this obvious reason, that the increase of crime depends not only upon the state of the Criminal Law, but upon many other causes which work together, and that no man can form an accurate judgment without taking all these circumstances into consideration. I have no doubt of the truth of the general principles; but I do not say that those general principles may not be counteracted by particular circumstances at particular times. At the same time I should say, that, even from the Tables generally, I think I can find quite enough to support any one opinion that I have given this day.

You have seen Mr. Phillipps's Tables, and you think those would bear out the opinions you have given?—I think they would.

When you set the prisoners to labour in a gaol, would you give them any pecuniary reward according to the exertions they make?—I think that depends upon the length of imprisonment to which they are sentenced; in the case of a person sentenced to perpetual confinement for an atrocious offence, I doubt if I should give him any reward at all; but in case of punishment for minor offences, where at a certain period the individual is to be released, then I think I should operate upon his mind by the incentive of giving him part of his earnings. My notion is to make the secondary punishment as certain and as severe as possible, consistently, of course, with principles of humanity.

Do you think the degrees in the crime of burglary require to be better defined?—Beyond all question; it is impossible for any man to have had his attention turned to the crime of burglary, without viewing with disapprobation the species of distinction which has been applied to that crime, and the generality which has been applied to it upon the other hand, in some respects.

Do you approve of the plan that has been lately introduced, of imprisoning for a short term previous to transportation?—I think that renders the plan of transportation less mischievous; but I should object to a plan of having imprisonment here, and of sending them to transportation, provided, when they got to the place of transportation, things were not better regulated than they have been up to a certain period.

Do you conceive that mischief is done by people occasionally hearing that those who have been transported succeed to property and to office, and have become in better circumstances than they ever would in this country?—There is no question about it; and moreover, I might say not only become persons possessed of property, but there was a petition presented to the House of Commons which showed that the transports had acquired a very large and considerable property, and formed a great section of society in affluence.

Will not the possibility of that always tend to prevent transportation from being a very efficacious punishment?—I think so.

Do you think improvements might be made in the treatment of prisoners before trial?—I think that is only to be done by classification; and I may say so much has been done since the period of my observation, that it is a totally different thing. I do not mean to say that at the present moment there is not a great deal that ought to be remedied, but since the Committee sat in 1822, and since Sir Robert Peel's Bill, founded upon the Report of the Committee, a great deal indeed has been done, not however to the extent that is desirable.

Have you any further information to communicate to the Commissioners upon this subject?—If any thing further occurs to me I shall be happy to add it. I should say in addition, that one of the great evils attending the severe state of the Criminal Law is its great encouragement to perjury. I would also take leave to recommend to the Commissioners to look at Mr. Buxton's Speech, upon the 23d May 1821, which is printed in Hansard's Debates; it appears to me to be an able dissertation upon the subject of the Criminal Law, and the result of great labour and pains on his part, and of practical observation, because, as the Commissioners are no doubt aware, he went over a great many of the gaols in England.

Saturday, 28th February 1835.

Thomas D'Oyly, Esq., Serjeant-at-Law; Examined.

Examination of *T. D'Oyly*, Esq.

HAVE you turned your attention much to the Criminal Law and its practical working?—I have.

Have you formed any opinion whether the number of capital punishments is now too large, and whether it is desirable that the number should be diminished?—I cannot say that it has particularly struck me that they are too numerous at present. They have been very much diminished of late.

Have

Have you turned your attention to the consideration whether capital offences as now defined are too general and extensive, so that, in consequence, out of a great number convicted there are very few executions?—I cannot conceive that the amount exists now at all to the same extent as it did formerly.

Are you aware of the proportion which the executions bear to the number of convictions?—I am not; it must change every Session of Parliament, so that the proportion would vary now from what it was last year.

Would you think it desirable that, with respect to capital offences, the circumstances of aggravation which would justify execution should be better defined than they are?—I should think so, certainly, if the definition be not made too strict.

You think that the circumstances which are sufficient to render a person capitally convicted deserving of capital punishment, ought to be required as part of the definition of the offence?—Certainly.

If that be not done, in your judgment, can the punishment operate sufficiently by way of prevention; should not the aggravation be known?—I think, clearly, it would be better on all accounts that such should be the case.

You have turned your attention very much to the practical administration of the law, particularly at sessions?—I have.

Would you have the kindness to state in what respects you think any improvements might be made, or to point out any defects in the present course of proceeding?—With respect to juvenile offenders and to small offences, such as trivial larcenies, I think if there could be devised some mode of punishing them adequately without undergoing a previous imprisonment, and without their being arraigned and tried before a jury upon a bill found by a grand jury, it would be highly desirable.

You think it would be desirable that some summary mode should be adopted?—Yes; if an expedient mode could be devised.

What do you consider the evils attending the present plan of sending juvenile offenders to be tried before a jury in the way other persons are?—I think the evils are many; the previous imprisonment is frequently of longer duration than would be inflicted by the sentence in case of conviction; it confounds the nature of crimes to proceed in the same mode against a boy who has taken some article worth a few pence only and the more serious felon; mere children thus put upon their trial remain stigmatized through life; and these kind of cases has much multiplied of late; whether this is owing to the prosecutor's getting his costs as a matter of course, or to any other cause, may be doubtful.

Do you think that the imprisonment of juvenile offenders is ruinous to themselves, and consequently detrimental to the public?—Yes, I think it must be injurious in the extreme, unless gaols could be better regulated than they are at present.

What sort of proceeding would you adopt instead of the present mode; would you give the magistrates a summary power?—I would, in the same manner as they have the power now for petty offences under Sir Robert Peel's Acts and Lord Lansdowne's Act, limiting the degree of offence and of punishment; and I have also thought that in these cases it would be a great practical improvement if a small jury, say from three to six, were called in to decide upon the question of fact.

Do you mean a jury by way of accusation as a grand jury, or for the purpose of trial?—I mean for the purpose of trial; and I think also that if the magistrates were allowed to punish in cases where the offender did not deny his guilt, a great many trials at the sessions would be got rid of.

Would you think it right, on a charge made before him in certain cases, either where the offender was very young, or the amount of the felony or offence committed was very trivial, to give the magistrate the power of deciding upon matters of fact and sentencing, provided the person charged was willing to submit to it, but giving him the option of being committed and tried in the regular course at the sessions or assizes if he chose it?—It might be left, as in the cases before alluded to, to the magistrate to decide, whether it was a fit matter to be remitted to the assizes or sessions; my idea, however, is that it would be better done at the petty sessions where there is more than one magistrate present, and that there should be a jury of three or four persons as a sort of check upon the magistrate as to matters of fact.

You would not have a jury regularly sitting from day to day, only at certain times?—The petty sessions are usually held at stated periods, once a week or once a fortnight; in large towns like Brighton I believe they sit every day.

It would be still attended with the inconvenience of imprisonment to the same extent, till the petty sessions met?—The party might be brought before the magistrates by summons or by warrant, with a power to take bail; I speak of course of very trivial larcenies only; but of such the number is very large in a session's calendar.

Do not you think that if the magistrates were entrusted with the summary power you suggest, it ought to be subject to the option or election of the party charged to be proceeded against in the regular course?—If the law defined and limited the nature of the offence and of the punishment, I think it might safely be left to the discretion of the magistrate.

The sentences passed on juvenile offenders for first offences are generally very small?—They are, and very often their previous imprisonment has been much more than the sentence itself; a short solitary imprisonment to keep them out of the way of other prisoners is most frequently imposed, and is put in practice as far as it can be done; a short imprisonment and a whipping are deemed sufficient in many cases.

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Examination of *T. D'Oyly*, Esq.

Do you think whipping a desirable punishment?—We have inquired of the gaolers, and it is said to make a great impression; and it has occurred to the magistrates, that it is the way in which a parent in certain stations of life would probably deal with his own son in case of his being found in any serious delinquency.

Do not you think that being subjected to a sentence of that kind attaches a stigma which it is difficult to get rid of in after life?—I never heard that fact established more than would be the effect of his being in gaol.

Is not the punishment of whipping subject to this difficulty, that it can be scarcely known by the magistrates or parties who pass sentence to what extent that whipping will be inflicted?—The gaoler is a person who ought to be worthy of confidence in this respect as well as in others.

Do you think you could ever place such trust in a gaoler, as to warrant the punishment at the risk of the great inequality that may arise in the infliction of it?—The gaoler in the House of Correction, of which I know most, is pretty strictly overlooked by the visiting magistrates, and if any thing was going amiss, as to partiality or the contrary, it would soon, I think, be discovered.

Do you not consider it a very unequal punishment if inflicted without regard to age, or sex, or constitution.

As to females, it is at an end; it cannot be inflicted on females.

You would not think it desirable that it should be inflicted on females?—Certainly not; and it is not very often inflicted at all; but if there is a young person, as to whom it appears that nothing else would make an impression, and that it is not desirable to give him a long imprisonment, it is then resorted to; and we have the evidence of our gaoler that whipping and solitary imprisonment are the punishments which the prisoners are most afraid of.

Do you not think solitary imprisonment is a mode of punishment which makes a great impression on young persons?—Yes, but we have been afraid to administer it for any great length of time.

You consider it a punishment that ought to be regulated by great attention?—Yes.

What do you think of imprisonment, the parties being kept to hard labour, and not allowed to speak to each other during the time?—I understand it has been found highly beneficial, and means have been taken and are now taking in the gaols and houses of correction in Sussex to accomplish that object.

With what success?—It has been partially tried, and the gaolers have told us the prisoners have been much more orderly since that has been done; the difficulty consists in finding them work.

Do you not think the punishments on juvenile offenders are so slight as not to prevent the commission of crimes?—I think not, or we should have inflicted heavier punishments; for the first offence of larceny, unless accompanied with aggravated circumstances, the custom has been not to punish very severely; but on the second conviction to transport for life.

For a small offence of larceny to the amount of a few pence, what would be the punishment on a young person, of fourteen for instance?—If it was for the first time, I should suppose it would be from a month to three months' imprisonment and hard labour, or perhaps a shorter one and whipping, or a shorter one and solitary confinement.

The punishment being so slight, do you think that it really operates *in terrorem* so as to prevent the commission of crime by a young offender?—I can hardly say; he is generally admonished that he now stands convicted of felony, and that if he does the same thing again he will be infallibly transported for life.

Do you not think that they will look rather to the second than the first offence?—Very likely.

If it does not operate in general and strongly as a check, do you not think it is attended with positive mischief, the imprisonment of a young person?—As it stands at present, I think it is so; I will not say what it might be when a better discipline is substituted for that prevailing at present. I can conceive a prison so well regulated, that keeping them at work and to orderly habits might be of use.

Would it not be necessary, for the purpose of inducing habits of industry, that the period should be longer?—Yes, unquestionably.

To what length of time should you extend it, to give the prisoner a fair chance of being reformed by prison discipline?—It would strike me that some months would be necessary to produce habits of industry; six months, perhaps.

Not fewer than that?—No, certainly not. I think, as to young persons supposed to be very unfortunate, and where there is a chance of their becoming reformed, as where they have been altogether seduced by others, or where they would be received again into some creditable employment, if the Court gave them only a few days' solitary confinement, that would be sufficient, keeping them quite apart from the other prisoners.

Do you conceive, from your experience upon the subject, that young persons are often reclaimed who have been once subjected to the contamination of a gaol?—I cannot speak positively one way or the other.

Do you not find that the greater number of those who are once tried at the Sessions and convicted, come again and again?—It frequently happens so, but I should not say any very great number; perhaps out of a list of twenty prisoners, there may be two or three who have been convicted before; I should think not a larger number.

What is the average number usually tried at the Sussex Sessions?—At the late adjourned Sessions

Sessions there were between twenty or thirty, and about the same number six weeks ago at the Quarter Sessions.

You say you think it would be desirable that the punishments for minor offences should be increased; do you think it would be desirable there should be longer terms of imprisonment than there are now, referring to the higher offences, so as to make the next inferior punishment to that of death, as regards imprisonment, a much more serious one than it at present is, putting transportation, for the moment, out of the question?—It requires more severe punishment than I think has existed of late years, unquestionably.

You have not, perhaps, considered how far the punishment by imprisonment ought to be carried in atrocious cases short of capital ones?—I have hitherto considered that in atrocious cases short of capital, most severe treatment in the countries to which they are transported is the only adequate punishment; that imprisonment here is suitable for none but crimes of less atrocity.

Do you consider transportation an effectual punishment for the prevention of crimes?—I think it is very much dreaded; we see that by the demeanor of the prisoners when such sentence is passed upon them, and from the feelings of those who are connected with them.

Do you find that is generally the case?—Yes, I do indeed.

Is not your district principally an agricultural one?—Certainly.

Are there any very large manufacturing towns in it?—No, not manufacturing towns; there is a great deal of loose population in Brighton, and a great many of the cases come from that place.

Have you ever observed, or has it fallen within your experience, to know whether the infliction of capital punishments in particular cases deters prosecutors from prosecuting capitally, and sometimes juries from convicting?—I should think not very often; I have not seen any particular instances of it.

Have you made inquiries with respect to that particular point, whether prosecutors are deterred or not?—I have occasionally turned my attention to it. I have known where the offence of sheep-stealing, for instance, has prevailed to a great extent, that the farmers have come and made an application to the Judge that he would make an example; and I have known complaints made of sheep-stealers or horse-stealers being let off too lightly; and it was felt that there was not sufficient severity in the sentences.

You think it makes no difference in the conviction by a jury whether the punishment is capital or not?—I would not say that; I think in some cases, especially perhaps in trials for forgery formerly, where the juries thought the prisoner would be actually executed, they have acquitted, and that the prosecutor has been earnest in some cases that the prisoner should not be executed.

Then the jury would be most careful of convicting where the case was an atrocious one?—It depends, I conceive, much on the nature of the crime. The jury would doubtless weigh the evidence with more anxiety where a sentence of death was to await the prisoner in the event of conviction.

Where cases were not atrocious they would not have the same hesitation?—I was thinking particularly of cases of forgery, where there was a great reluctance to convict.

In atrocious cases justice would be most likely to be defeated where it is most necessary that a conviction should take place?—I think there are a great number of capital offences in which there would be no pity for the offenders.

How is it in cases of forgery?—I have seen many instances formerly of an evident reluctance to convict in forgery.

Would not a jury be less inclined to convict, the greater their apprehension that execution would follow?—Certainly.

Do you think the distinction between cases to be tried at the assizes and those tried in the inferior courts is sufficiently defined?—Certainly not; I think it would be a great advantage to have that better understood.

Do you know whether it is a common practice in the County of Sussex to commit prisoners where the offence appears to be capital for the minor offence to be tried at the sessions?—No, I think it is not.

Do you know whether it is carried to a great extent in other counties?—I do not.

Should a distinction be made between such offences as ought to be confined to the sessions and such as ought to be tried at the assizes?—The Legislature seems to have drawn the line as respects the Central Criminal Court, and the same might perhaps serve as a general rule.

Do you approve of that as a general distinction?—I did not look at it with any particularity.

Is there any rule which strikes you as desirable?—It occurred to me that those offences which were a short time ago capital and are now peremptorily punishable by transportation for life, being next in guilt to those which still remain liable to capital punishment, require the solemnity of an assize rather than a quarter sessions.

Would you allow the sessions still to have jurisdiction where the maximum of punishment was transportation for life?—I should think they would be better left to the assizes, though it were discretionary.

What would be the maximum of punishment which you think ought to be inflicted at the sessions?—It is difficult to say, for all larcenies now are transportable for seven years. I do not know that there would be any harm in giving the power to transport for fourteen years.

You would not exceed that?—No; that is the kind of line which has occurred to me; I attend

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Examination of *T. D'Oyly*, Esq.

I attend the sessions both in the Eastern and Western Division of Sussex, and at the general meeting of the sessions last year I proposed that the two ends of the county should be uniform, and that we should come to an understanding what offences should be tried at the sessions and what at the assizes.

Is there a difference in practice in the quarter sessions at the two ends of the county?—There is a difference in the magistrates; some think it best to commit to the sessions, others to the assizes.

It is not a difference of practice at the one sessions and the other, but in the conduct of individual magistrates?—I do not know that there is any material difference in the business of the two sessions.

Do they both take cognizance of offences transportable for life?—Yes, I believe they do. I have not seen a great deal of the Western sessions; I have known very serious offences tried at the Eastern sessions, which I thought ought to have been reserved for the assizes, stealing to a large amount in a dwelling-house and sheep stealing. It is an impression upon most of the magistrates that they had better try at the sessions all which were not capital offences, provided the sessions come before the assizes.

Do you attend at both the sessions now?—I do.

Have you frequently points at law occurring in criminal cases which require the aid of a professional person to deal with?—Yes, certainly.

Where sessions are held before a bench of magistrates, no one of whom is of professional habits or education, do you conceive there should be some means of obtaining a just opinion upon difficult points of law which arise?—Unquestionably; but I think the case is almost unknown of a bench of magistrates without a professional person.

In Sussex there are persons of great professional ability, but are there not other counties in which that is not the case?—I cannot say, indeed.

Do you not think it necessary for the due administration of justice, especially where no magistrate attends who is of professional habits and education, that there should be some means provided of having difficulties resolved where points of law may arise?—Certainly; and I think that it is desirable in many cases where there is a professional person.

In what way do you think that object would be best accomplished?—I have not turned my attention to that.

Do you think it desirable that cases should be reserved for the opinion of the Judges who attend the assizes?—I can see no objection to that; they probably would not be very difficult cases or very numerous, and probably an opinion might be obtained in that way best.

Do you not find that nice and difficult questions arise in cases of larceny and theft?—Certainly.

It does not depend upon the magnitude of the subject matter?—Certainly not.

Do you conceive it would be a desirable course of proceeding, that the sessions should have the power of reserving cases for the opinion of the Court of King's Bench, as in cases of settlement law?—Of course it would be very satisfactory if it did not encumber the Court of King's Bench too much.

You would think it better that some judicial persons should be taxed for the purpose, than that injustice should be done at the sessions?—Certainly; and I think to have a point of law set right with certainty is extremely desirable. I do not know what the magistrates would do now unless they spoke to some judicial man privately as a friend. It is not unfrequent, I believe, to mention any legal doubt to some counsel not engaged on the trial. I am not aware of any substantial difficulty having actually occurred.

Have you ever turned your attention to the present classification of crimes, treasons, murders and felonies?—Yes.

With respect to the distinction between felony and misdemeanor, has it not often occurred to you that that is a nice distinction?—Yes, certainly, a verbal distinction without any solid reason; a great many misdemeanors are much heavier offences, morally speaking, than many felonies.

In point of practice, there are a great number of misdemeanors more heavily punished than felonies?—Yes, and there are cases where the party may be convicted of a greater or a minor offence, without regard to the charge as laid in the indictment, according as the fact may turn out; for instance, on a trial for obtaining money on false pretences, the prisoner may be convicted of a misdemeanor, though the evidence may amount to larceny; and in the case of a woman indicted for the murder of her bastard child, she may be found guilty of a misdemeanor in concealing the birth.

Does it not occur in the case of statutable offences, that it is frequently difficult to define whether the offence is felony or misdemeanor, as depending on ancient technical and perhaps somewhat subtle distinctions?—Certainly.

One consequence of the distinction between felony and misdemeanor being that counsel are not allowed to address a jury in the case of felony, what is your opinion as to the merits of that distinction; do you think that a good distinction?—No, I do not; I think it is almost a disgrace to the criminal judicature that there should be that distinction where the cases approach so nearly to each other.

You think it is not founded on principle?—I think it is not, as the Criminal Law is now understood and practised.

Do you apprehend that any considerable degree of inconvenience would arise from abolishing that distinction; viz. by allowing counsel to address the jury in the case of felony as well as of other offences?—I should rather have given my opinion the other way, and that a criminal trial is better conducted without speeches.

Generally,

Generally, whether for misdemeanors or felonies?—Yes.

But you think that they ought to be put on the same footing?—Yes.

Do you think it desirable that counsel should not be allowed to address a jury in misdemeanors more than in felonies?—Certainly, I think it would be very inconvenient to address a jury in felony, and I think some inconvenience arises now.

What, in your judgment, are the particular inconveniences which arise from the allowing that practice in the case of misdemeanor, and which would apply to the doing so in the case of felony?—I think that very often, if the court is a weak one, guilty persons might get off, and I think practically there would be a very great difference in the length of time a trial would continue.

If the court were a weak one, do you not think that a person might be frequently convicted for want of his case not being observed on by a jury?—I do not think I ever knew an instance of that; the jury will always discover any thing favourable to the prisoner.

Do you not think that such a case might arise if the court was, as you say, a weak one?—There are a great many considerations arise from the introduction of that question; supposing he had a powerful defender, the summing up must, in order to gain the objects of justice, be a much more strong one, to counteract the speech of the counsel.

Would not you then think it right that there should be no speech by the counsel for the prosecution?—The speech, as I hear the Criminal Law administered, is confined to a bare statement of facts.

Do you believe that to be the general practice?—Yes; I have known Judges stop counsel where they have gone further.

Do you think that the practice of the counsel for the prosecution addressing the jury should be abolished?—Perhaps it might be abolished with advantage in most cases; in some few cases the court and jury would not understand the case so well, if it was complicated, perhaps.

Do you not think that the rule should be general?—Yes, certainly; I cannot see any great mischief in the present use of that privilege.

Might not a clever shrewd counsel make a speech very much tending to conviction without enabling a Judge to lay hold of it?—That is possible.

Do you not think, then, that the prisoner ought to have the benefit of a counsel to speak for him, to prevent that?—It is very possible.

Have you ever read the trial of Patch, for murder?—No; but I have heard that referred to as the case in which the event occurred which I alluded to. In the Midland Circuit, the counsel for the prosecution makes no opening speech, but calls the witnesses; there is no case without a prosecuting counsel.

You think that the length of time to be occupied would be inconvenient; would not there be much time saved in cross-examination by the counsel?—I think we should have both; the trials of misdemeanors are generally considered to occupy more time than felonies; I speak of that species of misdemeanors which approach the nearest to felonies, obtaining money under false pretences.

Would you abolish the speech of counsel in case of treason?—That I can hardly speak to; it was evidently to protect the subject against the Crown.

Are there not many felonies in which the subject also requires protection; cases of the publication of libels on the Government, or other state misdemeanors; may not the prisoner in such cases require counsel as much as in cases of treason?—Certainly.

Would you allow it in those cases and not in others?—I am not aware whether some such exceptions as those should not be introduced.

You would not propose it as a general rule?—When I referred to it as a general rule, I was referring to the cases usually tried at the assizes.

Do you not think it would be difficult to lay down a general rule of distinction as to cases where it should be allowed and where not?—It might be allowed in cases of particular offences; libel for instance.

Would it not be a very difficult thing to draw a line between such libels as should be considered libels upon the Government, or persons connected with the Government, and libels on other individuals?—Yes, I think that might be; prosecutions for libels are so very rare as compared with other offences, that if they were all excepted together it would not signify.

Do you think in civil cases justice would be better administered if there were no speeches of counsel allowed?—I have not turned my mind to that.

Do not you conceive that the law of theft, and some other branches of law, at present depend on some very subtle distinctions?—No doubt they do.

Particularly larceny?—Certainly.

Do you think it desirable that these anomalies should be removed?—Yes, where there are subtleties and nice distinctions, such as what constitutes a breaking in burglary and offences of that kind; I think it ought to be a substantial breaking rather than a constructive one.

With respect to indictments for extorting money by threats, those are considered cases of moral force?—I think there is a pretty plain and broad distinction.

Do you not think that the original intention was the taking by actual force?—I suppose it was.

That it was then extended to cases of obtaining property by threatening to accuse a man of crime?—Probably; but whether there is any evil in so extending it, is another question.

Do not you think it difficult, when you extend it to something so evanescent as exists in some

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some cases, to say how far construction is to carry it, as in the case of constructive possession in larceny?—Certainly, I quite go along with that objection.

With respect to the other consequences of the distinction between felony and misdemeanor, for instance, forfeiture; do you think that a reasonable distinction?—I suppose forfeiture in cases of felony to be quite inoperative; it rarely amounts to anything.

Do you think that distinction rests on principle?—Certainly not.

Would you, in other words, think it right that where two persons, A. and B., commit the same offence, one being a pauper and the other having 10,000*l.*, they should each be imprisoned a year, but that the one having 10,000*l.* should be fined to that amount in addition?—Certainly not.

With respect to deodand, do you think that has any reasonable foundation?—I think it perfectly preposterous.

Another distinction between felony and misdemeanor is, that in the case of a misdemeanor the party is allowed a copy of his indictment, which is denied him in the case of felony; do you think that a reasonable distinction?—Certainly not.

Do you think they ought to have a copy in both cases, or in neither?—I have hardly considered that point; it is not of frequent occurrence that it is desired; and I believe, practically, the prisoner's counsel is always allowed to see the indictment.

Do you think that it is a document which a person would wish to possess who is charged with a crime, to see what the nature of the charge against him was?—Yes, I think it is not unfair to let him have it in both cases.

With respect to a new trial, which in certain cases may be had in case of a misdemeanor, but not in case of felony, do you consider that to be a reasonable distinction?—A great many misdemeanors partake more of the nature of a civil cause that what we call crime; I should think a new trial in felony would be objectionable.

Would it not be objectionable where a party had been tried in fact for a misdemeanor, which misdemeanor turned out to be a felony, as in the case referred to of goods being obtained by false pretences?—I think the same rule should prevail in both cases in these descriptions of misdemeanors.

Do you think a distinction can be drawn between crimes in which you can obtain a new trial and crimes in which you cannot, the object being equally applicable to both cases, that of obtaining satisfaction where the Court thinks there is reasonable cause of doubt; would you not give it in both, or deny it in both, leaving it to the King's prerogative of mercy?—I cannot help thinking that in all those cases which come within the definition of crimes, there had better be no new trial. In road indictments and others of the same description, in which legal questions arise and it is difficult to know what the bearing of the evidence is, they have done all they can to allow new trials.

On the subject of process, is there anything in which it has struck you as desirable that any alteration should be made?—I think that felonies and misdemeanors should be placed pretty much upon the same footing in respect of process.

Supposing that upon a coroner's inquest a party was found to be guilty of murder or manslaughter, would you think it necessary that a bill should also in those cases be sent to a grand jury, for any other purpose than that of having a more formal mode of accusation?—No.

Might not that object be equally well attained by allowing the coroner, after the means of legal consideration, to have the power of procuring a formal charge to be filed a certain number of days before the assize?—Yes, I think so; perhaps he would be hardly so competent to put it into its proper form as the Clerk of Arraigns; it might happen also that some evidence might be discovered between the time of the inquest and the time of the assizes that would put it in a different shape.

Do you mean by increasing it from manslaughter to murder?—Yes.

Would it not be sufficient to leave it in such cases to the parties to go before the grand jury?—Yes, I think so; I think some regulation of that kind might be very well established.

Would that not be a great relief to medical men who have to attend the assizes the first day, and to continue there for many days afterwards?—Yes, I think it would, if provision were made for having the inquest drawn in a proper way, so that the parties should not escape.

With respect to cases of felony, where a magistrate has committed, after taking the depositions according to the form of the statutes, do you conceive that it is necessary or desirable that a bill should be found by a grand jury, the party having been already committed to take his trial upon that charge?—It is difficult to see the usefulness of a grand jury in ordinary cases; but I think it works very well.

Is it not attended with considerable additional expense, in obliging the witnesses to go at an early stage of the assizes before the grand jury, and then to wait for the trial in chief, or to come again?—Yes, it may be so in some respects; it always struck me there was a great advantage in our administration of justice, in connecting with it the principal gentry of the counties in their functions of grand jurors.

The question refers to the case where they do not act as the first mover in the prosecution, but where the magistrates have taken the first cognizance of the offence, and have committed upon it?—I consider that to be the case in ninety-nine cases out of a hundred; I cannot help thinking that the grand jury might be dispensed with altogether, if their duties

duties were confined to those cases where the parties had not been already before a magistrate.

You think that it is desirable that the bills should be brought before the grand jury, though the circumstances have been inquired into before a magistrate who may be supposed competent to inquire, and the witnesses bound over to attend?—There are a great many very loose commitments.

May they not in some instances be attributed to this cause, that though the magistrate has committed, the case does not go before the jury who try the prisoner in chief, unless the grand jury find the bill?—I cannot help thinking that there must be a great many incompetent magistrates.

Do not you think those incompetent magistrates would be more cautious, if upon their sole responsibility a party was to be put upon his trial without the intervention of the grand jury, or the case got rid of altogether?—Yes, I think so.

Now if the grand jury throw out the bill, no more is heard of the case?—No.

In fact, now the responsibility of the magistrates is lost sight, because either the grand jury find a bill, in which case the responsibility rests upon the grand jury, or the grand jury throw out the bill, in which case no more is heard of the matter?—Still the responsibility of committing the party must lie with the magistrate in any gross case, but such cases very rarely occur.

With respect to the trial of offenders, have you any suggestion you would wish to make?—The system appears to work well; an improper conviction is almost unheard of; there re many improper acquittals in my opinion.

To what do you attribute those?—It is extremely difficult to say.

To legal subtleties, or the unwillingness of juries to convict?—I should not think it owing to legal subtleties, but generally to imaginary doubts occurring to the minds of the juries, and which are sometimes suggested by the court.

Would you apply it generally to the unwillingness of juries to convict, or apply it to capital cases only?—I am sure improper acquittals take place in offences that are not capital.

Is there any particular cause of this, capable of remedy, in your opinion?—No; I should say in general we get good juries. If you go through a circuit you will see that of those acquitted there are not many who are perfectly innocent; the acquittals may be proper acquittals, but I believe there are very few of those who are put on their trial who are not involved more or less in the guilt of the offence.

With respect to the framing of the indictments, do you think there is unnecessary technicality?—No; I think there ought to be certainty.

Do you not think it is often necessary to introduce a vast number of counts into an indictment in order not only to state the facts, but to accommodate the facts to every bearing of the Law?—Yes, it is so sometimes; but I should not say that any great inconvenience results from it.

Have you perceived any inconvenience to arise from a sort of compassion on the part of the jury in consequence of what they have conceived to be a capriciousness on the part of the Judge in administering the Law; in such a case as this for instance, where a notion has been entertained that it was felt necessary to depart from the usual course, and to execute for sheep-stealing for instance, for the purpose of putting down the offence in consequence of its prevalence at a particular period?—No, I think that the contrary feeling has rather prevailed, that the jury have felt with the Judge that the prevalence of the crime required an example.

You do not think that it has had an effect upon the minds of juries afterwards?—No; I confess I have heard complaints made rather of the leniency of the Judge than his too great severity.

Have you turned your attention to the establishment of a rural police in agricultural districts, with a view to the prevention of crime?—Yes, my attention was called to it at the time when that subject was introduced into the King's Speech, and I considered it a good deal. It struck me that it would have a very beneficial effect in the preservation of peace in times of disorder, if a certain number of the respectable middle classes were invested with official authority for the purpose of acting in aid of the magistrate, and I think that it might also have the effect of preventing crime in many cases.

Do you consider that the state of the Common Law relating to crimes is incumbered with many subtleties?—Unquestionably.

Do you think the sessions have experienced difficulties arising from that; are there not very nice cases?—Yes, not of very frequent occurrence; the same subtleties will make their appearance in small cases as in large ones.

Do they not get over many difficulties by cutting the knot?—No, I think they generally get a good legal decision.

That is where there are magistrates of the legal profession; but must they not be often at a loss in other cases?—My idea is that there are not many benches of quarter sessions where they have not lawyers attending.

Do you not think that if some such means of taking the opinion on difficult matters of law were established as has been suggested, that would tend to uniformity and an improvement of practice in future?—Certainly, if there were some ready means of getting a decision from authority, it would be a very great advantage, and would tend to disseminate uniformity no doubt.

Is it your opinion that the gaoler is more in favour of whipping than the magistrate?—No;

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No; I have heard the question asked of him, what effect solitary imprisonment and the tread-mill, and whipping, and so on, had upon prisoners; and I remember his answer being that the solitary imprisonment and the whipping were the punishments of which the offenders stood most in dread.

Has not the whipping gone much out of use of late?—No, I do not know that it has it is not however very frequently, nor very indiscriminately, resorted to.

Tuesday, 3d March 1835.

William Ewart, Esq., M. P.; Examined.

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YOU are a Member of Parliament, and a Member of the Northern Circuit?—I am.

You have a paper before you, will you make any observations that occur to you upon it?—This paper relates to the mitigation which has of late years been introduced in our capital punishments. The first change in the law since I came into Parliament was the abolition of capital punishment in the case of coining. The next was in cases of horse stealing, cattle stealing, sheep stealing, and stealing above 5 *l.* in a dwelling-house; the next in cases of forgery, the next in housebreaking, and the last in cases of returning from transportation.

Are you aware of any inconvenience or mischief which has resulted from those alterations?—I am not aware that any petitions have been presented to the House of Commons complaining of them; it further appears that the committals for those crimes, which are no longer capitally punishable, are very slightly increased, and not in any degree out of proportion to the increase of the population. During the three years preceding the mitigation of capital punishments for coining, for forgery, for horse stealing, cattle stealing, and stealing above 5 *l.* in a dwelling-house, 43 persons were executed in England and Wales for those offences. In the same three years the committals for those crimes were 835. For the three years subsequent to the mitigation of the law, the executions being 0, the committals have been 856. There has therefore not been an increase of crime in proportion to the increase of the population. I have chosen, as examples, those crimes in which the punishment was contemporaneously mitigated; but it might also be shown that other crimes, for which the punishment of death has been abolished at other periods, have not increased in consequence of such abolition.

In your judgment the change has not been attended with any mischief?—I apprehend that such is the impression of Members of Parliament who have given their attention to this subject. There has been a vast number of comparisons drawn out to prove the good effect of mitigation; I have not seen any satisfactory ones on the other side of the question.

Do you consider that the punishment of death is still too extensively denounced by the law?—Certainly. Since the recent mitigations, one may reason almost *a fortiori* that capital punishment should be further mitigated; it still remains assignable for crimes less dangerous to property than the crimes for which it can no longer be inflicted; consequently the arguments for its further abolition are in those cases stronger than they ever were. I may instance the crime of sacrilege, still capitally punishable, though never capitally punished; also the crime of letter stealing. We have almost entirely abolished capital punishment in cases of forgery. There is no doubt that the danger to property is much greater from forgery than it can be from sacrilege or letter stealing; yet we retain capital punishment in these latter cases. Perhaps it may be said that the punishment of death is much more frequently carried into effect in cases of letter stealing than it was in cases of forgery; because, though individuals, in cases of forgery, would not prosecute, the Post-office hesitates not to do so in cases of letter stealing. But it is a strange anomaly to maintain a barbarous disproportion in your punishments, simply because an individual prosecutes in one case, and a public body in another.

The necessary trust might perhaps render extreme severity in case of breach of duty necessary?—There is no doubt that breach of trust is an addition to the crime; but breach of trust exists also in many cases of forgery. A Bill was introduced by me last Session to abolish capital punishment in cases of letter stealing; it passed unanimously through the House of Commons, but in the House of Lords no Member could be induced to take it up; it was deemed impossible that such a Bill could pass the Upper House. It was also found impossible to get any Member of the House of Lords to move the consideration of a Bill which passed the Commons unanimously, giving to prisoners a full defence by counsel or attorney.

Do you consider that the making so many cases capitally punishable is attended with any inconvenience and mischievous consequence in the administration of the law?—It produces uncertainty.

From whence does that uncertainty arise, is it that the prosecutors are unwilling to prosecute where the consequence may be capital punishment, or that juries are unwilling to convict in such cases?—I think it operates both ways. I have known myself several individual cases of prosecutors who have refused to prosecute; I know, for instance, a Member of Parliament whose servant committed a capital offence, and who absolutely abstained from all prosecution in consequence of the capital punishment which the criminal would have to undergo.

What

What was the nature of that offence, did it relate to property?—Yes, stealing in his master's dwelling-house.

Do you believe, from your knowledge upon the subject, that is the general impression?—Yes, I am strongly of opinion that it is.

Supposing the number of capital punishments to be reduced, are you able to state any general principle on which you think that reduction ought to take place,—whether capital punishments ought to be principally confined to offences against the person, committed with force and violence?—I think that is a very fair distinction to take, that crimes against property should not be capitally punished. At the same time, my own individual opinion is, that the mitigation ought to go much further. I have read a great deal theoretically upon the subject; many Italian writers have devoted themselves to this question; many French and many Belgian; they all come to the same conclusion. I should not hesitate to abolish capital punishments in all cases except murder; indeed, theoretically, I entertain a strong impression of the unjustifiable nature of capital punishments altogether.

With respect to the offences which come near to murder, or the nearest to murder in point of magnitude, as comprehending great violence to the person, what punishment would you suggest short of capital punishment?—My impression is very strongly in favour of the mode of punishment adopted in the United States, though that system has not yet been perfected. But its principles are excellent—separation and silent labour.

With respect to the extent of that punishment, if capital punishments were done away with in a great number of instances, would it not be necessary to have the terms of imprisonment lengthened?—Certainly.

Do you think in any cases it ought to extend to the term of life, in the case of the most aggravated offences, or would you stop short of that?—I think that in some cases imprisonment for life might be found necessary.

Supposing capital punishments still to be retained in cases of aggravation, besides those of murder, is it your opinion those aggravations in respect of which punishment is to be inflicted should be defined by the law, or that they should be left as matter of discretion, as they are now, to the particular judge and those whose duty it is to deal with the punishment afterwards?—They should, as far as possible, be defined by the law. But there are limits to definition, and the nicer shades of distinction must in certain cases be left to the judge.

In case of punishments which are to be capital (not in case of minor offences, where there is a discretion allowed,) would you in the first place be of opinion that when the law threatens capital punishment, that punishment should be inflicted, unless in extraordinary cases where the Royal Prerogative may be exercised?—Certainty is the great object of criminal as of other laws. If you could make your capital punishments so accordant with public opinion that the public would sanction the infliction of such punishment, there would be no good reason, arguing from expediency only, why capital punishment should not in such cases be inflicted. Though, in my mind, there would always exist a moral and religious objection to the original imposition of such a punishment.

Would you not think it desirable that the punishment should be decided by the particular aggravations of the offences as specified by the law,—that the law should point out the aggravations in respect of which an aggravated punishment ought to be inflicted?—Yes; I am clearly of that opinion, that the law should define it as clearly as possible.

In the crime of burglary capital punishment is denounced against a very large class of offenders, the offences of whom differ infinitely in degree; a great number are convicted, but perhaps not one in fifty executed; is it not an inconvenience that those who are executed should be so executed by the particular aggravations not specified in the law, but known only to the judge?—The law itself should specify the aggravations.

Would it, in your judgment, be desirable that there should be a certain scale of punishments,—different gradations of punishments, known and defined by the law, consisting of several classes, and giving a discretionary power to the judge between a maximum and minimum punishment, to administer such as the case called for?—That would probably be the safest way of limiting the power of the judge, without unduly fettering his discretion.

Have you turned your attention to the number of gradations there ought to be?—No, that is a question of detail, requiring very minute consideration.

In your judgment, would it not be a considerable practical advantage if you had one scale of punishments numbered the first or highest, the second, the third, fourth, fifth and sixth, or whatever number it should be thought proper to appoint; and that when those punishments were once fixed, in defining the crime it should be enacted generally that the punishments should be of such a class, in order to avoid the constant repetition in defining each offence, of what the punishment in each particular case should be?—In the French and in other foreign codes, certain shades of crime of a like nature, and deemed equally culpable, are classified under one and the same head of punishment. Such a mode is more compendious and more clear, than where a constant repetition of the punishment denounced occurs, as in our criminal statutes. It is most desirable that the people should understand distinctly that particular punishments are awarded by the law to particular crimes: and this knowledge would be more simply and more clearly conveyed by the system of classification I refer to, than by the constant repetitions and circuitous phraseology of our Acts of Parliament. As this part of the subject touches on the necessity of clear and well-defined punishments proportioned to the crime committed, I may, perhaps, be allowed to make allusion to the anomaly which exists in our law, in imposing transportation for life, as a fixed and unvarying punishment for crimes greatly varying in their degrees of criminality. In these cases the law makes no distinction, and it takes away the power of making any from the judge. This

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error is, *in principle*, the same as an unvarying and indiscriminate award of the punishment of death. A Bill was introduced four years ago abolishing capital punishments in the case of horse stealing, cattle stealing, sheep stealing, and stealing in a dwelling-house to the amount of 5*l*. This Bill both awarded different sorts of punishment, and between certain fixed limits left a discretionary power to the judge, in conformity with Sir Robert Peel's amendment of the Criminal Law. But when the Bill advanced into the House of Lords it was thought proper, in order to terrify the person about to commit the crime, to impose on all the different degrees of the offences specified the same unvarying punishment of transportation for life. With this provision the Bill passed into a law. It appears to me that the persons who thus legislated committed an error in supposing that a *fixed* punishment must necessarily be a *certain* punishment. The very reason why punishments are uncertain in their infliction is, that they are too fixed and unvarying in their enactment. So it was in the case of the indiscriminate enactment of the punishment of death. So I apprehend it will be found to be in this case of indiscriminate transportation for life. Prosecutors will withdraw or hesitate, where they find a punishment must be inflicted at variance with their conscientious ideas of the principles of justice. This and similar enactments should, in my opinion, be altered.

Have you turned your attention to the efficacy of transportation as a punishment?—I have paid some attention to it. I doubt whether transportation, considered in the light of a *punishment*, will stand the test of time and reason. There is an objection, *primâ facie*, to such a punishment. Transportation, considered as a punishment here, is viewed in another light in the settlement to which the criminals are transported. They are there made, as it were, the instruments of Government, and serve the purposes of the colony. The colonial governor who decides on their subsequent fate, looks upon them in a different light from the judge who sentences them in this country. There must also be a necessary inequality in such a system of punishment, since it must depend on the character of the master to whom the prisoner is assigned, on the nature of the labour he appoints him to undertake, and on various other contingencies.

In your judgment is not that uncertainty, with respect to the real quantum of punishment, attended with inconvenience?—I think it is. It appears to me that no person should be transported for life, and to be left comparatively at large, until he has previously undergone some system of reformatory punishment. By this previous penal discipline, and by his subsequent emancipation in another country, you might act both upon his fears and hopes. By subjecting the prisoner to a preparatory state of discipline in this country or elsewhere, by giving him time for reflection, and adopting all means for his amendment, and afterwards placing him in such a position that he may begin a new life and make himself a new character, the system of transportation might be continued with advantage. But a distinction should first be drawn between crimes of such an aggravated nature, that the reformation of the criminal can scarce be hoped for, and those crimes, the perpetration of which does not exclude the hope of subsequent reformation. Perhaps in the first case a long solitary confinement on the American system would be the best punishment; but in those cases where it is reasonable to hope for a reformation of the criminal, confinement first, and afterwards transportation to a place where the offender might establish a new character, would be a desirable alteration of the law.

In your judgment, is the punishment of transportation attended with any considerable degree of terror and apprehension, as inflicted upon the lower classes of society in the great mercantile districts; do you know whether they regard it with much fear?—No, I do not think that they regard it with so much fear as if they knew the consequences of it; in the colonies they really would regard it.

Do you conceive that the reports which are frequently circulated from time to time of the ultimate success which persons transported meet with abroad, acquiring fortunes and rising to office, and so on, are attended with prejudicial effects?—Yes, I believe, so far as I have the means of knowing the effects produced on such persons, that they have produced an erroneous impression upon their minds.

Do you conceive that that is an impression which, however erroneous, can ever be removed?—No, I think the nature of the sentence creates a wrong impression. The distance gives an indefinite character to the punishment; no distinct idea is associated with a penalty so far withdrawn from practical observation.

Would it not be necessary to hold out to those who behave well after transportation, that their situation may be bettered, and that they may obtain a rank in society superior even to that they possessed before; could that be removed without much inconvenience abroad?—Such a hope of bettering their condition would naturally exist, if transportation were made, not the punishment, but a corollary to the punishment.

Do you conceive the Criminal Law as it stands very satisfactory in its operation on very young offenders?—I think it not satisfactory certainly.

Would it be desirable, in your judgment, that in certain circumstances, to be regulated chiefly by the age of the offender, a magistrate should have a summary jurisdiction in inflicting punishment for small offences, reserving always to the party the right of being proceeded against according to the usual course of proceeding, in case he declines to be subject to that summary jurisdiction?—I think it would appear to be more reasonable to make the summary jurisdiction of the magistrate definable, not by the age of the offender, but by the amount of his offence. The crime supplies the place of age. It has been attempted in the House of Commons to give a summary jurisdiction in cases of extreme youth; but it may be doubted whether such a distinction will stand the test of reason.

You would draw the distinction by the amount of crime?—Yes.

Do you mean by the value of the property, or what other circumstances?—I do not think that value is generally a good measure of criminality.

You mean value where there are no circumstances of aggravation, as stealing from a dwelling-house, or in the night time, or with reference to the unprotected state and situation of the property?—Yes; simply value.

Have you had any opportunity of judging whether the punishments as now inflicted on young persons, which are usually very slight indeed, are not attended with this inconvenience, that they afford too slight an impediment to the commission of crime in the first instance?—I think so.

As the principle of punishment is the prevention of crime, is there in the punishments usually inflicted on juvenile offenders at the sessions, any sufficient obstacle to the commission of crime?—No, I do not think it is sufficient, nor do I think that the principle of separation is sufficiently adopted in the case of young offenders.

Do not you conceive that for the purposes of reformation, the imprisonment of the young offender, which is usually for a few days or a few weeks after the sessions, ought to be for a longer term?—That would depend very much upon the nature of the confinement to which they are subjected; if that confinement implied separation and silence, the imprisonment need not be so long as it ought to be under the present system of prison discipline. Under the present system it is too short.

Do you not conceive, that in a large manufacturing town like Manchester, by throwing a great number of young persons into prison for slight offences, where they may be congregated together with thieves older in iniquity, great mischief is done?—There is no doubt of that.

Do not you think that might be partially prevented by giving to magistrates a summary jurisdiction, and partly also by inflicting a punishment which should operate more strongly by way of prevention than those now inflicted?—Yes, the nature of the punishment is susceptible of great improvement, and the jurisdiction might be more summary, especially if the tribunal were improved by the more extensive introduction of stipendiary magistrates of legal education.

Do you think so in respect of their being too lenient?—I do not think they receive a proper judicial education. I apprehend that a man who has received a regular legal education, as well as enjoyed an opportunity of observing the practical application of the laws, would make an infinitely better magistrate than a man chosen on account of the convenience of local situation only, or nominated (as magistrates frequently are) from political considerations.

Would it be desirable, in your judgment, that the line of jurisdiction as to offences tried at the assizes and those tried at the sessions should be more distinct than at present?—Yes, I think it should be more distinct, especially as (since the mitigation of capital punishment) many cases are now tried at the sessions which formerly were tried at the assizes only.

Is it not the practice now to try offenders for offences at the sessions for which they are liable to transportation for life?—Yes.

And cases where there is no discretionary power,—where the statute is positive?—Yes; for instance in the cases of unvarying transportation for life, described in a previous portion of the evidence I have given.

Was it not formerly the practice to commit for trial at the assizes larcenies attended with aggravations which constituted them burglaries, and offences of a much higher degree?—Yes, it was.

Highway robberies in particular?—Yes.

Do you conceive that the present definitions of crimes are defective?—Yes, I think they are certainly.

Have the constructions put upon the old definitions of offences for the purpose of enlarging the power of Criminal Courts been attended with uncertainty and inconvenience?—Very great indeed. That inconvenience is pointed out in the report of the Commissioners on the law of theft, a most able document in my opinion. In cases of burglary the inconvenience is also manifest.

Do you conceive that that which is there taken by way of example, and for the purpose of ascertaining what the state of the law is as to theft, is, in a considerable degree, also applicable to the definitions of other offences?—Yes.

For instance, burglary and homicide?—Yes.

In your judgment, does the want of certainty in the laws render their application more uncertain, both because the extent of crimes and of punishments is not known, and because the punishment is not certainly inflicted?—I think that our definitions of crime (as well as our inflictions of punishment) are uncertain. The people are not fairly treated by our Criminal Law; means are not given them of knowing what constitutes the crime with which they may be charged.

Do you conceive that the distinction of crimes into treasons, felonies and misdemeanors, and particularly the distinction between felonies and misdemeanors, is founded on any just principle?—No, I do not think it is.

In your judgment, are not many offences, especially those which relate to the fraudulent taking of property, some of which are felonies and some misdemeanors, almost undistinguishable?—I think they are so.

In your judgment, is so great a difference as exists in practice between the proceedings against persons charged with one class of offences and another warranted in principle?—No, I think not.

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Particularly with respect to the privilege which the prisoner, in case of misdemeanor, has of having the jury addressed by counsel, which is denied in cases of felony; do you conceive that well-founded?—No; I think it a distinction not founded on reason at all.

Do you conceive there ought to be a similarity of practice upon that subject?—I think there ought to be a similarity of practice. But it appears to me that the practice in cases of felony should not be assimilated to the practice at present prevalent in cases of misdemeanor. The practice ought in both cases to be altered, and brought to a common point of union; for instance, I think that both in cases of felony and in cases of misdemeanor, counsel should not only be allowed to speak for the prisoner, but that the prisoner's counsel should always have the last word, according to the principle of the civil law, and according to the practice of all those countries which have adopted it as the basis of their criminal proceedings. Our mode of conducting a defence in misdemeanors appears to have been imitated from our mode of proceeding in civil cases.

Would you make a distinction between the practice in felony and in misdemeanor, or put them on the same footing?—I would put them both on the same footing, and cases of treason also.

Would you give the prisoner the last word in all cases?—Yes; I have never heard a good reason against it, and it is justified by the practice in Scotland and in other countries.

Do you know any country in which the person charged with a crime is debarred the benefit of counsel in addressing the jury?—I am not aware of any. The United States of America, which borrowed their legal proceedings from England, formerly followed our example in denying to a prisoner the right of full defence. But now, I believe, in every one of the United States the prisoner has the privilege of defence by counsel or attorney.

Have you understood that any inconvenience has arisen from the practice of allowing it?—No; I know that some English lawyers think so; but I never met with a Scotch lawyer, whatever his general opinion might be, who did not think that the apprehensions entertained by English lawyers were ill-founded. I have introduced Bills during the two last Sessions of Parliament for giving the prisoner a defence by counsel in all cases, and equalizing the system of defence, making it similar in treason, felony and misdemeanor; on those occasions I had opportunities of hearing the opinions of Scotch lawyers on the subject. They were all in favour of the measure. Perhaps the Commissioners would not be indisposed to hear a brief statement of the information which I was enabled to collect, as to the practice in Scotland, on that occasion; especially as it may induce them to extend their inquiries into the whole system of criminal procedure in Scotland.

The Commissioners will be obliged by the statement.—I understand that in criminal proceedings in Scotland the whole evidence is first gone through on both sides. The counsel for the prosecution then addresses the jury; the counsel for the pannel (or defendant) addresses them in answer. If the counsel for the prosecution thinks proper to reply on the speech of the counsel for the pannel, the power of answering always ultimately rests with the counsel for the pannel; he has always the last word. I thought that this plan, being proved to have succeeded in Scotland, might be with great facility introduced in England; and that we might open the proceedings, as they do, with the evidence, leaving the speeches of counsel to follow. But I found on inquiry, there was this great distinction between the criminal procedure of the two countries. In Scotland the indictment contains a most exact and elaborate account of the nature and circumstances of the offence. In England the indictment is short and general; in England therefore an opening speech is requisite, to enlarge upon and expand, as it were, the charges contained in the indictment. In Scotland the minuteness of the indictment supplies the place of an opening speech. In addition to this, in Scotland, 15 days before trial, a copy of the indictment is delivered to the prisoner. He is thus enabled to have his evidence arranged, and to give the fullest answer in his power to the evidence for the prosecution. On the prisoner's side therefore, as well as on the prosecutor's, an opening statement is unnecessary in Scotland. In England it is necessary on both sides: because the indictment gives no opening statement, and because the prisoner, having no precise previous intimation of the charges which will be brought against him (as he would have by delivery of the indictment in Scotland), cannot so mould his case and arrange his evidence before trial as to be able to dispense with an opening statement. In the Bill therefore introduced last session, the course suggested was this: that the prosecuting counsel should make his opening statement and call his witnesses; that the counsel for the prisoner should then address the jury and call his witnesses, and that if any reply should be made by the counsel for the prosecution, the counsel for the prisoner should have the right to answer such reply. Thus the prisoner would have the last word; and these full means of defence were to be extended to cases of treason and misdemeanor, as well as felony. This is, as I understand it, the course of proceeding in France, though not, as I have said before, in Scotland.

Has the counsel for the prisoner in France a right of answer?—That is always the case in countries where the Roman law was the basis of their system of jurisprudence. It was an axiom laid down in some part, I think, of the Novels of Justinian, "*Non debet actori licere quod reo non permittitur*;" and this principle has been generally adopted by continental nations. One of the objections raised to the introduction of such a principle into our law is the sacrifice of time which, it is said, such an alteration would occasion. To show that in the opinions of Scotch lawyers such apprehensions are of an exaggerated character, I will just read an extract from Alison's and from Mr. Baron Hume's works on the Criminal Law of Scotland. After observing that counsel were originally given to Scotch prisoners by an Act which passed in the year 1587, Mr. Alison continues to say, "This privilege has not been found to lead to any abuses or evil consequences uniformly held forth in England

as

as likely to ensue from its adoption. As the pressure of business increases, the necessity of expedition and despatch is more strongly felt by both parties; concessions take place by advice of counsel, in cases where resistance is hopeless; speeches are dispensed with on both sides when nothing can be said against the evidence, and criminal business is conducted on the circuits, it is believed, nearly as rapidly in Scotland as in England; at all events, sufficiently rapidly." Mr. Baron Hume, in his book on the Criminal Law of Scotland, says, "In two occasions the assizes at Glasgow were the heaviest in the island, not excepting York and Lancaster; but in both the business was concluded in eight days of actual work." There is another portion of the Scotch criminal system well worthy of our imitation—I mean the establishment of a public prosecutor. The Lord Advocate is the public prosecutor in Scotland. The Solicitor-General and four advocates-depute act as his deputies. They may prosecute in any court in Scotland. Besides this, there is a Sheriff's Court and the Borough Court. Before these the Procurator Fiscal prosecutes. I would further add, that these lower courts and the justices of peace have in Scotland no power of transportation, or of inflicting corporeal punishment, or any punishment greater than imprisonment. The Commissioners will perhaps allow me to state the following short summary of proceedings, so far as they affect the prisoner in Scotland. The prisoner has a right to a copy of the warrant and petition for the warrant by the prosecutor. The indictment must be minutely exact in its statements. Fifteen days before the trial, a precise copy of the indictment must be given to the prisoner, with a list of the witnesses and of the assize or jury list. On the trial in court, if the prisoners are too poor to retain counsel, the court assigns them compulsorily. I do not think that this compulsory power is desirable. Indeed the Scotch writers admit that it is scarcely necessary. The speeches by counsel are then conducted as before described. Previously to the sentence, the prosecutor has a power of restricting the libel; that is, he may bring down the punishment from the capital punishment to a punishment short of death. In such case the judge cannot pronounce a capital sentence. I ought to apologize for introducing this portion of the subject to the notice of the Commissioners, conscious that it would proceed with greater propriety from a member of the Scotch bar. But I was desirous of stating my impression of the expediency of an inquiry into the mode of criminal procedure in Scotland.

Do you know whether the power of restricting the libel has ever been acted on?—I apprehend that it has; but on that point I cannot speak with certainty.

You have mentioned as one objection to the hearing counsel address the jury in cases of felony the length of time which would be occupied; do you consider that in point of fact much more time would be occupied?—I think that more time would be occupied, but not so much more as is generally apprehended.

Do you conceive that time would be saved in cross-examination of witnesses on the part of the prisoner?—Yes, I think that a speech is now often made under the mask of a cross-examination. The time absorbed in this circuitous process would of course be saved. Those who object to a full defence by counsel are apt also to forget this circumstance, that the power of answering given to the prisoner's counsel would often prevent the counsel for the prosecution from replying on the prisoner's evidence. He would feel that his reply would call down an answering speech.

Supposing the objection as to time is better founded than you think it is, should you conceive that a very material objection?—No; I think not against the great principles of justice and of truth.

Do you conceive it would be a very strange inconsistency to allow counsel for the prisoner to take up the time of the court as long as he thought fit, on a mere question of five or ten pounds as to property of that value, and that when the prisoner's life was at stake he should not have the assistance of counsel?—I think that is a very cruel distinction, and one which cannot long continue to exist.

How would you propose that prisoners should obtain counsel,—to be assigned by the court or retained by the public?—That he should be appointed by the court.

Should he have fees?—No; I do not know from what fund the fees could proceed.

Should they not come from the same fund as the fees for prosecutors' counsel?—They might; but I believe the prisoner's counsel have no fees in Scotland, and I think that they have none in France.

Supposing no provision to be made, but that it was left, as in a civil case, for the prisoner or defendant to employ counsel to speak for him if he chose, would it be desirable to go to that extent?—Such a limited concession would not be just. The power of employing counsel would then depend on the wealth or poverty of the prisoner, not on the merits of his case.

Your Bill went not only to allow but to supply counsel?—Yes, and in cases before magistrates as well as in the higher courts. But this provision was opposed in the House of Commons by Members who were magistrates.

It has been sometimes said in answer to objections on the ground that the court ought to assign counsel, that the judge is the prisoner's counsel, do you conceive that objection to be founded on principle?—No; I think it quite contrary to principle; if he is an efficient counsel, he transgresses his proper power as a judge; if he is an inefficient counsel, the prisoner is not properly defended.

In your opinion would he be an efficient counsel, without knowing such facts as the prisoner could communicate?—He could not. Blackstone, I think, states that the judge is only so far counsel for the prisoner as to see that he is fairly treated. If that is the amount of the judge's defence, he is not an adequate counsel.

Have you found that in practice at the sessions or otherwise, the presiding judge is usually counsel

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Examination of *W. Ewart*, Esq. M.P.

counsel for the prisoner?—No; I think that, as far as my limited experience has gone, he certainly is not.

Are you aware of any other objections besides that mentioned, on the score of the time occupied, to the allowing a counsel to speak in cases of felony?—There have been some objections taken to the increased severity of punishment which it might introduce. There is no doubt that guilt would escape more seldom than it does at present. But I apprehend the foundation of this alteration to be the attainment of truth, and consequently the more certain punishment of guilt, as well as the more complete defence of innocence. I cannot therefore admit the validity of this objection.

Has it not been objected sometimes that a greater number of prisoners would be convicted?—I do not think that is an objection, if they deserved conviction.

Has any other objection of magnitude occurred to you, or have you heard any stated?—No, I do not at the present moment recollect any other; if the Commissioners have heard of any other, I should be very happy to state whether it has been raised in the House of Commons.

It has been sometimes said that the judges would not sum up with that calmness and fairness they now do,—that there would be more heat introduced into the proceeding?—I think it probable that, counsel being allowed to prisoners, a very humane judge would feel himself at liberty not to lean so decidedly in favour of the prisoner as, in the prisoner's present unprotected state, he may consider himself bound to do. He will feel himself at liberty to follow the fair inferences of reason; to hold the balance evenly between the two parties, without swaying it, as he now does, on one side. On the other hand, the change proposed will give the prisoner a much more effectual protection than he now enjoys against a judge who inclines to undue severity.

The summing up of the judge must in all cases be in some measure an answer to the speech of the counsel for the prisoner, must it not?—I do not see, if the proposed system of full defence be given to prisoners, why it should be so. The duty of the judge will be, simply to state facts unobserved or arguments omitted by the counsel on either side; not professedly to answer the speech of either party.

Is there any risk of the result of the trial depending upon the merits of the counsel opposed to each other in the prosecution and defence?—That is an objection which must to a certain extent prevail in all cases, civil and criminal. We cannot insure equality of talent on both sides; some inequality must occasionally exist against the prisoner. But the defence even of an inferior advocate is better than no defence at all.

Must not considerable inequality arise from the difference in professional skill of the opposing counsel?—That cannot be denied.

In your judgment, would it be a greater inequality than now takes place where there may be on the one side a very able advocate, with the power of addressing the jury, and an inefficient advocate, or, at all events, one who has not the power of addressing the jury, on the other?—I think that the objections against the present system are greater than the objections against the proposed innovation.

In your judgment, is it attended with inconvenience, in cases of misdemeanor, that counsel should be allowed to address the jury?—No; at all events it is proved that it cannot (as some say) act detrimentally to the prisoner, because he always takes them when he can pay them in such cases; he does so, even though he is subject (under the existing system) to a reply from the prosecutor's counsel; an inequality which I wish to remove by giving to the prisoner's counsel a right of answer. If the prisoner, therefore, adopts the present incomplete power of defence awarded him by law, much more will he avail himself of the more effectual instrument of defence which the change proposed will give him.

Is one of your reasons for postponing the address of the prisoner's counsel till the evidence is given, that the counsel cannot so well address the jury till the facts shall have been proved on which the speech is to be founded?—I was once favourable to the postponement of the speeches till the evidence had been given. But after reflecting on the incomplete character of an English indictment, I think it more reasonable to make the speeches precede the evidence, as they do in this country, than follow the evidence, as they do in Scotland.

Would you think it more desirable that the prisoner's counsel should address the jury upon the facts before or after his evidence is given; would it in your judgment be more desirable that the speech for the prisoner should be made before his evidence is given or after?—I am aware that some opinions are favourable to the speech being after; but it appears to me best to enable him to speak before, particularly as, according to the alteration proposed, he would always have an ultimate power of answer, if the prosecutor's counsel should reply upon his evidence.

You would allow him to reply upon the prosecutor's counsel?—Yes; I would always give him a final answer, if there is a reply on the part of the prosecutor; adopting the principle of the civil law, and giving the last word to the accused.

With respect to the indictment, do you think that a difference ought to exist between misdemeanors and felonies, and indeed between misdemeanors and larcenies, as to allowing a copy of the indictment?—No, I think it ought not to exist.

Do you think a copy ought to be allowed in each case?—Yes, I think so. I would further suggest that the prisoner ought to possess a copy of the depositions against him before his trial; the Scotch law gives this fair notice of accusation to the prisoner, since the exactness of the Scotch indictment supplies the place of a copy of the depositions; and a copy of the indictment is given in Scotland fifteen days before the trial.

Do you conceive that the practice of allowing copies of depositions to prisoners would not be attended with this inconvenience, that you would often detect slight variances between

between the depositions of witnesses as taken down, and the evidence given on the trial, arising not so much from any real variance as from the careless way in which depositions are frequently taken by magistrates' clerks; and would not that be attended with inconvenience?—It might be so. But the contingency of such an inconvenience (which might be remedied) does not counterbalance the argument in favour of giving full and distinct notice to the prisoner of the charges made against him.

Would it not be desirable to enforce, if the thing could be done, the taking the depositions originally in a more correct and exact mode?—Certainly it would.

With respect to the forms of indictment used at present, is there any thing strikes you with respect to them; for instance, the necessity of such a number of counts as are now introduced to apply the state of facts to a great number of legal definitions?—If an indictment could be approximated more to the charge really brought against the prisoner, and not made so technical a document, it would, I think, be better; and so far it would approach more nearly to that which I understand to be the frame of the indictment in Scotland, which consists of a statement of facts, so exact, that if there is the slightest variance between the indictment and the proof on the trial, the prisoner escapes.

May not that be carried too far?—It may; there should be a certain judicious latitude given to proof. Substantial proof should be sufficient.

There may be a new trial in case of a misdemeanor, but, as you are aware, none in case of felony; do you conceive that distinction ought to be made?—No; the only court of appeal, in many cases, is the Home Office. I think that it should not be so; the criminal court of appeal should be a judicial tribunal, not a government office.

With respect to difficult questions of law which sometimes occur at the Sessions, do you not think there ought to be some regular and systematic mode of deciding those questions?—I do.

You have already suggested what the present mode is, when a doubt of that kind occurs,—an application to the Secretary of State; have you considered at all in what way that defect might best be remedied?—I think that it is a subject which requires very great consideration. It is more befitting the deliberation of a Commission than the decision of an individual. I merely state my impression, that with the very best intentions, the Home Office cannot give the same attention to the law and facts of a criminal case, which would be given by a legal court of review.

Has it occurred to you to consider whether it might be desirable that a case should be reserved by the Quarter Sessions or other inferior criminal tribunal, in case of doubt, for the opinion of the Court of King's Bench or the Judges of Assize?—Yes, that would, I think, be a judicious reform.

You are no doubt aware, that formerly the finding a bill by the grand jury was the first step of criminal proceeding previous to the establishment of magistrates, who had the power of precognition in criminal cases?—Yes.

Do you conceive that, that power being once established of a magistrate's hearing evidence, and committing the person charged to prison, and binding over the witnesses to appear at the assizes, it is necessary there should be a still further preparatory inquiry by going before a grand jury?—No; presupposing that the first inquiry is made by a satisfactory legal authority, and that the present system of an unpaid magistracy were abolished or amended, the interposition of the grand jury might probably be dispensed with.

Supposing that the magistrate has exercised his power to commit, and that the commitment has taken place, and evidence has been transmitted, would that, in your opinion, be sufficient, and would it not be attended with great convenience and saving of expense, if the witnesses were not obliged to go before a grand jury, but the depositions returned to the court, and a bill filed by some public officer, such as the Clerk of the Crown, whose duty it should be to draw the indictment?—Yes, I am inclined to that opinion.

As to the forfeitures incident to a conviction for felony, which are not incident to a conviction for misdemeanor, do you conceive them to be founded on any satisfactory principle?—No, I think on none.

Would it be desirable, in your judgment, where property has been stolen, and in other cases where damage has been done to property, that any compensation should be made out of the offender's effects, if any?—Yes, I think so.

Might it not be objected, that it would be somewhat in the nature of a civil remedy, and the parties might become interested and biassed in the testimony they gave, and if so, would that be a sufficient reason for withholding that satisfaction?—No, I do not think it would; it has always appeared to me just that such compensation should be made.

Would not the principle, if valid at all, be equally operative against allowing the restitution of goods where the prosecutor prosecuted to conviction, which is allowed by statute?—Yes.

Would you think it desirable as a general principle, of course subject to be limited and moulded by proper rules, that a person who has been guilty of an offence against the property of another by stealing it or partly damaging it, should be obliged by hard labour to make some degree of compensation to the party injured, in order more practically to instil the observance of the laws of property, the loss of the prosecutor being generally lost sight of; that the length of the imprisonment should depend in some degree upon the making satisfaction, and that the punishment should be greater, where the offender had stolen to a greater extent?—It has always appeared to me that value is a bad measure to take in estimating the amount of crime, and consequently a bad measure of the amount of punishment. Many other elements besides value determine the amount of a crime. These elements ought to enter into the award of punishment.

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Examination of *W. Ewart*, Esq. M.P.

But as being one ingredient, might it not tend to instil the general principles of honesty?—Judiciously applied, it might.

So that by depriving a person of property of larger amount, the offender would necessarily bring upon himself a greater degree of punishment?—Yes; any thing which connects crime and punishment, as cause and effect, would operate with advantage upon the mind of a prisoner.

Have you considered the technical distinction which exists in the case of felony, but not in either treason or misdemeanor, respecting accessories before the fact; does not that frequently introduce a great deal of nicety and difficulty?—Yes.

Do you think that founded on justice or proper principle?—I think that the distinctions of accessories before the fact and after the fact, and principals in the first and second degree, technical distinctions, which should be simplified and rendered more intelligible.

Would it not be more simple, equal and just, and get rid of nice and technical distinctions, to consider a person who caused another to set fire to a barn, to be just as much guilty of the crime as the person who actually did it?—Yes, I think it would.

Perhaps you would think it still less desirable that there should be a distinction between principals in the first and second degree?—I do not think that is a reasonable distinction.

With respect to accessories after the fact, do you conceive that the law is founded on any just principles, which should make a man who harboured another, knowing him to have committed a felony, himself guilty of felony, for which he was subject to forfeit his whole property?—That construction of the law is among the traps and pitfalls the law.

That would go to this extent, that if a man knew that his servant had committed a felony, and for his previous good character, and for the purpose of reinstating him in the means of getting an honest livelihood, concealed him, he would be guilty of felony, and subject to the loss of his property?—Such a construction ought not to exist. The doctrine also which makes men, meeting with a common intent, answerable for the act of any one of them, sometimes extends beyond the limits of equity.

In case of executions on conviction of murder, is it desirable that death should so immediately follow the conviction of crime; does it not often happen that there occur circumstances which lead to inquiries, which ultimately show that it was a mistake?—Yes, I think that in cases where there is the slightest doubt, ample time should be given. Sufficient time also should be given for persons in the place where the crime was committed, and the inhabitants of the place from which the prisoner comes, to make any representation, tending to mitigate the character of the crime before execution; but (protesting generally against the punishment of death, and speaking of other punishments) I think it desirable, after the crime is once fully established, to associate, by approximating them in respect of time, the ideas of crime and punishment.

Do not you think that it is expedient that the public should have an accurate and defined summary of the Criminal Law?—Certainly I do.

So that it should be accessible to all parties?—Most certainly.

Have you ever turned your attention to the propriety of the French practice of examining the prisoners?—Not sufficiently to entitle me to pronounce a decided opinion on its propriety or impropriety.

Are you of opinion that a public exhibition of punishment by forced labour in the highways would be beneficial as preventing the commission of crimes?—I doubt whether such an exhibition produces any great effect.

It is a system which has been tried abroad, are you aware how it has operated?—No; but I think that any punishment which tends to make a prisoner believe that a mark is set upon him, indelible throughout his future life, such as (to a certain extent) the punishment you have mentioned, branding, and like punishments, are impolitic; they may render the prisoner irreclaimable.

Would it, in your opinion, be desirable that on criminal trials, instead of the jury being bound to give a verdict of guilty or not guilty, it should be according to the Scotch system, not proven, which would be analogous to the *nisi prius* practice of nonsuiting the prosecutor, without a distinct finding of guilty or not guilty?—I have not perhaps given to that subject the consideration it deserves.

At present a party cannot be indicted again if he is found not guilty of the offence; might it not be desirable in certain cases to give a power of prosecuting again?—With that view it might be desirable.

In your opinion would it be advantageous to afford facilities to poor prisoners unable to bring witnesses,—to bring them for them?—It would of course be better to do so than that the object of justice should be defeated. But such an end would also be materially promoted by bringing justice near the abodes of the great mass of the population. It would then be much easier than it now is for any person to bring his witnesses into court. An alteration of the assizes would facilitate that object. In the county of Lancaster, prisoners tried at Lancaster for crimes committed at Manchester or Liverpool, have not been able to bring their witnesses to the place of trial. Our smaller local Criminal Courts also demand much improvement in this respect.

The prosecutor in fact has that advantage at present?—Taking that into consideration, the prisoner ought also to enjoy the facilities to which you have referred above.

Are you aware that some difficulty has frequently arisen from the circumstance of persons being committed on suspicion when there has not been sufficient evidence to convict, the consequence of which is, that, if a jury found a bill, he must be acquitted, and cannot be again

again tried, because he would plead *autre fois acquit*?—Yes, I apprehend inconvenience has arisen from that circumstance.

Would it not be desirable that there should be a power lodged somewhere or other, such as that of delaying the sending the bill before the grand jury until further inquiry has been made?—Yes, I think that such a change would promote the ends of justice.

The course the judge will often take, now, is to advise the grand jury, on that ground, not to find the bill?—Yes.

To that extent the finding a bill by the grand jury is an inconvenience, as he must be tried: the evidence being insufficient, he is acquitted, and cannot be afterwards brought to justice?—It is so.

Do you think it desirable that preliminary inquiries with respect to evidence in cases of offences, and particularly heinous offences, should be more strict and systematic than they now are?—Yes, I have often thought that there should be greater exactness and perhaps more competent persons employed in taking the evidence on committals.

Do you believe that prisoners frequently escape in consequence of the want of sufficient care in taking the depositions?—Yes.

Particularly in cases of homicide, where it is necessary to observe the position of the deceased, and the marks of violence, and the situation of any instrument of violence, and a variety of other circumstances which are usually material subjects of inquiry in cases of homicide?—Yes, I think a much greater degree of exactness is highly desirable.

Have you ever considered to what description of officer that should be intrusted, whether the coroner should be a more efficient officer, or whether some other person should be employed?—I think that the office of coroner is not adequately filled in many instances; but whether the office of coroner should be abolished, or the mere administration of it amended, I have not sufficiently considered to entitle me to give a fair opinion.

Do you conceive that the expenses of prosecutors are sufficiently provided for; or have you heard complaints of certain expenses being thrown on different parishes and officers who have been bound over to prosecute?—I have heard that complaint made.

Ought those expenses to fall on a particular parish, which may happen to be a small one, the offence happening to be committed within that parish?—I think that such an occurrence is frequently a hardship.

What do you think of the binding over a man to prosecute whether he is willing or not, ought he not at all events to be remunerated all the expenses he is put to?—I think he should. The establishment of a public prosecutor, paid by Government, would probably be the best remedy. The principle of public prosecution ought to be extended to this country. It exists in Scotland; it exists on the Continent; and it ought to exist here. In this respect the principle of the Civil Law, which those countries followed, was a most just one. The Civil Law held the Emperor to be the *pater patriæ*, and therefore bound universally to pursue crime and protect the people.

Friday, 6th March 1835.

The Attorney General (Sir *F. Pollock*); Examined.

DO you consider it desirable that counsel should be allowed to address a jury on a charge of felony?—I certainly do. It appears to me that the question of the benefit to the accused may be presented in a very clear form; thus:—No person having a right to retain counsel would, in my judgment, omit to do so if he were under accusation; and as the law now stands, I think no person competent to address a jury, if he were standing at the bar as a criminal, would omit to act as his own advocate and urge to them every topic which could be presented in his own favour. I think I may assume that every gentleman under accusation would certainly be glad to avail himself of the assistance of counsel, and that every person competent to act as counsel, if he could not employ another advocate, would himself act as his own counsel. I cannot therefore conceive that there is any foundation for the argument that it is a benefit to the prisoner to be without counsel. In one sense it may be a benefit. It is very likely that more prisoners are acquitted under the present system than perhaps would be acquitted under a new system that allowed of counsel for the prisoner; but the misfortune, I think, of the present system is, that the favour is shown to the wrong class of accused persons. I think if prisoners had counsel, every case would be more thoroughly sifted, and guilt would very frequently much more clearly appear; but I think innocence would have a much better chance of being made manifest, and the accused party, on the whole, would have much more justice done to him.

You think it would be of the utmost advantage in the investigation of truth?—I am most clearly of that opinion; and I need hardly tell the learned Commissioners that the origin of the practice certainly cannot be looked to as a justification of it, because the denial of counsel to prisoners arises out of its being supposed that the proceedings are on behalf of the Crown, and therefore that counsel are not to be heard against the Crown. There was a time when the prisoner's witnesses were not even sworn. It is quite plain that the King has no interest in the guilt of his subjects; on the contrary, it must be the interest of the Crown that every investigation in a court of justice should be conducted by such means as are most conducive to the ends of truth.

At all events, do you think there is any thing that justifies that wide distinction now made, between treason on the one hand and felony on the other, and felony and misdemeanor?—I certainly do not; and I may add, that not only does it appear to me to be contrary to all principle, contrary to what every man would certainly wish for himself or those persons in whom he might take a great interest; but I have known, I think I may say on several occasions, great injustice done for want of counsel.

Do any instances occur to you at the moment to which you are able to refer?—I have no desire to conceal the strong impression which has been made upon my mind on several occasions many years ago. I remember once a person of the name of Hodgson tried for rape. I think it must have been about the year 1811. He was convicted. I feel quite convinced that if his counsel could have addressed the jury he must have been acquitted, and it was a conviction that gave great dissatisfaction to the whole bar, and I believe to the public. I was present during the whole of the trial, and recollect, to this day, the circumstances that were detailed in evidence, and I think there can be no doubt of his innocence of the crime as charged upon him, though probably he had been in a situation to create considerable suspicion.

That was a case of direct evidence, where, amongst other things, the prosecutrix swore to being carried across a public street in Leeds?—Yes, the Brigate. I have no doubt she was at first a consenting party, but that she was forcibly detained a longer time than was convenient to the domestic arrangements of the family in which she was a servant, and having been detained, probably by some degree of force, during the latter part of the interview, she converted the whole matter into a charge of rape.

In that case the speech of counsel would have been directed to the question whether the statement of the prosecutrix was credible throughout?—Yes; and I would remark here that that is a class of cases which peculiarly calls for the assistance of counsel.

Do not you think it is also very desirable, in case of circumstantial evidence, to show the bearing of the evidence?—That is the class of cases I mean. I remember a case of a conviction for murder on the northern circuit; the precise year I do not now recollect, nor am I desirous to name either the individual or the judge who tried him; but I have the strongest impression that the man was convicted, being entirely innocent, the death being not at all satisfactorily accounted for as a case of murder, either in respect of the motive of the prisoner or the means by which he had committed the crime, and I thought then that if the attention of the jury had been called by the speech of counsel to the circumstances, the result would probably have been very different. The man was executed, and to the last persisted in declaring his innocence, and in stating *that* to be the truth which was the view of the case taken by several gentlemen at the bar at the time. I remember in particular one counsel who was present, and who is now a distinguished ornament of the bench, agreed with me entirely in the view I took. Believing, therefore, that on more than one occasion accused persons in this country have been executed upon convictions which did not appear to be warranted by the evidence, and which evidence would not have produced conviction if counsel had been allowed to address the jury, I am a strenuous advocate for allowing counsel whenever the accused party is desirous of having the benefit of that assistance.

Are you of that opinion from what you have heard upon the subject, as well as according to your own experience?—There is a very considerable difference of opinion certainly in the profession, and many very eminent, enlightened, able, experienced and humane persons have been altogether of an opinion different from mine, and I must admit that, as far as my experience goes, I think the majority of the profession would be adverse to a change of practice. Various arguments are urged in favour of the present system. One frequently urged is the injury that it would be to the prisoner, and I think it would frequently be injurious in showing the strength of a prosecution and exposing the weakness of a defence; but I think that argument ought to have no weight, because the object of a trial is not to conduct the proceeding in a manner most favourable to the accused. The object is to do justice and obtain the truth, and if that in some cases would more strongly tend to conviction, I think, with reference even to those cases alone, it ought to be adopted, but still more so in the cases where innocence would be better protected.

Do you think it would also be more satisfactory to the public that there should be that full investigation?—I think it would be much more satisfactory to the public. There are other arguments that are urged against the allowing counsel to prisoners which I have heard. One is the very great time that would be consumed in the investigation. I rather doubt the truth of that objection in fact, but in principle I think it ought to have no weight, even if it were well founded in fact; but I very much doubt whether it be so. The present system leads to very long cross-examinations, the object of which is to make a speech under the pretence of a cross-examination, and to inquire into a number of particulars which are in themselves of little or no moment, except as they enable the counsel either to make remarks while he is putting such questions, or indirectly to call the attention of the judge and the jury, not to the circumstances, but to the arguments that may be drawn from them. I think if the counsel had to make his observations directly to the jury, he would present his case in less time, with more clearness, and under circumstances more favourable to the judge and to the jury, distinctly understanding what is the object in view.

Supposing that that objection were better founded than it is in your judgment, ought the greater consumption of time to be set in opposition to the effectual administration of justice?—Certainly not.

Those objections which you have suggested would apply as well in the case of misdemeanors, where counsel are allowed to speak, as in case of felony?—Certainly. I think

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comparing the time now occupied in the trial of a misdemeanor and the trial of a felony, there would be very little more time actually employed in satisfactorily disposing of a case of felony in the same manner as a case of misdemeanor is now disposed of. There is another objection I have heard urged, that the tendency of this would be to degrade the profession of the bar; I certainly do not think so, but any effect that it might have on the profession, I think ought not in the slightest degree to stand in the way of an alteration of this nature, if it be, as I think it is, a great improvement.

Have the kindness to state in what respect it is supposed that it would degrade the profession?—I have heard it suggested that it would tend to create a class of practitioners who would exclusively direct their attention to criminal proceedings, and that the sort of topics that would be urged, and the length of time that would be occupied by criminal courts requiring, as they then would, according to this suggestion, to sit (for instance, the Old Bailey I have heard it said would be obliged to sit from the beginning to the end of the year), the same advocates would practise there, and it would have a tendency to create an exclusive class of advocates, devoted altogether to criminal proceedings. I do not think that that would be the effect of the alteration, but as I have said before, if it were, it appears to me that is no reason whatever for not adopting a manifest improvement.

Might not one effect probably be to occasion the retaining of leading and eminent counsel in the Criminal Courts, if they had the power of addressing the jury?—That of course would occur in cases of importance, where individuals of wealth and station fell under accusation; no doubt they would have the assistance of the best counsel.

Just as in the other courts,—if it is worth any man's while to employ the most eminent counsel, where property of 50*l.* is concerned, *a fortiori,* where his liberty and life is concerned?—Yes.

Do you think the result of a trial might too much depend upon the comparative merits of the counsel?—I was about to advert to another objection urged to allowing counsel, which is included in the question just proposed to me, that is, that it would make a man's life the subject of contention and advocacy in a way to which we are not accustomed, and probably should be much shocked to see; but a case of high treason always presents that objection when it occurs, and I must admit there would be some weight in the objection, unless the same spirit of forbearance, which hitherto has obtained among counsel for the prosecution, were also to be maintained under the new system. In every case of misdemeanor, where I have been counsel for the prosecution, I have always considered myself bound to act as if I were a public prosecutor, representing the interests of the public, and not conducting a prosecution on behalf of any particular individuals, and I think that unless that spirit shall obtain in all cases of prosecution where counsel are allowed to be heard, frequently an unseemliness may prevail, and that the spirit of justice may be forgotten in the rivalry of advocates at the bar. But I should here wish to state that I think that any idea of affording counsel to defendants would be mischievous, unless the prisoner's counsel were allowed to have the last word; and the Act which went through the House of Commons last Session was so framed, upon an amendment proposed, I think, by myself; and strongly as I feel upon the general question, I should say, without hesitation, that unless the defendant's counsel is entitled to have the last word, I would rather leave the matter as it now stands, with all its defects in principle, and its evils in practice. In cases of misdemeanor, where the defendant calls witnesses, and the prosecutor's counsel is allowed a reply, I have known the greatest injustice done; and if the cases of perjury and conspiracy that have occurred within the last 30 years be referred to, it will be found that convictions have been obtained which the Court of King's Bench has felt itself bound to set aside in many instances, and those cases have been followed up by new trials and acquittals to the satisfaction of every one; and one of the evils of allowing the prosecutor's counsel the general reply is, that the defendant frequently dare not put the jury in possession of all the materials upon which they may fairly decide, because the powerful speech of the advocate for the prosecution may more mislead the jury, than the additional facts would tend to enlighten them; and I have known that occur in so many instances, that I consider it to be one of the crying evils of the present criminal administration of justice.

The course you would think best would be that of allowing counsel for prisoners on all occasions to have the last word?—Yes; the course I should recommend would be this: to allow the prosecutor's counsel to statethe case, with such observations as might occur to him to be necessary to enable the jury to understand the evidence, and then, after the evidence for the prosecution, to allow the defendant's counsel to address the jury and to call his witnesses; and then, if the prosecutor's counsel thought it advisable to make a speech to the jury upon the whole case, I would certainly give to the defendant's counsel the right of a general reply; but if the prosecutor's counsel declined addressing the jury at the close of the defendant's case, then I would not allow the defendant's counsel again to address the jury; and I think the effect of this rule would be, that in a very large majority of cases, probably 19 out of 20, if not 99 out of 100, the prosecutor's counsel would not address the jury upon the defendant's case, and therefore the proceedings would be very nearly as short as they are now, the defendant's counsel substituting his speech for a long cross-examination of the prosecutor's witnesses. I would here add, with regard to allowing the defendant's counsel the general reply, that it is in accordance with ancient practice that the defendant in every case, if he calls witnesses, should have the benefit of his counsel addressing the jury twice. In Ireland, at the present moment, if the defendant calls witnesses in a civil case, one counsel opens the case to the jury and another counsel at the close of the case addresses the jury upon the effect of the evidence, and in many cases it is essential to the attainment

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attainment of justice that the defendant should have that privilege; it is fallen into desuetude in this country except in certain cases; it still obtains in commissions of lunacy, in proceedings before the House of Commons, in cases of high treason, and I am told in some cases at the quarter sessions, and it is the opinion of some learned judges, I believe now, that it ought to obtain in civil cases; and any person acquainted with our trials by jury must be aware that, unless the defendant has the means of setting some little matter right where his statement to the jury is different from the evidence actually produced, injustice very often is done. Considering it therefore the right of a defendant, speaking generally, to sum up the case as well as to state it, I would postpone the defendant's second speech to the prosecutor's second speech. There is a great advantage in civil cases in the plaintiff's having the first word and the last word; the advantage of the last word must be given to some one, and in civil cases I think it is quite fair that the last word should be given to the plaintiff if the defendant calls witnesses; but in criminal cases I think that if there be any advantage it ought rather to be given to the defendant. With respect to the supposed mischief of allowing the defendant's counsel the last word, I believe there is more injustice done in misdemeanors by allowing the prosecutor's counsel the last word, than there is done in cases of felony by not allowing the defendant's counsel any word at all.

You would apply this to all cases of criminal proceedings?—I would apply this to all criminal cases of misdemeanors as well as felony.

And at the sessions as well as at the assizes?—Yes. Whether it would be desirable to introduce a Bill, in the first instance, making an experiment at the assizes under the authority of the first judges of the land, to see how it would work there, and then that it should be introduced at the sessions under regulations, is a matter on which it is not necessary to enter.

With respect to the mode and temper with which a criminal case ought to be conducted, in your judgment, would not a great deal depend upon the presiding judge, who would give the tone and might prevent that undue eagerness in procuring a conviction which perhaps some counsel might be tempted to indulge in?—I should certainly think it the duty of a judge to repress on the part of the prosecuting counsel any eagerness to convict, or the adoption of any line of conduct which went beyond a faithful discharge of his duty to the public, who alone ought to have any interest in the event of a criminal proceeding.

How would you propose to supply counsel to prisoners who were too poor to obtain that assistance from their own funds?—I do not know that any other provision need be made for counsel than is now made; it is usual now, if a prisoner professes his inability to retain counsel, for the court to assign counsel, and not unusual for the ablest and most experienced counsel cheerfully to undertake the duty of the defence. It does not appear to me that any alteration is necessary.

Would you propose that a fee should be allowed for the prisoner's counsel?—That is a subject I have not considered; I had rather leave that to the decision of gentlemen who are better acquainted with the fund out of which that would be taken.

It has been suggested that if the most able and eloquent counsel were employed in criminal cases, it might often be the case that there might be great disparity between the counsel employed for the prosecution and for the prisoner; in your opinion would a greater disparity obtain then than does now, where an able counsel is frequently employed for the prosecution with the power of addressing the jury, and the prisoner's counsel has not that privilege?—I think not; I have no doubt that sometimes the disparity of counsel may be an impediment to the attainment of justice; it is undoubtedly one of the imperfections of the system, but it is a necessary and unavoidable one. Upon the whole, it is very much better that counsel should be employed rather than the parties themselves, for the disparity would then be much greater.

In your judgment, does not much disparity, according to the present mode of administering criminal justice, obtain, from the opportunity an able counsel for the prosecution has in addressing the jury, in which his speech may appear to be very temperate, but it may be a very convincing speech for the purpose of obtaining the conviction of the prisoner?—Yes.

Do you not think that the experience of trials of misdemeanor and of treason, and the non-inconvenience arising from allowing counsel in those cases, afford an argument against the speculations of the evils that may arise from allowing the prisoner counsel in cases of felony?—Yes; I think the cases of misdemeanor are a practical answer to most of the speculative objections to allowing counsel, and they afford a practical lesson of the necessity of giving the prisoner's counsel the last word.

Perhaps the trials for treason, in modern times, are specimens of the fairest trials which take place?—I think they may be so considered.

It has sometimes been said upon this subject, in answer to the objection, that this difference in practice ought not to prevail between cases of felony and misdemeanor as to the prisoner's counsel addressing the jury, that the judge is the counsel for the prisoner, and that he is therefore sufficiently protected; do you conceive it to be founded on any principle of law, that the judge should in any practical sense be the advocate of the prisoner?—I do not apprehend that in point of law it is the duty of a judge to act as an advocate either for the prisoner or for the prosecution, but to attain the true end of the inquiry; and though it certainly would be the duty of the judge, if the prisoner were without counsel, to prevent improper questions from being put, or incompetent evidence from being received, or a conviction taking place upon illegal or insufficient grounds; and although it is also the duty of the judge to take care that the case shall be presented to the jury in a fair, clear and true light, yet it cannot be his duty to sift the case of the prosecution with the zeal

zeal of an advocate, and present what may be the defence in the strongest manner in which it may be urged on behalf of the accused.

Do not you think one advantage of giving the prisoner counsel is, that you would get rid of that vulgar notion, that the judge is counsel for the prisoner, which prevails, and which is inconsistent with the character of the judge?—It certainly is a very erroneous notion in point of fact; it does not, in my opinion, obtain sufficiently in point of fact to dispense with the necessity of the accused having counsel of their own appointment.

Even supposing that a judge was ever so desirous of advocating the prisoner's cause, would he in many cases be able to do it for want of knowing what the prisoner's case really was?—I think it is quite impossible for any judge, however acute, enlightened, experienced or humane, effectually to present the defence of the prisoner in as satisfactory a manner as the prisoner's counsel could do it.

Have you ever turned your attention to the speculative question with the foreign jurists of the power of examining the prisoner?—I have.

Have you formed any opinion upon it?—I should think it a practice extremely dangerous, and I think it would hardly be tolerated in this country, opposed as it is to all the feelings and prejudices of the great majority of the nation.

Even if it were good in theory and good in practice where it has long prevailed, the introduction of such a thing would be extremely difficult from the want of its assimilation to the habits of the people?—Yes; and I have no hesitation in saying that I think it would be very mischievous. Where a man is under accusation of a grave offence, it is exceedingly difficult for him to conduct himself in a perfectly natural manner. Perfect calmness may enable guilt to assume the appearance of innocence, while terror and alarm may give to innocence the semblance of guilt.

Monday, 9th March 1835.

The Attorney General (Sir *F. Pollock*); further Examined.

YOU gave the Commissioners your opinion, upon a former day, on the subject of counsel addressing a jury in cases of felony, a distinction arising out of the general classification of crimes into treasons, felonies and misdemeanors; do you think in general that the distinction between felony and misdemeanor is sufficiently marked by any test or distinction founded in principle; the technical distinction being that felony is an offence which is attended with the forfeiture of goods?—Perhaps not enough so; but I think it would not be wise to break down the distinction between one description of offence and another; and instead of diminishing the classes, I should rather be disposed to increase them. The distinction at present between felony and misdemeanor is very often this, that while felony invariably affects a man's general reputation, he may in many instances not scruple to allow that he has been guilty of a misdemeanor. Thus cases of assault are misdemeanors, and there may be other instances where a man may have offended the law and become an object of punishment, without any general and lasting imputation upon his moral character; and instead of the distinction between felonies and misdemeanors being a matter of regret, I think it is rather to be wished that misdemeanors were separated into distinct classes, or that some other mode were adopted of ascertaining civil rights and legal liabilities than now often obtains by an indictment for a misdemeanor. It seems objectionable in principle that perjury, or an assault with an attempt to commit a rape or other offence, a conspiracy, the object of which may be to take away life by perjured testimony, should all be found in the same category of offences with a blow struck in a moment of perhaps pardonable irritation, or a refusal to serve some office or to discharge some duty which the party refusing has the strongest grounds for thinking he is not liable to, or neglecting to repair a road where the liability to repair is extremely doubtful; and it has always appeared to me to be a matter of regret and objection that offences so widely differing in their nature and character, and in their effect upon society, and so differently affecting the individuals charged in point of reputation and punishment, should be classed together under one common name of misdemeanors.

In your judgment, without abolishing the distinction between felony and misdemeanor, might it not, upon grounds somewhat analogous to those you have stated, be desirable that there should be no such distinction as is now made between offences which are felonies and misdemeanors, particularly in cases where the misdemeanor consists in an attempt to commit a felony, and consequently where the crimes are very much of the same nature. You are aware that difficulty frequently occurs, and expense is incurred and time lost in many instances where a party is indicted for a felony, but where the evidence does not go to the extent of showing the consummation of the crime, although there was a clear attempt to commit it, the consequence of which is that an acquittal is directed by the judge, but the party is directed to be kept in custody, and another indictment to be found, and in many cases it happens that the grand jury is discharged, and the prisoner is kept in gaol till the next assizes. Would it not be proper to consider whether it might not be advisable that, upon an indictment for the principal offence, means should be provided of convicting for the attempt, supposing the attempt to be proved and the consummation not to be proved?—I think the question is not free from difficulty. In a case of murder, where death has clearly ensued

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ensued from some illegal act, and the only question is the character of that act, whether done wilfully and of malice prepense, or by a sudden outbreak of passion, or in consequence of an unintentional result from some illegal act, there may be no objection to leaving it to the jury to say whether the act was murder, manslaughter or no offence at all; but where doubt might exist whether any crime had been committed at all, I think the arrangements for the defence of a party accused would be made somewhat difficult, and both the accused and his counsel might be extremely embarrassed by the sort of double defence which would have to be made, namely, first, that no offence had been committed at all, or that if some offence had been committed he was no party to it; or, secondly (it being admitted on the part of the prosecution that the offence was not fully proved), that the conduct of the accused did not amount to an attempt to commit the alleged crime. I think there might be no objection in cases where the *corpus delicti* should be fully proved, to assigning to the accused a greater or a less share of participation in the crime; but I think I see some danger, where no crime at all shall be proved to have been committed, in allowing the jury to find the accused guilty of an attempt, unless that attempt be made distinctly, precisely and singly the ground of accusation.

Do you think that to this extent an alteration might be made,—supposing the party to be put upon his trial solely for the principal offence, and to be acquitted of that, but manifestly upon the ground that an attempt only having been made, the party was entitled to his acquittal since the offence had not been consummated, that he should afterwards, according to the direction of the judge, be subject to trial for the attempt, without finding another indictment, which is in fact now done by taking another bill before the grand jury, and proceeding *de novo* entirely, which is often attended with delay and expense?—I think with reference to the subject of examination, when I lately had the honour of waiting upon the Commissioners, I should say that, in my opinion, it is not desirable that the verdict of a jury should have any other effect whatever than simply to pronounce the accused guilty or not guilty of the crime; I think if the jury impanelled to try the offence had any power of finding any other matter, or by their verdict were to have any influence upon the accused being subjected or not to a further investigation, it would tend to much delay and to a great consumption of time in the discussion of these collateral matters, and I should deprecate any attempt to extend the issue to be tried beyond the single point of guilty or not guilty, as calculated to prevent the experiment being fairly made of allowing counsel for prisoners to make full defence. It is notorious that in Scotland there are two verdicts—not guilty, which means a full and perfect acquittal, and not proven, which, I apprehend, leaves a stigma upon the character, and imports that the offence is not brought home, but that some suspicion attaches to the party accused. I should exceedingly deprecate the introduction into our Criminal Law of any such proceeding. It is objectionable, I think, upon very many grounds, but especially it is objectionable upon the ground of introducing another issue beyond that to which I think the attention of the jury ought singly to be directed, whether the guilt of the accused party is made out, aye or no.

The object of the last question was to find if possible some remedy for the inconvenience now experienced with respect to the time and expense which are requisite in order to procure the trial of a party who has been acquitted upon a mere technical point,—often for want of showing some matter of technical proof which is essential to the conviction of the principal offence; do you conceive that there would be any impropriety, without giving any discretion to the jury to find guilty of a lesser offence, or to give any intimation that there should be any further prosecution, that the judge should have the power, without a further indictment found, to direct the party to be tried for the attempt, supposing it to be limited to particular cases?—I would rather detain the grand jury to find another bill, than embarras the petty jury by complicating the issues presented to them; and I think I would rather detain the grand jury than throw upon the judge the office of the grand jury and introduce such an anomaly as a judge of his own motion presenting a bill, or directing a prosecution except in a regular way. There can be no objection to a judge detaining a prisoner, and directing him to be prosecuted in the regular way; but I see great objection to a judge, who has already tried the prisoner for one offence, directing him to be tried for another without the intervention of the grand jury, as it must be manifest that the accused would have some ground to complain that he could hardly have a fair trial, inasmuch as the judge must have made up his mind to a certain extent upon the subject.

Do you not think that where the grand jury have found a bill for the greater offence and the party has been acquitted, that he might be indicted for the minor offence of the same description, without going again before the grand jury, inasmuch as they have already thought they were warranted in finding a bill for the greater offence?—I think more would be lost than would be gained by such an alteration.

Do you think that in such cases delay and expense might be saved by directing the trial to take place at the sessions?—I think so, and I see no objection to that.

Do you not think that the objection which you have stated with respect to the judge directing a prosecution without the intervention of the grand jury may to some extent apply to the present practice, by which the judge who directs the prosecution frequently tries the party?—I think that there is sufficient difference between directing a case to be submitted to the grand jury for them to consider, and at once directing that it shall be submitted to the petty jury, to justify the one without giving countenance to the other.

Would you think that, if the present distinctions between felony and misdemeanor did not intervene, it would be right that the jury should have the power of finding the party guilty of the inferior offence?—I think there might be no objection to that in cases where the inferior offence formed a substantive part of the greater offence charged.

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There is one case, if not more, in which the jury may convict of a misdemeanor, although the felony be proved, as in the case of the concealment of a child where the mother is indicted for murder?—I think the principle of that is objectionable.

Do you think it would be desirable that the line of distinction should be better drawn than it now is with respect to offences triable at the assizes and such as may be tried at the sessions?—I never attended any quarter sessions, and should not therefore think myself justified in offering any opinion to the learned Commissioners upon any point connected with practice at the sessions.

There are some other distinctions, of considerable magnitude, which follow from the general classification of offences, particularly that relating to felonies and misdemeanors, for instance, the denial of a copy of the indictment in a case of felony; do you think that that is a distinction which ought to prevail?—I think it is extremely unjust in principle, and it an opprobrium to the law, though probably its effect in practice may not be very mischievous, as, upon special application, the court would probably in all cases grant it. I remember when I first went the circuit, many years ago, being very much struck with the interference of the clerk of the Crown upon my wishing to see the file of indictments. He asked me if I was counsel for the prosecution. I said no. He asked me if I was counsel for the prisoner. I said no, but as a barrister attending, I was desirous to read the indictments that were likely to come on. He said, I might then, if I pleased, peruse the indictments, but had I been counsel for the prisoner it was the invariable rule to withhold an inspection of the indictment till the prisoner was arraigned; and I must say it made a very strong impression upon my mind, that the counsel for the prosecution might have access to the document, or any individual, from mere curiosity, but that the counsel for the prisoner was not permitted to see the indictment till the prisoner himself was called upon to plead to it. I cannot imagine what possible mischief could arise from the counsel for the prisoner having a right to see the indictment and to have a copy of it, while it is obvious that his possessing that right would give a greater character of fairness to the trial, might frequently be the means of saving time and of enabling the prisoner more advantageously to make his defence.

Should you think it necessary that that alteration should be made by a statute, or that judges would suppose that they had the power of granting an indictment without any interposition of that sort?—If there were any general amendment of the law in criminal matters to be introduced, I think it would be desirable that this should form part of such a statute.

There is another great difference between felonies and misdemeanors with respect to the granting of a new trial,—it can be had where an indictment is before the Court of King's Bench, but none can be had in case of felony; do you conceive that that difference is one which requires any alteration?—The question that is now proposed to me recalls some circumstances which occurred a few years ago, when Mr. Wilde, of College-hill, an attorney, was one of the sheriffs of London; and I will endeavour to give to the Commissioners (I am afraid but imperfectly) some of the circumstances which occurred during his shrievalty, and I wish that I had been at all aware that an opportunity would have occurred of adverting to these circumstances, as I would have taken care to have been provided with more distinct information; but I think the Commissioners will probably feel it their duty, when I have stated as far as I know the facts to which I advert, to endeavour to procure the attendance of Mr. Wilde himself, and to obtain from him more minutely the cases to which I refer. I think he was sheriff during part of a year only, having been elected upon the death of one of the sheriffs chosen in September 1827. I am not quite certain that I am correct as to the date, but I am right within a year. During the seven months he was in office, by his exertions he saved several men from public execution, I think as many as seven, but I am certain as to five. I had frequent communications with him upon those cases while they proceeded. My impression is, that several out of those cases were cases of perfect and entire innocence, and that the others were cases of innocence with reference to the capital part of the charge. The then Secretary of State, Sir Robert Peel, paid great attention to every application for mercy, and having satisfied himself in each case that the prerogative of the Crown ought to interfere, the lives of every one of the individuals were spared. It is impossible to speak in too high terms of the zeal, humanity, unsparing labour and expense which Mr. Wilde bestowed upon those occasions, but the result satisfied me that the parties were in several instances guiltless of any crime, and in all the cases were such as did not justify capital punishment, and Sir Robert Peel, after much labour in the investigation, was of the same opinion. It has always, since this occurred, been impressed upon my mind as a very appalling fact, that in one year so many persons were saved from public execution, for which I believe most, if not all of them, had been actually ordered; and though I believe, undoubtedly, the sheriffs of London are in general conspicuous for an active, humane and correct discharge of their duty, they have not all, and cannot have, the means of bringing to the investigation of such subjects the same facility and the same unsparing exertion that Mr. Wilde afforded while he was sheriff; and I am persuaded, and have been ever since I knew those facts, that unless the practical difficulties are insuperable, which I do not apprehend would be the case, some legal constitutional mode ought to be adopted by which errors and mistakes, from whatever source arising, should be corrected in criminal trials as well as they may now be in civil cases.

Do you think it is expedient that the statute which enacts immediate execution in the case of murder should be amended?—I think it would not be desirable to meddle with it. I think it is one cause of the terror that is excited by an execution for murder, that the murderer is speedily executed. I am aware that if a power of moving for a new trial were afforded in criminal cases, more time might occasionally be consumed in such applications than frequently is devoted to the original inquiry; but I think it is impossible to be aware of

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of the notorious fact, that in cases of misdemeanor the Court of King's Bench has felt itself compelled to grant a new trial in many cases, which have been followed up by a satisfactory acquittal, without feeling that in cases of felony some legal provision should be made for a similar failure of justice; and ever since my attention has been drawn to the cases which occurred while Mr. Wilde was sheriff, I have been very anxious to call the attention of the Government to the necessity of administering some practical remedy to the acknowledged evils of the present system; and undoubtedly, had not this Commission been now sitting, which is so well calculated to present the subject to the attention of the Legislature, and to devise deliberately some mode of amending the Criminal Law on this point, I should have felt it my duty, as Attorney General, officially to bring the matter under the notice of Government, and have endeavoured to procure some legal and satisfactory mode of obtaining a reconsideration of a verdict in a criminal case, without throwing all the labour and responsibility upon the Secretary of State, who is called upon to interpose the mercy of the Crown in cases where the appeal ought rather to be to the justice of a legal tribunal.

Have you considered what mode would be the most desirable to effect that great object, whether by granting a new trial, or by having some court of investigation as to the facts?—One obvious course would be to adopt in all criminal cases the practice which is now open to the convicted party in case of misdemeanor before the superior courts, namely, a motion for a new trial, founded upon the verdict being either against evidence, or against the truth of the case, as made manifest by affidavits to be submitted to the consideration of the court, subject of course to such rules with respect to the reception of affidavits as the experience of courts in other cases has established. These remarks equally apply to inferior courts, who are incapable of granting a new trial in misdemeanors as well as felonies. During the last Session, I moved for a return of the result of all prosecutions for perjury and conspiracy in the Court of King's Bench since the year 1800, together with the result of the prosecutions as to new trials, and the cases in which parties have been called up for judgment. The Session ended before that return was complete; but I allude to it now for two reasons. I have very little doubt it would prove, by the number of instances in which new trials have been granted, and the defendants have been afterwards acquitted, or the prosecutors have declined to go on with the prosecution, that the motion for a new trial is essential to the administration of justice in criminal as well as in civil matters; but beyond this I expect it would tend to show that indictments for conspiracy and for perjury are frequently made the instruments of great wrong and oppression, and that they are much oftener brought with a view to enforce a civil claim well or ill founded, than they are brought really and truly for the purpose of punishing the offences complained of. I have, however, no doubt such a return would prove the necessity of some mode of relief against an improper verdict in a criminal case. The subject is one of great difficulty on several accounts, and it may not be easy to discover the best remedy. I have often heard it said, even by judges, that without the power of granting a new trial, a jury would be a very imperfect tribunal in civil cases, and I think such must be the opinion of every one competent to form one. The same mischief obtains in criminal cases, against which a new trial is the only protection in civil cases; and the only remedy is an application for mercy where sometimes there ought to be an appeal for justice. If no better mode can be adopted, I think there ought to be allowed a motion for a new trial.

Do not you conceive that an indictment for a conspiracy is sometimes resorted to in order to convict a particular person of a crime, which would have been no crime had he been the sole agent; that in fact it has the effect of introducing a new species of offence, of which the party could not have been convicted solely, and in those cases would not you think it better that they should be defined as substantive offences, and not made to depend upon involving two or three persons in the commission of the offence?—I think the present state of the law of conspiracy peculiarly calls for the attention and consideration of the Commissioners. The crime of conspiracy is very ill defined, and it should certainly appear from some decisions that a person may be guilty of a conspiracy without being at all conscious of it. I believe the legal definition is conspiring to do any thing unlawful, or to do any thing that is lawful by unlawful means, and among the unlawful means, a mere combination I think is generally taken to be one; thus any man may refuse to deal with another in the way of his business, but it should seem that two cannot agree to do so without being guilty of a conspiracy. On one occasion when two persons were indicted for a conspiracy to destroy the game of a third by shooting upon his land, Lord Ellenborough perceived at once the absurdity of the charge and dismissed it; but it is very difficult, upon legal principles, to say that the parties then charged were not within the legal definition of the crime. I remember not many years ago some persons were convicted of a conspiracy to take out a commission of bankrupt against a trader and were convicted, the conviction turning chiefly upon how far the defendants were more or less competent to judge and had the means of judging whether the individual against whom they had taken out the commission was liable to the bankrupt laws. This is not the only instance of such a charge: in another case that came within my own knowledge, the parties were acquitted, and I have no doubt the indictment was adopted instead of an action for suing out a commission of bankruptcy, without reasonable or probable cause, in the expectation that it would be more powerful in extorting money. Some cases of conspiracy since I have been in the profession have tended to show that it is a charge very easily made, very difficult to disprove; and, as the rules of evidence are different in a case of conspiracy from other cases, in this respect, that every thing that is established against one is to be received as evidence in the cause in furtherance of the act, and then the jury have to pick their way with great difficulty through the mass of evidence

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and find out what applies to each, the accused party is extremely embarrassed in his defence; and I believe there are far more instances of new trials in cases of conspiracy than in any other description of misdemeanors. I should wish to call the attention of the learned Commissioners particularly to this subject, and to suggest to them whether it might not be proper that no indictment for a conspiracy should ever be preferred, except under the sanction of the Court of King's Bench, and that where a prosecution is commenced it shall not be abandoned at the pleasure of the parties instituting it.

As it is possible that some of the arrangements that may be proposed for the better administration of the Criminal Law might be objected to on account of time, do you think that any plan could be suggested by which a certain number of the judges might have their attention solely confined to the Criminal Law as in other countries?—I think it would be open to much objection if any of the superior judges had their attention exclusively directed to the administration of the Criminal Law. I think the high character which attaches to the mode in which Criminal Law is administered at the assizes, arises from the judges of the superior courts, whose attention is elsewhere directed to important civil matters, presiding at the assizes.

In cases of new trials granted in respect of trials that have taken place at the sessions, by whom would you propose that they should be granted?—I must at once state that I am so deeply impressed with the mischiefs which I think have resulted from the present system, that I have fearlessly and without hesitation stated my distinct opinion; but it is rather with a view of calling the attention of the Commissioners to the evil and imploring them to find a remedy, than that I am prepared at once, by any suggestion of my own, to supply what appears to me to be a defect; but I see no objection at present to the presiding judges every where entertaining an application for a new trial, and dealing with it according to the apparent merits of the case.

Saturday, 16th May 1835.

Mr. Alderman *James Harmer*; Examined.

Examination of Mr. Alderman *James Harmer.*

THE Commissioners have read the evidence you gave before a Select Committee of the House of Commons, appointed to consider of as much of the Criminal Law as relates to corporal punishment in Felonies, and which was ordered to be printed the 8th July 1819;* you then gave your opinion at large as to the inexpediency of the then capital punishments; do you still remain of that opinion?—Certainly. All the experience I have since had confirms my previous opinion of the inutility of capital punishments for repressing crime, and upon the same grounds.

*See Appendix, No. 3.

Since that time several capital punishments have been repealed by the Legislature; have you found that that has been attended with bad effects in producing an increase of those crimes?—I should say not, but with a very good effect, because you find no repugnance now on the part of prosecutors or witnesses to give evidence against the persons whose lives are not to be sacrificed, but who, on conviction, are to be sent abroad; any thing short of death the public appear to be satisfied with, however severe; there is no sympathy for a delinquent if his life is spared, which is a great thing to accomplish; for, in my opinion, no punishment can be effective which excites a feeling of compassion for the sufferer. I have here a Letter which I received in the year 1830 from Lord Lansdowne, asking whether I still retained the impressions which I held when I gave my evidence upon the effect of capital punishment for forgery, and this is my answer to his Lordship, containing my sentiments upon that particular subject.

(*The following are the Letter and Answer above referred to.*)

"Sir, Lansdowne House, June 23d, 1830.

"I TRUST that, although I have not the pleasure of your acquaintance, the object of this Letter will be a sufficient excuse for my troubling you with it.

"In considering the evidence produced before the Committees of the House of Commons relating to the punishment of Forgery, when I was induced to undertake the conduct of the Bill in the House of Lords, there was no witness whose testimony produced a stronger impression on my mind than yours, from the peculiar opportunities you must have had of observing the habits and motives of criminals.

"Ten years, however, have elapsed since you gave that testimony, and the favour I have to beg of you is to acquaint me, if not inconvenient to you, whether subsequent experience has confirmed, or in any degree varied, the impressions you then described as prevailing upon your mind.

"The clauses relating to the abolition of the punishment of Death will be strongly opposed in the Committee on the Bill, and it will be contended, I understand, that no greater reluctance is apparent in prosecutors in cases of forgery than in others, where capital punishment is enacted.

"I have, &c.

"J. Harmer, Esq." "*Lansdowne.*"

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"My Lord, Hatton Garden, 25 June 1830.

"The Letter which your Lordship did me the honour to send me, dated the 23d inst., has just reached my hands, and I feel great pleasure in giving your Lordship the information which it requires.

"In answer to your Lordship's question, as to whether my opinion has varied on the subject of capital punishment for Forgery, since I gave evidence before the Committee of the House of Commons, ten years ago, I beg respectfully to assure your Lordship that, so far from the opinion I then entertained being in the least changed, the experience of every subsequent year has only tended more strongly to confirm my previous impressions; and I feel now, as I did then, that by mitigating the punishment, although prosecutions may, and doubtless will, multiply, a less number of forgeries will be committed, and for these reasons: Many bankers and tradesmen, who now rely on the severity of the law, as being sufficient to deter persons from committing forgery, do not use sufficient precaution to guard against the offence, and thus give a facility to a needy and desperate man to succeed. If the punishment be mitigated, no such reliance will remain. Merchants and tradesmen, and perhaps even bankers, will adopt additional precaution, make more diligent inquiries, and scrutinize with greater care and attention all the negotiable securities which may come to their hands. Attempts at frauds will thereby be more speedily detected, and in proportion as the chances of success are rendered less sure, and detection more likely, men will be deterred from attempting to commit the offence.

"I believe, my Lord, that many persons, previous to committing a forgery, deliberate on the consequences, and are induced to proceed from a persuasion that a want of due caution on the part of those whom they intend to defraud will render success pretty certain, and should detection follow, that they have still many chances of escaping conviction and punishment. The most prominent of these chances is, the reluctance which prosecutors and witnesses feel to give evidence against a forger, because the life of the individual is involved; and next the sympathy which, from the same cause, juries always feel for the accused, and which frequently induces them to invent or adopt any surmise, however absurd, in his favour, and to acquit in the clearest cases.

"It is, my Lord, a matter of common occurrence, for prosecutors and witnesses to devise some stratagem to secure the escape of the offender; and I have known them to suppress facts, and colour their evidence to effect their object. When reproved for such conduct, they have justified the act by asserting that it was better to err in their testimony than to be the means of taking away the life of a fellow creature. Often, my Lord, have I been consulted by prosecutors and witnesses, as to whether they were liable to any other consequences than forfeiture of their recognizances by neglecting to attend to give evidence; and I have known a prosecutor not only submit to pay the amount of his own recognizances, but those of a witness also, whom he prevailed upon to keep out of the way because his testimony would have convicted the prisoner, and the only motive for paying this money and foregoing a public duty, I know to have been a merciful feeling to save human life. Had the punishment been short of death, no consideration would have induced the gentleman to whom I allude to forbear prosecuting.

"I have likewise known several instances in which avaricious and unprincipled men, finding a debtor to them involved in pecuniary difficulties and likely to fail, have, by stating to him that they would cash him any bill he could bring them, partly suggested to the insolvent the idea of fabricating securities and thereby invited the commission of the crime; not with a view of prosecuting the offender, but to get a forged instrument into their possession which they could use as the means of extorting the payment of the whole debt, either from the unfortunate man or his relations and friends; and in very many cases which have come under my observation, near relatives of an accused party have in a measure ruined themselves to buy up the bills he has forged, but who would have left him to his fate had the punishment been any thing short of death.

"The cases which come before the public for prosecution on bills of exchange are not, in my opinion, any thing near equal to the detections which take place and the compromises which are made thereupon. Respectable bankers, merchants and solicitors engage in such compromises the more readily now, because from the merciful feelings of juries a conviction is uncertain; but many more on account of the highly penal consequences which would result from a successful prosecution. If, therefore, the punishment were less severe, both these considerations would be removed, and compromises would of course be less frequent.

"I cannot, my Lord, calculate, even within a hundred, the number of compromises (of the description above alluded to) which have come within my own knowledge; but I remember a learned and excellent judge interesting himself to get up a forged bill which had been passed by a worthless man whom he had only known as a school-boy, and to save this very man from transportation the judge would not have advanced a farthing or spoken a word.

"I have been induced to take the liberty of troubling your Lordship with these remarks, to show that, although prosecutions may, and no doubt will increase, for some short time at least, after the abolition of the punishment of death for forgery, still that circumstance ought not to be considered as a demonstration 'that the lessening the punishment has increased the number of forgeries.' On the contrary, I should consider it as strongly proving the utility of the mitigation, because punishment would become more certain, and the law consequently more effective.

"I have, &c.

"To the Most Noble the Marquis of Lansdowne." "*James Harmer.*"

Then,

Then, you think that the repeal of capital punishment, so far as it has gone, has been attended with beneficial effects?—Certainly. The last case in which I was engaged for the prosecution was of a capital nature, and it was not without very considerable reluctance that the prosecutor was induced to carry on the prosecution; it was a very bad burglary: I do not go the length of saying that for a burglary of a character like that to which I allude the punishment of death should not still be awarded, viz., where midnight robbers break into the house either by stratagem or force, carrying with them weapons of destruction, and who may therefore reasonably be supposed would not hesitate to take life to prevent themselves from detection; that I think is a case in which the delinquent ought to be punished with death: I know that there are some persons who even go the length of thinking that the punishment of death should not be inflicted for murder, but I do not concur with them; I think that the penalty of death might be affixed to any offence where the public mind would go with the correctness of the punishment, and in such cases only can it operate beneficially as an example.

Are you able to state to what extent public opinion would go and what kind of limit should be placed, making public opinion the criterion?—I do not find that there is any repugnance to the punishment now inflicted upon forgers and upon other offenders, by sending them for a period to labour previous to transportation and then sending them abroad for life.

When you speak of the public showing a reluctance in particular cases to conviction, to what extent would public opinion, in your judgment, go with respect to the limit of capital punishments?—I think that murder ought to be punished with death, and also midnight burglars who are armed with weapons likely to occasion death.

Would you make it an ingredient in the case that more than one should be concerned in the offence?—I think so; for instance, when a number of persons, three or more, go disguised with their faces blacked, and force their way or by stratagem get into a house in the middle of the night, they would not mind, if their safety depended upon it, taking away life; but I do not know where to draw the line as to the number.

But the principle that you lay down would be to inflict the capital punishment in cases where, either from the number of offenders or the manner in which they were armed, violence and death were likely to ensue?—Yes, where they would probably take life, in the event of their being disturbed or discovered. Then again, I think where a highway robbery is attended with circumstances of great violence to the person—not a mere blow with the fist, but to strike a man down with a weapon of any sort, or with an hedge-stake, so that it is the mercy of God and not of the offender that the person survives, in that sort of case I think that public opinion would feel no sympathy for the offender.

Would you extend that principle to all cases, such as used to come within Lord Ellenborough's Act, which is now superseded by one of Sir Robert Peel's?—Certainly.

And generally to all cases of crimes attended with violence to the person and where death was likely to be the result?—Certainly; I think that in those cases public opinion would go with the correctness of the punishment.

Amongst others, arson?—Yes, of course; a man who wilfully sets fire to a house cannot tell where the mischief will end.

What would you say to the case of rape?—I think there would be no sympathy there; the mischief is, that one sees so many instances of charges that would hardly bear the complexion of a rape, in which the man is to a certain degree culpable, but not to the extent of deserving death; I should say that, upon a decided case of rape with violence, there the offender would have no sympathy in the public mind.

Do not you find in a crime of that nature the evidence is often very ambiguous?—Very much so; no accusation can be more easily fabricated, and more difficult to disprove. I had a case before me, as a magistrate, two or three days ago, in which there was no pretence for the charge, and yet the girl, a young woman of 23, had made out a very plausible case when she obtained the warrant: but by putting a few questions to her, it was evident that the accusation was made with a view of extorting money. I found she had gone voluntarily to the prisoner's house where the connexion had taken place, and had friendly conversations with the man upon two or three occasions, almost immediately after the supposed rape.

Inasmuch as rape is a case which, independently of the testimony of the prosecutrix, often rests upon doubtful evidence, and the almost certain consequence of conviction being loss of life, do not juries frequently avail themselves of the difficult nature of the evidence to acquit where they would convict if it was not for the severity of the punishment?—No doubt of it; wherever the punishment of death is certain to the delinquent, a jury will hesitate, and they will not convict if they can find any crotchet that will satisfy their own minds to acquit, although the guilt of the accused is irrefragable; they see the person before them, they feel for him; a juryman says, "Now that man's life is in my hands, I am to be the arbitrator of his fate; why should I send him prematurely to the grave? We are all fallible, and I may do wrong in assisting to deprive him of life, but I cannot do much harm by leaving him to God and his conscience, and I will therefore acquit him." Such reasons as these I have often heard given by jurymen when they have, to the astonishment of the court, returned a verdict of not guilty in a clear case for conviction. For myself, I cannot help thinking that public justice would be more often satisfied if a very severe punishment, short of death, were inflicted even for that crime.

Your evidence is directed before the Select Committee to the inexpediency of transportation for a term, do you still maintain the opinion you then gave?—I confess that I think if you could avoid the transportation, unless it was for more than seven years, it would be a much more effectual punishment.

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Do you think that in general imprisonment for a considerable time, attended with hard labour and with seclusion and preventing the communication which is now generally allowed, would be more efficacious?—I have no doubt of it; and I regret very much that there is not some mode adopted of punishing juvenile offenders, without sending them to a gaol for trial, where they are sure to be contaminated by association, and afterwards become confirmed thieves.

Will you have the goodness to state what your opinion is with respect to juvenile offenders?—We have a constant source of creating offenders by the sending little children for trial for perhaps a first offence, and having once undergone that ordeal, they cannot in after life retrieve their characters, it sticks by them to their old age and throughout life; whereas if there was a summary mode of giving them slight punishments, such as a parent would inflict on his child for misconduct, no one would think any thing of it; if there was a flogging with the birch, or putting them into solitary confinement for a day or two, or keeping them upon coarse food, any of those little punishments would not be thereafter thought of, any more than an adult is thought the worse of, because, when a child, his parents or schoolmaster have given him half-a-dozen floggings.

Will it not be desirable to prevent contamination by preventing young offenders of that description from mixing with the rest?—Certainly; a boy gets intermixed with a few of his little loose acquaintances, and is tempted or urged by them to commit a petty theft, which he had not previously contemplated; he is committed to Newgate to take his trial, which, instead of its having any effect to deter him in future from crime, is a source of amusement to him. The novelty of every thing about him pleases rather than afflicts him; on entering the prison, he sees no misery or melancholy such as he had anticipated, but all are playful and merry, and the dread, if he had any, of the trial is dissipated the moment he enters into the court. To find the judges and the officers in their costume, that he has the power to challenge the jury, that all the forms and ceremonies of a trial are on his account, and that he is the hero of the piece, rather tends to gratify his vanity than to intimidate him. He hears that he is the object of commiseration by the audience saying "What a pity it is that such a child should be brought here." And whatever may be the result of the trial, what is the consequence of his committal? he is perhaps intermixed with a captain of some of the little gangs in Newgate; he hears him recount his hair-breadth escapes, and sees how he is laughed at and admired for his conduct amongst his associates, and it is an encouragement to him to imitate the conduct he has heard extolled.

Whatever he is when he goes in, he comes out a regular thief?—He comes out a determined thief; he is acquitted almost as a matter of course, but if convicted, a trifling punishment is inflicted, and he is turned adrift ten times worse than when he went into prison.

According to your experience, have offenders of that kind any other course to take but to go on offending; can they be restored to society?—After being committed to Newgate as a felon, they cannot wipe the stain away by subsequent good conduct, even if they had a chance and an inclination to reclaim.

In fact, does the course taken with young offenders operate as a punishment sufficient in its nature to deter them from crime?—Certainly not; a boy affects to cry at the bar, and his mother or some relation will cry with him, and the judge gives him a little lecture and sends him home, or sometimes they inflict a whipping, but that is made a matter of laugh among these young rascals after becoming inured to a gaol.

Do you think if the punishment were increased, by sentencing young persons of that description to a longer term of imprisonment, but making it more severe, either by seclusion, by solitary confinement, or by restricting them of food, than at present, that that would have a salutary effect in preventing crime?—Yes, I think any thing that would separate them from their companions, for when the boys are together they are generally concocting some mischief—the boys I have seen in prisons appear to be united, and are always in good spirits.

Do you consider that, by the mildness of the punishment to which juvenile offenders are now subjected, they are less prevented from crime than they might be?—I think they are. I do not think the punishment now given to them at all deters them; the same boy comes half a dozen times over, and little urchins that you would hardly suppose would have the hardihood to commit an offence, you find them marked in the calendar a second and third time, and what punishment they have had has been a very slight imprisonment previously, or perhaps they have been whipped, or perhaps acquitted; and you are sure almost to see them come again. My opinion is, they ought not to be sent to the Old Bailey, unless where there has been shown something like incorrigibility in their disposition by frequent offences after juvenile punishments.

Would you give a magistrate, where the offender was under a certain age, in some cases of minute thefts, a power of inflicting a summary punishment?—I would with two magistrates give such power. I have frequently heard parents say, "For God's sake, give my child correction;" but the magistrate has replied, "I have no power to correct them; I cannot do it." I think if the boy is under 12 years of age, when the mind is hardly formed, it is too much to send him for trial at the Old Bailey, and thus, whether found guilty or acquitted, consign him to infamy for life.

Would not solitary imprisonment be a salutary punishment in such a case?—Yes; I think where the magistrate could confine a boy for a week or a fortnight and not extend the punishment to more than a fortnight for solitary imprisonment; but I would give him a power beyond that, of whipping with a birch for the second offence, and at the third offence I should say he is incorrigible, and might be sent for trial and got rid of by transportation.

Would you think it proper in a case of that kind, where a magistrate had the power to inflict

inflict a summary punishment, still to give the party the power of appealing from the magistrate, and to insist upon being tried?—There is a difficulty in this; those children would be advised by their companions to claim the appeal; I do not think a child of 12 years of age ought to be considered, in such a case, as having any mind to choose what is most beneficial for him.

Would not they find that that was considered as showing a kind of hardihood which would subject them to much severer punishment when they came to be tried by a jury and sentenced by the court?—They would, and they would be more careful of their conduct. I think it would operate to prevent them from committing a third crime, when they knew that transportation for life would be the consequence.

Would not there be sometimes puzzling questions for magistrates about the age of children?—Yes, there might, and one does not like a limit to be fixed, because it might be hard to make a difference for a day or an hour; magistrates might hear slight evidence upon that subject; when youthful offenders were sent to trial and convicted they would be severely punished; they would be severely punished without exciting any sympathy, because it would be known at once that they were old offenders. Every day at the Old Bailey, when prisoners are brought up to be arraigned, you hear an expression of feeling at seeing several children, whose heads scarcely reach the top of the bar, intermixed with the other prisoners: this is a miserable exhibition for the audience, and the little urchins are the only persons in the court who are unconcerned.

At all events, do you conceive it to be an object most desirable to render punishments more effectual in the first instance, in order to prevent the first inroad into the path of guilt?—Certainly.

And you think, upon the whole, that those punishments which are now usually inflicted are not sufficient for that purpose?—Certainly not.

Have you turned your attention to the subject of allowing counsel to address the jury for the prisoner in cases of felony?—I confess that it has appeared to me a hardship that in any petty assault case the prisoner's counsel might address the court for the accused, and yet that they should not be permitted to do so in cases of a capital nature, where the person is perhaps unable, from the weight of the charge against him and the situation in which he is placed, to address the court; and sometimes very ignorant men that cannot understand even the bearing of the case against them; and I have generally found that innocent men have always been the least capable of defending themselves; their mind is so agitated by the falsehood of the testimony that they are in confusion, and they cannot possibly direct their attention to it.

You find the practised thief the most collected?—Always; when I used to be concerned, if I went to a thief he would tell me every point of evidence against him, and what every man had said before a magistrate; but not so with a man that is innocent; he would be hardly able to tell me what had passed. I feel that in practice great inconvenience might arise from prolonging the proceedings, but as a matter of justice I confess I think it ought to be allowed.

Do you conceive that, with respect to guilty persons, its effect would be to produce acquittals?—I feel some difficulty in answering that question. An eloquent and very talented counsel might puzzle or create doubts with a jury in a clear case, and thus impede the due administration of justice, were it not that the judge would be able, in summing up, to explain away any mystification that might be thrown into the case by the counsel for a guilty man.

With respect to an innocent man, what, in your judgment, would be the general effect?—I think a protection.

It has been suggested that the allowing counsel to address the jury in a case of felony, as in a civil court, would be likely to generate contention and heat in the discussion of the case, and that counsel would rather aim at victory than the strict execution of justice: in your judgment, would that be likely to be the case?—I should think not.

Would it be likely to have a prejudicial effect in the case of an innocent person?—I find that the generality of the profession are of opinion that counsel ought not to be allowed to speak for a prisoner, and that the practice would be injurious to the accused, and I therefore feel a delicacy in offering my opinion in opposition to theirs; but I do not see why it would be more likely to create injustice in cases of felony than it does in cases of misdemeanor and treason.

In your judgment, are there cases where it is essential to the safety of an innocent man, that his counsel should address the jury?—I think I have been concerned in many such cases. The only thing I could do as a remedy was, to prepare a written defence for the accused. After possessing myself pretty well of the facts of the case, I have prepared such a defence as I thought would best explain the facts for my client; but of course circumstances may arise in the course of a trial which would render the defence mischievous instead of beneficial.

May not it often happen that the case of an innocent man cannot be brought sufficiently before the attention and consideration of the jury, by evidence or cross-examination, or by the suggestions of the judge, who has not studied the case?—I should hardly think it could, because the counsel is stopped in a moment if he throws out any thing that may be construed into a remark, or an argument in his cross-examination. He must confine himself to a matter of fact.

Do not you find a difference in that respect, under the different judges,—that some allow it to a much greater extent than others?—Certainly.

With respect to the notion that the judge is counsel for the prisoner, do you think that, however

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however eminent a judge may be, he is competent to seize all the points as a counsel would do?—Certainly not, as a person fully possessed of all the facts; and I cannot help saying that I have seen some instances in which the judges have taken up a wrong impression against a prisoner, and it has been very difficult to remove it.

Have you had experience of any cases where persons you believed innocent were convicted, and where you had reason to suppose that had they been defended by counsel, with power to address the jury, a different result would have taken place?—I think so. I have known certainly instances in which I had not a particle of doubt the men were innocent, who have been convicted and executed; and where, if a counsel had been permitted to address the jury on their behalf, I think a different result might have been anticipated.

Were those cases principally of circumstantial evidence?—Rather of positive. I think in three cases where there was positive evidence, and in one of them a false charge altogether.

And where the speech would have been directed against the credibility of the witnesses?—In two cases out of the three: in the other there was a mistake.

In those three cases, were those persons capable of defending themselves?—Certainly not. In one of the cases to which I alluded, I was quite satisfied the offence was never committed; and if there had been any body to remark upon the evidence, it was impossible that he could have been convicted.

Do you think, on the other hand, that the allowing counsel to address the jury would be likely to be attended with any prejudicial effects to innocent persons?—I should think quite the contrary.

In some particular cases it might be said that the counsel on each side were not well matched; you might have a very acute man to make a speech on one side, and a raw junior upon the other?—Those are chances that cannot be regulated. The only objection to it is the inconvenience of delay. A longer time would be occupied by speeches of counsel; and then there appears another hardship to be noticed, that an offender would have a better chance, if he has money to employ counsel, than a poor man that cannot obtain that advantage.

Do you think the inconvenience arising from the occupying of greater time is a matter to be put at all into consideration with the value of a man's life?—I think it ought not; and I do not think there is much in what I stated with respect to the man with money having an advantage over a poor man, because I have reason to believe that there are always professional men who would give their services gratuitously, when it was absolutely required, to assist the innocent; and I do not see why, in all cases of felony, there should not be counsel allowed as they are in misdemeanors—I mean, to be permitted to address the jury.

In those cases, and where there is to be a reply by the counsel for the Crown, would it not be desirable, for the sake of attaining justice, that the prisoner's counsel should have the last word?—It certainly would be an advantage if the prisoner's counsel were to be allowed to have the last word before the summing up.

You are aware that in civil cases the defendant will rather give up material evidence than give his antagonist a reply; do you think that is a principle that ought to be acted upon in criminal cases?—I think not, because, if the prosecuting counsel should not make a speech unless evidence were called for the defence, the prisoner's counsel might decline calling witnesses rather than risk giving his opponent the last word; and a man convicted under such circumstances would with good reason complain and say, "I had not my witnesses called, who would have proved such a fact," whereas the counsel, in his discretion, perhaps thought he should have been able to effect an acquittal without the testimony of such witnesses, and great dissatisfaction would, I fear, result, if the prosecutor's counsel had the last address to the jury.

In order to correct that, might it not be desirable that at all events the prisoner's counsel should have an opportunity of addressing the jury after all the evidence on both sides is given?—I think that would be the correct mode; I think it should be a comment upon all the evidence, not to be allowed two speeches, but previously to the summing up to have liberty to animadvert upon all the evidence, and I do not see that any great delay would be occasioned by such a course.

Would not time be saved as to cross-examinations, which are often in fact used as a means of addressing the jury?—I think so, and a great deal of unnecessary repetition to get out the fact which the counsel wishes to impress upon the mind of the jury; whereas, if he could state it direct to them, he would not labour so much in the cross-examination. I do not think we should find the same zeal for success in cases of felony between counsel as in other causes; I do not think there would be a strenuous exertion made by any gentleman at the bar to obtain a conviction; I think the good sense and humanity of the barristers would prevent their attempting to work injustice by their talent.

You think that the capital punishments ought to be confined within narrower limits?—Certainly.

Do you think that capital punishment ought to be denounced in any cases where it is not intended to carry it into execution, provided the facts are all proved upon which it is made to depend?—Certainly not.

For instance, the crime of burglary now covers an enormous extent of offences which differ very widely in degree; would it not be desirable that the cases in which burglary is to be punished capitally should be defined?—Certainly, I think so indeed; I think that the law ought to be quite clear and distinct, so that any person should be able to understand it.

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As the law stands at present, is the denunciation of capital punishment in case of burglary where it is seldom executed, attended with sufficient effect?—No; it does not carry that terror to the mind that it ought.

And the same principle would apply to the case of robbery and to all cases?—Yes, to all cases.

Has it fallen within your experience to know whether witnesses who have been examined before magistrates have been tampered with before they go before the grand jury so as to prevent the bill being found?—Very often.

Can you suggest any remedy for that?—The remedy I would suggest would be, that the grand jury should either have an abstract of the depositions before them, or that some accredited officer should attend the grand jury, having the depositions in his possession by which he should be able to examine the witness; and I think it would also very much facilitate the business by directing the attention of the grand jury to the important point which the witness has to prove. Witnesses generally state a great deal that is, perhaps, extraneous; every witness, in telling his own tale, gives the history of the transaction, when, perhaps, he has only to speak to a short fact, which he sometimes omits to prove. I used to find it beneficial, when I had a long and intricate case, to give the name of the witness with the short fact to be proved by him; and I have had cases of 60 or 80 witnesses which would have been a mass of confusion without something of that sort to guide the jury. I think also that there ought to be some protection against persons having bills found against them by malignant persons. I have known several instances where perfectly innocent men and respectable tradesmen have been obliged to go to the bar of the Old Bailey to be acquitted upon an indictment which has been preferred by some malicious person, without the slightest foundation for any criminal charge.

Are those cases in which you think the party would not have ventured to go before a magistrate?—Certainly; the only object was to degrade and inconvenience the accused. Now, if a person was to attend the jury with the depositions, or an abstract of them, it would be found that in those cases to which I have alluded there are no depositions, the party never having been before a magistrate; and the jury would say, "Why did you not go before a magistrate?" and they would suspect that the prosecutor had some sinister motive for the omission, and would consequently examine the case more minutely.

Do you think that would be a sufficient check upon that evil of preferring malignant bills?—I think it would; and I have known frequently cases of bills having been thrown out in consequence of the grand jury having been mystified by the stupidity of witnesses and their not understanding the case.

Do you conceive that after a case of felony has undergone a regular examination before a magistrate, upon which a party has been committed for trial, it is attended with any very beneficial effect that there should be another inquiry before the grand jury previous to trial?—It is a little difficult to say, because we find sometimes that magistrates misconceive a case, and I have known instances in which a grand jury have rectified it by throwing out the bill; they are generally a very intelligent body of men, particularly in the country, and we have now excellent grand juries at the Central Court.

May not that operate to render the committing magistrates less careful, inasmuch as an improper committal does not come before the public, but the bill is thrown out and the party never comes to his trial, and therefore the weakness of the case is never publicly known; may not that tempt magistrates to be less careful in committing, knowing that if there is not sufficient evidence the grand jury will do justice by throwing out the bill?—I do not think that consideration operates upon magistrates; we find there are some gentlemen who are called the committing magistrates, and others the contrary; you can form a judgment of the indiscretion of the former by looking at the result, when you will find that one-half of their committals are discharged.

What should you say with respect to those cases in which an inquisition has been found before a coroner in which the party must be put upon his trial, might not the going before a jury in cases of that kind be dispensed with?—I feel a little difficulty in answering the question. It frequently happens that a coroner's jury, taking up the local prejudices, find a verdict of murder or manslaughter; but when the witnesses go before the grand jury, they, upon hearing the evidence, impartially throw out the bill for murder and find for manslaughter, or throw out the bill altogether; and thus, although the accused has to undergo his trial on the inquisition before a petit jury, the prejudice against him is, in a great measure, removed, and in such cases the investigation by a grand jury has a good effect for the accused.

Is not it attended with inconvenience to medical and other witnesses?—Yes, I should say that the worst part and the most irksome to a prosecutor and witness is the attendance before the grand jury, where they may be kept four or five days in waiting, without any accommodation.

Has not that been attended with very great inconvenience to medical men and others?—No doubt about it; and it might, perhaps, be avoided when the verdict of a coroner's jury is for murder, because the accused must be tried for murder, and the court and jury would have the same power of reducing the inquisition to manslaughter as upon an indictment; the only objection would be, that justice might be frequently defeated in consequence of the informality or incorrectness of the inquisition, because you find, from the confusion in which inquisitions are sometimes taken, the coroners very often return an inquisition that is bad in law.

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Might not that be obviated by allowing the inquisition itself, drawn up according to law to be filed within a certain number of days?—Yes, it might be remedied in that manner.

It is a great inconvenience, if it could be avoided, the sending prisoners to gaol previous to trial, when they may be ultimately acquitted; does it occur to you to make any suggestion with respect to the power of holding to bail?—I think the present power is sufficient; if there is any doubt of the guilt of an accused, two magistrates may admit to bail.

In your judgment, is it not desirable that the trial should follow as speedily as may be after the committal?—Certainly; nothing in my opinion is so beneficial as a speedy administration of justice.

Do you conceive that it would be desirable in the counties which are not within the operation of the Central Court Act that the trials should be more frequent?—Certainly; where a trial is long delayed, there is always a risk of a failure of justice by the removal of witnesses, either by design or accident, as in the case of seamen.

May not it be considered also that punishment, to be effectual, ought to be as speedy as possible after the offence?—Certainly, to follow immediately upon the offence.

Have you ever experienced any inconvenience from the want of the means of a new trial in case of felonies; what has been the usual practice in a doubtful case of fact?—Always to rely upon the Secretary of State; and unfortunately he has so much of other matters to attend to, that he generally refers to the same authority which had before decided, so that, in fact, it is no appeal at all; I doubt whether it would be beneficial to have a power of new trial in case of felony.

Do you know how it works in the case of misdemeanors, where new trials are granted by the Court of King's Bench?—I know of one case that strikes me, at the moment, in which a gentleman had been found guilty of perjury by the most foul combination and perjury on the part of his prosecutors; he happened to have the means, with the assistance of his friends, of going to a large expense to make inquiries, whereby he obtained demonstration of the conspiracy entered into by the parties who had prosecuted him, and a new trial was obtained; the result was his acquittal, and the conviction of some of the witnesses against him. This case would certainly tend to show that there ought to be an appeal, in a criminal case, for a new trial.

How would you have proceeded in such a case if it had not been a King's Bench prosecution?—By application to the Secretary of State for pardon.

Would you not have had great difficulty in procuring a pardon in such a case?—Very great; I have had occasion to solicit it in some cases, and in some I have succeeded, but not without great difficulty. Some years ago, a young man was capitally convicted upon apparently the clearest possible evidence; I conducted the prosecution against him, and could not imagine that there was any doubt of his guilt; but the young man protested his innocence, and he communicated facts to the then governor of Newgate, which impressed him with the belief that the young man was innocent, and he begged me to see him. I heard the young man's statement, and commenced a minute inquiry into the circumstances, and I was at length fully satisfied that he was innocent. I consequently memorialized the Secretary of State; but it was not without great difficulty I obtained his pardon, after he had been in Newgate ten months under sentence of death.

What is your opinion of the law requiring such very speedy execution after murder?—I think it is useless to maintain it, because facts might, by possibility, turn up to create a doubt. I remember a case where, in a little more than 48 hours, enough could have been shown to justify a suspension of the judgment, but the men were executed before I had time to investigate. Directly I began to make inquiries, fact upon fact was developed, which would not only have justified a suspension of punishment, but would doubtless have obtained for the unfortunate men a free pardon.

In cases of rick-burning and the burning of out-houses where life was not endangered, do you think they should be visited with capital punishment?—I can hardly venture to give an opinion on this point. The setting fire to a dwelling-house deserves the severest punishment, because the lives of persons are likely to be endangered by the spread of the conflagration; in rick-burning there is no such danger, and I think that transportation for life, with imprisonment previously and hard labour, would have more effect than even hanging to prevent that and many other crimes. A man is forgotten directly he is hanged, and his friends think no more about him—indeed, they do not wish to recall him to memory; but if he is living in misery and suffering, all his associates and acquaintances are feeling sympathy for him, and the dread of meeting a similar fate deters others from going on in the same courses.

Thursday, 25th February 1836.

The Right Hon. Lord *Wharncliffe*; Examined.

Examination of The Right Hon. Lord *Wharncliffe.*

YOUR Lordship for many years has filled the situation of chairman at the quarter sessions for the West Riding of Yorkshire?—I have.

Would your lordship state your opinion as to the best mode of treatment of juvenile offenders?—That is perhaps one of the most difficult questions connected with criminal law, and I very often have had occasion to turn my thoughts to it. I am quite clear that the putting young lads into the society of the older thieves in a prison is the worst system that

that ever was adopted in any country; and the classification, which under the Act of Parliament takes place, has not the least effect in preventing the contamination that ensues from that sort of society; but it appears to me that a great number of offences for which juvenile offenders are committed to prison, might be punished in a more summary manner, so as to prevent their ever going into the walls of a prison at all, until they commit offences of so deep a nature that it cannot be prevented. I have once or twice suggested in Parliament, whether there could not be some tribunal at the petty sessions for the purpose of getting rid of offences of that description; for instance, if the justices at the petty sessions had the power to summon or to swear a jury *de circumstantibus*, and immediately proceed to the trial of those young offenders, always taking care that the offences for which that proceeding should take place should be well defined, and the punishment limited; I cannot help thinking that would have a better effect than sending those lads to prison.

Has your Lordship ever considered whether it would be desirable or safe to entrust to two magistrates the power of summary conviction with respect to juvenile offenders in cases of hedge-breaking and other offences of that nature?—I think it might safely be entrusted to two justices to a certain extent, but we all know that with those juvenile offenders corporal punishment has, if properly administered, more effect than any other. It has very often happened to me, and I have seen it happen in other cases, where a very small corporal punishment, administered with the consent of the parents, has had all the effect, although the present state of the law would, strictly speaking, have obliged us to send these unfortunate lads to be tried, and perhaps to remain six weeks in gaol before they are tried, and to be all that time in the society of thieves and rogues, and have afterwards to undergo the same punishment.

Though the punishment afterwards inflicted is slight, yet the mischief is done in the previous depravation of their morals?—Yes; I doubt whether the punishment of imprisonment, hitherto administered, has had any good effect at all in deterring from crime those juvenile offenders. No doubt this new system of silence has a considerable effect. I should say, my experience goes more to its effect on grown persons; but when a lad comes into prison there is a certain degree of compassion on the part of the gaoler, and he is not so strict with the lad as with the man. I doubt if any penishments, such as that of solitary confinement, have much effect on the juvenile offenders. A few stripes would be much more effectual than anything of that sort.

Would not one great advantage of summary conviction be the immediately sentencing the offender to his punishment, whatever it was, without the mischief of previous contamination before the time of trial?—Yes, it would, certainly.

Would your Lordship think, supposing power were given to the magistrates, without the intervention of a jury, that it would be desirable either that it should be exercised only with the consent of the young offender, or rather of his friends, or that there should be a power of appeal?—I think that a punishment of the sort I am speaking of, corporal punishment, ought not to be inflicted upon any summary conviction of magistrates, without the consent of the parents, or of the nearest friends. But if a tribunal were established in which a jury acted, I do not see the least necessity for any consent on the part of the parents.

Would your Lordship think it necessary to have a jury of 12?—No, three or four; a small jury, not at all amounting to 12. Indeed I do not see why, if you have only six or seven, the magistrates should not decide such a case as that.

Does your Lordship think, in case the power were to be exercised by two magistrates, without a jury, there ought to be consent?—Yes, I do.

Does not your Lordship conceive, that in by far the greater number of instances juvenile offenders would prefer summary conviction to being sent to gaol to await their trial?—I doubt very much whether they would. I think they would be more afraid of corporal punishment, immediately inflicted, than any thing else. Besides that, the effect of the example would be so much greater in the place where it was administered. Suppose the punishment to be inflicted on the boy, and he is sent out crying to his companions, I cannot help thinking it would have a much better effect on persons of that age than any other punishment. I remember an instance at the quarter sessions, of a boy being sent there to be tried for stealing two eggs; that case came before the quarter sessions from the very extremity of the West Riding, and must have cost the county 8*l.* or 10*l.* at least. Sitting as chairman, I could not help finding fault with, and reflecting on the magistrates, for sending a case of that sort. The answer was, "it was very true, but he was a boy of bad character, and we had had some difficulty in bringing him to punishment before. Here was an offence committed, and they did not know what to do with him." My answer was, "If I had been the magistrate, and the father had consented to it, I would have taken on myself to have flogged him at the time, and have done with it."

The boy had probably been in prison three weeks or a month?—Yes.

Is your Lordship aware of any ill effect that has resulted from the exercise of the summary powers which the magistrates have in respect of many small offences?—I cannot say I know any instance myself; at the same time it is very necessary to guard against the warm feelings of magistrates, on all occasions, if possible.

Does not your Lordship think that that could be effectually done, if the power were entrusted to two magistrates, subject to the right of appeal to the sessions?—I thnik it might.

Without a jury?—Yes, I think there ought to be a right of appeal on the part of a lad of that sort, against a summary conviction. But supposing a slight punishment to be in

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the power of the magistrates (as I have stated, it should not be done without the consent of the parents), I do not think there would be occasion for any appeal.

It should be open to appeal, unless done with the consent of the parents?—Yes.

Where the offence is very slight, such as the case which your Lordship has been alluding to, of stealing a few eggs, does your Lordship think that that summary jurisdiction might also be with benefit applied even in cases of adults?—I think it might, but I have considerably greater objection to any corporal punishment inflicted on adults. The misfortune is, that as to these punishments of adults, for trifling offences of that sort, there is a difficulty in executing it. Stocks have gone out of fashion, and you do not see them; formerly, for drunkenness, a man was put in the stocks and exposed; that is entirely out of date, and you never see them anywhere in the country. There are scarcely any standing in any part of the kingdom; and to send a man who commits a small offence 30 or 40 miles to the county gaol is an enormous expense. I really do not know how you are to avoid it, unless there are means of confinement; and means merely of confinement are very rare, that are really of any effect. As to putting a man in a cell, where he has communication with other people, it is in point of fact no punishment at all. In many cases an idle man cares nothing at all about it.

Might it not afford some mitigation of the present evil, of sending persons to gaol for slight offences, if the magistrates had the summary power of imposing a fine?—Independently of confinement in a gaol, the only means of punishment which a magistrate could summarily inflict would be by some pecuniary fine. I think it might. I think it might be so contrived as to enable the magistrates to impose a fine summarily on persons for certain slight offences. But after you have imposed the fine the man may not be able to pay it, and you must then, at last, have recourse to some ulterior punishment.

Does your Lordship find that a great number of parties, charged with small offences, and juvenile offenders, plead guilty at last?—A great number do, and that in spite of any thing that can be said. No doubt they do it with the notion that by pleading guilty they are to get off part of their punishment. My system has been, not to treat them in that way, but to go to the full extent of the punishment they would have had if they had been found guilty; provided always, the counsel against the prisoner states a case calling for punishment. On that point I am quite aware that in France, according to the law, the man is not only punished, but is made subject to the whole costs of the proceedings. I do not know how that would be effected in England, for the greater part of the men brought before us have not a shilling; how you could enforce the payment of the costs I do not know.

Perhaps the only feasible mode would be, by obliging the party to work, and giving the party injured the earnings?—Yes; still how are you to force the man to work? you can only do it by the terror of some other punishment. If you can force him to work while in prison, you may give the profits of his work to the party injured.

Would it not have a salutary effect, if every party were obliged to work (subject to certain modifications, so that a man might not be kept perpetually in prison), and so do something, the profits arising from which might be given by way of compensation to the injured party?—Yes, I think something of that kind might be arranged.

So that, in point of fact, the not paying the costs of the prosecution, might prolong his punishment; or supposing the offender to be imprisoned for a month, with a fine subject to the payment of costs, on non-payment of the costs, his time might be trebled, or doubled, as is the case in France?—I am not aware how that is enforced in France; that is a principle on which the commitments are now made by magistrates, under certain Acts of Parliament, in England. The parties are imprisoned till they pay the penalty.

Is not that a good general principle in all cases of injury to property?—I think it is, certainly.

It keeps up a better adherence to the distinction of the *meum* and the *tuum*?—Yes.

Perhaps, according to your Lordship's experience, it seldom happens that a person once immured in a gaol, ever turns out an honest member of society afterwards?—I think anything like reformation of persons committed to a gaol, to any extent, is the purest dream that can enter into any man's mind. It is quite a different thing to say, that while in gaol they should not have all the means of reformation possible; but I confess I have not the least hope that any system can by possibility reform many individuals that are sent to gaol. The effect of proper treatment in a gaol may be an example to others. As to the individual himself, I think it rarely has any effect on him. When you see a lad beginning at twelve to be a thief, by the time he is sixteen, he will have been tried several times, and will come before you over and over again. This is not confined to offences of a civil nature. We all know (and I know from inquiries I have been making lately) that in the army, out of a company of one hundred, perhaps there will be four or five persons who will be constantly punished; they come over and over again; any reformation is rare, and confined to very few cases.

Does your Lordship think it stands very much in the way of the reformation of juvenile offenders, where such reformation is possible, that they are often confined for a very short time in prison after conviction or pleading guilty; commiseration being excited, they are sentenced to confinement for a few days, or at most for a short time only?—I confess my experience leads me to say that the punishments we are able to inflict on young offenders, have very little effect indeed. The effect soon passes from the mind with persons of that age.

Do those punishments, in your Lordship's judgment, afford any effectual or practical barrier

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to the commission of crimes, or to the first entering into crime by young persons?—I think not. I think, as I have stated already, if it were possible that on the first offence there should follow immediately corporal punishment, it would have more effect than any thing else; and after all, those are the modes, undoubtedly, by which discipline is preserved among boys of a higher class, with all the feelings of honour and spirit about them.

Has your Lordship ever considered the effect of transportation as a punishment?—I think it is a punishment that acts very unequally; it is far better now than it was some few years ago. No doubt some six or seven years ago, transportation instead of being looked on as a punishment on the part of persons sentenced to it, was rather looked on as a favour. But the regulations that have taken place in the Colonies and Australia lately, have been such as to make the representations that have come from thence not so very seducing as they were before. At the same time, even now the effect of a sentence of transportation is very different on different people. I have seen a man receive the sentence of transportation even now, and sentence of transportation for life, without his apparently feeling that he was to be much worse off at the place to which he was going than in that which he had left. On the other hand, I have seen the sentence of transportation for a short period affect the friends of the prisoner who was transported, very much indeed, and there could be no doubt, in cases of that sort, where the sentence passed on individuals has excited tears, and even exclamations on the part of their friends, that that must have a considerable effect, as an example, on all those who heard it. I should say, that to a young man, or a young woman, this punishment is, generally speaking, not so very great as people imagine it to be. I cannot help thinking, however (looking at the effect on those who hear and see it), that the sentence of transportation has a very considerable effect. Emigration is a much greater favourite with people of that class than it used to be; they do not look on it as such a great misfortune. A few years ago, the separation of a man from his family, to an individual, was a great punishment. I am afraid that is wearing off very much, and that there is a feeling among the common people, that there are places to which they may be sent and live much better than they do in England, and that they may better their condition by being sent out of this country.

That, probably, is often increased by occasional instances of persons returning with success?—Yes, and sometimes with considerable sums of money. I have seen letters from persons there, who are exceedingly well off; and a few years ago it really was no punishment; now it has become a considerable degree of punishment. Young women are sent there; they know that young women are scarce in that country, and that if they behave themselves tolerably they will soon be enabled to earn money and live comfortably, and almost all of them get married.

Probably your Lordship would be of opinion that among what are called the bad or regular class of thieves, transportation has not any very great effect, as it must be an event looked forward to?—It is looked forward to; but I am not sure it has not effect on that class of persons; perhaps a greater effect than on a better class. On that class of persons who are constantly in the habit of indulging in all their passions and vices, no doubt, when sentenced to transportation, and to be kept in prison till sent on board a transport, and separated from all their haunts and companions and vices, it has a very sensible effect. Then, if they look forward to the fact, that when they arrive there they are to work, and be made to do something, I cannot help thinking it has a very considerable effect on them. The very breaking off habits of intimacy with a parcel of blackguards with whom they have been in the habit of indulging in vices and irregularity, is in itself considered a great punishment by such men.

Though a great privation and hardship when it arrives, does your Lordship think it tends in a very high degree to wean them from their courses?—I have not experience enough on that subject; I can scarcely answer that question; it is a question that I think persons employed in the police are more likely to answer than a person who has been administering justice. We can only judge of the effect of a sentence from our own neighbourhoods, and seeing the effect of it in courts of justice when sentence is passed.

In your Lordship's judgment, is there not a great chasm, as it were, in the scale of punishments between what are termed capital, and transportation for life, and imprisonment?—There certainly is; but at the same time it is a chasm most difficult to fill.

Could it be filled otherwise than by longer terms of imprisonment?—I do not know that it could in any other way. The French undoubtedly have much longer periods of detention than we have; then, on the other hand, they have not the means of transportation to the colonies that we have, and their punishment of confinement, as I have always understood, the galleys, is a very severe punishment, and we have nothing of that sort.

Does not your Lordship think, in respect of some very atrocious offences, which still are short of capital, a longer term of imprisonment might be beneficially adopted?—Yes, I think so; but I am inclined to think, for that sort of offence there should be special places of confinement; that they should not be mixed with those persons who are confined for more trifling offences.

Probably it might be desirable that that period should be passed either in solitary confinement to the extent a person might bear it, or imprisonment under silence?—I confess I think all that is exceedingly well managed in America; it is a very trite remark to say that; every body refers to America when they talk of imprisonment. The idea was first struck out there, and we cannot do better than follow it, except in some of their more rigorous rules, because there is no doubt that they have been far too severe in corporal punishments in order to enforce that discipline. I do not think there is any occasion for that severity, from the experience I have, which is confined to the prison at Wakefield.

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We have been enabled to establish a system of silence without any very severe discipline at all. Solitary confinement, as it is carried on in those prisons in America, must be a most severe punishment to individuals; and I think it is a pity there should not be an attempt of that sort here; but I think it should be in a prison entirely separate. In the Penitentiary there is, to a certain degree, solitary confinement, but it is not quite effectual. I see no difficulty in making it effectual, and I think it ought to be tried.

Would it, in your Lordship's judgment, be desirable that those great ranges of crime which are now by law indiscriminately termed capital, that those should be distinguished, the aggravations marked, and capital punishment inflicted with greater certainty on offenders convicted of the more heinous and more atrocious aggravations?—I think the perfection of the system of punishments would consist, if it were possible, in very nice definitions of the degree of offence, and that the punishments should be equally definite, and that they should be certain, and follow always on the commission of the offence, unless in cases in which the circumstances were such as that it should be thought right by the Crown to grant a free pardon. I confess I think there is nothing worse than a sentence being passed on a prisoner who has been convicted of a crime, and the execution of that sentence being in part remitted. I think when once sentence is passed, the person who is sentenced should feel satisfied that sentence is to be executed upon him, unless he is able to make out such a case as to call for the entire remission of the punishment. But at the same time, it is an exceedingly difficult thing to define crimes to the extent they ought to be.

Your Lordship probably thinks it right that there should, to a certain extent, be a discretion left in the Judge, inasmuch as you never can make definitions to suit all crimes?—No, you cannot make definitions to suit all crimes, but I cannot help thinking that a variety of punishments for the same degree of offence is a very bad thing. I think a judge in one county sentencing a man to a fortnight or three weeks' confinement, and in the next county to six weeks, has an exceedingly bad effect. If it could be avoided, it would be very desirable. If it were possible to say that for such an offence there would be a certain punishment, of any kind you please, and that that is not to be remitted unless you show that there is such a case as calls for the entire remission of the punishment; that is my notion. It would perhaps be difficult to carry such a system into execution.

In the case of burglary, which your Lordship knows is a very comprehensive class of offences, might not that conveniently, so far as regards capital punishments, be restricted to particular cases (without going into them), where violence is done to some member of the family, or where the offence is accompanied by any circumstance of violence or cruelty?—In practice, that is very much the case; burglaries are seldom punished with death, unless accompanied by some act of violence. I see no reason why the law should not so state it. On the contrary, I think that would be an approximation to the principle I have stated.

Would your Lordship not think it more certainly efficacious, as preventing persous committing crimes with those enormous circumstances of aggravation, if they knew it was capital, and that death would certainly follow conviction?—I think it would to a certain degree; but there might be rather too much reliance placed on it. A great proportion of the cases where violence follows the commission of other crimes, arises from accident at the moment, not from premeditation. I am not sure that knowing a certain punishment would be inflicted would prevent it, as it often results from passion and temptation, and accident.

But still, is it not your Lordship's opinion that in all cases it would be proper to leave a discretion in the Judge as to the infliction of that punishment, and that there would be a difficulty in saying, wherever any violence was offered to any part of the family, death should *necessarily* follow, inasmuch as it might (as your Lordship observes) arise from accidental circumstances, and therefore that some discretion ought to be exercised in such cases?—I am not quite sure. The question is a difficult question to answer. I am not quite sure that it ought to be left to the Judge.

Perhaps your Lordship would think the more certain the punishment, the more efficacious?—If the object is to prevent the commitment of those violences, though it might be a hardship if it arose from accident, I think, probably the prevention would be more complete, if the punishment were more certain. At the same time, I would not have it conceived to be my opinion that that certainty would prevent those offences; as I said before, I think they sometimes arise from accident, and nothing threatened beforehand can prevent them entirely.

With respect to flogging, your Lordship would not apply that to girls?—No, certainly not. How far corporal punishment inflicted by females on girls might not be salutary, I do not know; but I am quite clear it ought not to be inflicted by men.

Do you think the age of fourteen would be about the age to which you would restrict it?—No, I should say you might even go further than fourteen; you might go to sixteen.

Would you have the flogging private or public?—I think, in general, private. I think there might, for the graver offences, be a power left to the magistrates to order it to be public, and even to be repeated.

It has been suggested to us, by a magistrate of considerable experience and intelligence, that he conceived very small offences might very well be determined by an equal jurisdiction in the chairmen of the unions under the Poor Laws; that he conceived it would form in rural districts a very efficient tribunal; is that your Lordship's opinion?—I have had no experience in this; I think it possible; I cannot help thinking the petty sessions competent for

for the purpose; I do not see the use of removing from them that sort of jurisdiction; I can only say, as to unions, I have no experience of them.

One of the advantages would be, supposing they were convicted, imprisonment would follow on it; it was also suggested by him, that in the case of juvenile or very young offenders, imprisonment in the workhouse rooms might be better than in a public prison?—I think so.

He said no well-conducted workhouse would be without some place of restraint in which to put refractory paupers; do you think that would be useful?—I think it might; that is making the workhouse to a certain degree a prison for children only; I think they might have good and effectual cells for punishment in all those places, and there might be a power to magistrates to commit to them.

Is your experience confined only to rural districts?—Both in rural and in town districts; for a great number of years of my life, I acted every week at Sheffield and the great manufacturing towns about Sheffield; even now, when I do business, I go to those great towns.

If your Lordship's plan were adopted, of having a jury of a small number, you would think no right of appeal necessary?—None; there should be some means of recording the proceedings of that court, which might be submitted to some superior court; I think, for instance, if they were to be returned to the Quarter Sessions to be recorded.

Is your Lordship in favour of a lenient first punishment?—No; I at once say I do not think the beginning with lenient punishments has a good effect at all; I have already said, that the definition of punishment, and a certain execution of that punishment, is very essential for the purpose of correcting offences.

Sending them to prison for one or two days is quite useless, you think?—I think quite so; I have always objected to it where I could; on the contrary, I am inclined to think that severe punishment at first has ten times more effect in reforming than that mode of beginning with light punishments and ending with severe ones.

Does your Lordship think that flogging would not be too discretionary, if left too much to the gaoler to use what instrument he pleased, and give what number of lashes he chose?—Yes; but I think that is generally regulated by the visiting magistrates; I think that in the regulations of almost all the prisons I am acquainted with, no punishment is to be inflicted without certain reference to those magistrates, and certain punishments only are to be inflicted by a certain number of stripes.

Is it usual for magistrates to attend punishment, or to leave that entirely to the gaoler?—No, I think not; but, however, living at some distance from the prison, I cannot speak correctly; my impression is, that it is done by the gaoler himself. In cases where I, sitting in court, have ordered the punishment of whipping immediately, and the prisoner to be discharged afterwards, it was done by the gaoler, and no one else was present.

Of course it is an object to guard against the improper excess of punishment?—Yes; certainly.

As to the question of capital punishments, do you think a difficulty arises from punishments being imposed for the lighter shades of offences; the lighter burglaries, for instance, which are never inflicted?—Yes, I object exceedingly to that; I think the hanging a punishment of that sort over all descriptions of burglaries, for instance, gives this notion to the prisoner; he thinks that the chance is greatly in his favour; that the offence he has committed will not be considered worthy of the capital punishment; I think that has a bad effect, and that is one reason why I think, if it were possible to define crime very strictly, it would be of great advantage.

You think certainty is the great object?—Yes, undoubtedly.

Do not you think they might be defined more strictly?—Yes, in the French code I believe they are defined more strictly; I know they are in the military. The definition of crimes, military crimes, are defined ten times more strictly than in England.

Your Lordship thinks burglary, arson and robbery might be defined strictly?—Yes, I think they might; there is that great distinction at once, the accompaniment of violence.

It has occurred to some of us, that in arson, the circumstance of life being endangered, the building being an inhabited house, might make a difference; is that your Lordship's opinion?—Yes, I think so.

The danger or risk a person incurs in committing a burglary, is not greater than a man pursues in carrying on a dangerous trade like that of a miner, and probably the average mortality is less in the case of the burglar than in the case of the miner?—Undoubtedly.

A much larger number lose their lives in the occupation of miners than in committing burglaries?—There is no doubt of that.

One cause of it is from the reluctance of juries to condemn and find them guilty?—There is that feeling.

Would it not be desirable in this point of view that the laws should read lessons of morality to the public, and is it not necessary that they should define the more immoral and enormous crimes, and not confound them together, inflicting the same punishment on a person who snatches another's umbrella, as would be inflicted on one who cut his throat?—No doubt that is very objectionable.

Has your Lordship found of late more capital cases, in consequence of capital punishments being repealed in some cases, or that many more serious offences are tried at the sessions than formerly?—There certainly are more serious offences: and in respect of burglary, a great number of cases of robbery brought before the sessions are, in point of fact, burglaries, and sometimes burglaries of very great consequence; but that I am told—I am not sure—differs very much in different counties. In one county they send almost every case to the assizes; and in other counties, as in the county of York, where it is spread over certain

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certain districts, the proportion of cases sent to the assizes is very small compared with the others. There is a great difference in the different ridings of Yorkshire. We, in the West Riding, do not send the same proportion as they do from others; they send slighter cases from the North and East than from the West.

Are you aware of any rule?—No, there is no rule; it rests with the magistrates more than any body else.

Do you think it desirable that the distinction between cases triable at the sessions and those at the assizes, should be more marked than at present?—I have not seen any bad effect from the present state of things in that respect.

When justice is well administered at the sessions, does not your Lordship consider it more desirable that offenders should be committed to the sessions, the interval between committal and trial being less?—I think it very desirable, and if I speak of the county of York, the very circumstance of the trials taking place, the capital trials, at the assizes at York, is a great reason why a great number of the cases should be kept in the ridings. When a man goes from Huddersfield, or from other distant parts of the West Riding, to York, he is lost sight of, and it has no effect on the country from which he comes; but if tried at Leeds, Pomfret or Sheffield, there he is among his friends, who are seeing and hearing what passes, and knowing and hearing the sentence passed on him; that has a good effect; the example is more immediate, and presented to the people before their eyes; they not only read it in the newspaper, but see it.

Is not the force of punishment at the assizes often weakened where judgment is merely recorded and no sentence passed, which can impress the people with a corresponding notion of the heinousness of the crime?—I think it is a very bad practice; it would be better to say a man is to suffer death or not; and if he is not to suffer death the sentence should be immediately passed.

The subject of prisoners having counsel has been much agitated of late; what is your Lordship's opinion?—I have already given it in another place.

Perhaps your Lordship will give us a general opinion upon it?—I am quite ready to do so generally. In the first place, the ground on which it is advocated is, that it would be for the benefit of the prisoner; I am quite of a contrary opinion; my notion is, it would be much worse. In the first place, there can be no doubt the prosecutor would have the best opportunity of choosing his own counsel, and he would probably secure the greatest proportion of talent he could, either on circuit or at sessions, or at the Old Bailey, when the man was tried. Now the present practice undoubtedly is, that the counsel merely opens the case, states the facts that he means to prove in evidence, and there is not the least attempt to draw an inference from the facts as bearing unfairly on the prisoner. If the counsel felt that he was to be followed by a speech from the opposing counsel, I cannot help thinking that that absence of all passion, and all pressing points in the way I have alluded to, would not exist, and that he would exert his best talents to press home, on the prisoner, the crime of which he is accused. And then if the counsel for the prisoner calls witnesses, the counsel for the prosecutor again would have to answer, as he has on a misdemeanor. It very often has happened to me to see that the fear of the speech of the prosecuting counsel in answer has had such effect on the defending counsel, that his client has been convicted because he has not thought proper to bring evidence, for fear of the speech in answer. The defending counsel perhaps feels his case is a bad one; it is his business to make the best of it; he does so, he tries to gloss the case to the jury; then, unfortunately, the judge, whoever he is, must, if he does his duty, appear to the jury and to the court to take the part against the prisoner at the bar, for he cannot allow those things which he sees are evidently glosses to pass unnoticed; he in fact makes a charge which is in a great measure an answer to the defendant's counsel's speech. That, I think, has an exceedingly bad effect. I have seen it occur; I have been more than once, in the situation of chairman of the quarter sessions, obliged to do that; I have seen counsel try to put the facts in a point of view, and state certain things which were revolting to any one who knew any thing about the case, and more especially to those attending to the whole evidence, and who knew any thing of the law. I have been obliged to address the jury really as if I were making a speech in answer to counsel. I think that has a bad effect. As trials are now conducted for felony, nothing in my opinion can be better or more dignified than the whole case from beginning to end; upon these occasions there is a calmness, a repose, an evident appearance of not trying to deceive or entrap the verdict of the jury; but apparently an evident attempt to elicit the truth, and get out the real fact at issue, namely, whether the accused is guilty or not guilty. I have seen trials in other places, in Scotland for instance, where they have counsel; I confess that I think trials for a grave offence in England, have a superiority over any other mode of trial I have ever seen; it is very striking indeed.

Your Lordship says, and very justly, that the apprehension of a reply would very frequently induce a prisoner's counsel to suppress the evidence that he might have; that certainly would be the case; but does not your Lordship think that that would be counteracted if that were done which has been suggested, and forms part of the proposed Bill, viz. that the counsel for the prisoner should always have the last word?—I do not know I am not sure about that; I think where the counsel for the prisoner was fearful of the talent of the opening counsel, I do not think he would depend on that.

Would your Lordship think it desirable, inasmuch as the proceedings on trials for felonies and misdemeanors now vary so much in this material point, that an alteration should take place as to the trials for misdemeanors, so as to preserve a consistency in the mode?—That is the great argument for the allowing counsel for the prisoner; in felonies there *is* an inconsistency;

tency; one cannot deny that fact; there is an inconsistency, first in allowing counsel to speak for the prisoner in cases of treason and the very highest classes of offences known to the law, and then refusing in a case equally involving life and death. Likewise in cases of misdemeanor, there are several of them very heavy crimes indeed. This is the real difficulty of the whole case. If all the trials were conducted in the same way, I should have had no doubt whatever on the subject. I should say, that if the present practice in felonies *is* the best for eliciting truth, it would be the best for eliciting truth in all other cases. But I am not sure that that would be a complete answer to those persons who are struck by the more apparent humanity of the other proceeding in certain cases. I doubt whether you could make an alteration as to the misdemeanors and treason. I think there lies the whole difficulty.

Has your Lordship ever read Patch's trial?—I have forgotten it if I have.

Does your Lordship think, in a long case of circumstantial evidence, that any judge, however experienced, is competent to raise all the points, both for the prosecution and the defence, and put them in the same way that opposing counsel would do, to raise them distinctly for the consideration of the jury?—Yes, I do; I think that if a judge, of proper qualities as a judge, gives his attention, I think he is; and besides that, I think the defending counsel, supposing he has not the power of speaking, can bring before the judge points, though he is not allowed to speak in public. There is no point that can be raised he could not put before the judge in some way or other, by cross-examination, or by directing the attention of the judge to it, or saying a word to the judge.

Can your Lordship say whether, on the Committee in the House of Lords, you examined any of the Scotch lawyers or judges?—I do not know who was examined.

Does your Lordship think we ought to have the benefit of their experience?—I think so.

Your Lordship is aware that there has been another point connected with the allowing counsel to prisoners, which has occupied the attention of the speculative reformers of the criminal law, which is the examination of prisoners?—I think that the principle never to ask a prisoner a question, is much the better one.

Have you found any difficulty, when a question of law has a little puzzled the Court, in reserving the point, the practice being to send it to the Home Secretary, and he referring it to the Attorney-General; does your Lordship think that that is a convenient mode of rectifying mistakes?—I do not remember such an occurrence.

You cut the knot?—Yes, whether right or wrong, I think I have been in the habit of doing it; I do not remember adopting the other mode.

Your Lordship does not recollect having reserved any point?—No, never.

The judges at the Assizes have difficulties, and they reserve their points?—It has happened to me more than once, perhaps, to take an *amicus curiæ* from among the counsel; if I had a difficulty, I asked his opinion, he not being employed in the case.

Supposing such a difficulty to arise, is the course of sending to the Home Secretary more convenient, or would it be more so to send to the judges directly?—I think from the quarter sessions, it would be better to apply to the judges. It comes upon me rather by surprise; it has never happened to me. Nor have I, that I know of, heard of a complaint that there was a decision given in these matters that was not a fair decision, or that required any reference.

Does your Lordship conceive it would be an advantage in this country if the judges were to go the circuits, for the purpose of trying criminals, oftener than they now do, once in five or six months, so that if they were devoted to the continuous trial of prisoners for graver offences it would be a good thing?—I think it would be a great advantage, for the punishment would follow more quickly on the offence; but that must depend very much on the business to be done elsewhere. But no doubt when a man is accused of a crime, the sooner the question of his guilt or innocence is decided the better.

Assuming that if two or three judges were employed continuously in trying prisoners, they would of course relieve the other judges from that labour, and it would not increase the expense of the country, and even if it did, the object is so great of bringing prisoners rapidly to trial, it might be desirable, might it not?—I think it might be.

Another point, as your Lordship has stated, which is very important, is, that where a long imprisonment is to be inflicted for a grave offence, it would be an object to devote a prison to that purpose; does not your Lordship think that some modification of that sort might be extended to transportation; that there should be persons transported without any hope; transported for life and kept to hard labour and left without the hope of reprieve or pardon in some more distant settlement, as in some degree has been done?—I think there has been a system of that sort. I do not apprehend you could ever establish it as a principle, that the power of the Crown to pardon after being transported should not be continued.

But a pardon from the governor?—I think there might be.

You think already what has been done there has had a very salutary effect, though it is not so well explained and known in this country as heretofore?—O! it has become better known.

Has your Lordship read the First Report of the Commissioners, recommending a consolidation of the Criminal Law?—Yes.

Does your Lordship think an advantage will arise from having the definition of crimes simplified, and the difficulties and niceties, as far as is consistent with experience, remedied and made more simple?—No doubt of that. I conceive it to be exceedingly difficult; and the more it is looked into, the more difficult it will appear, I am afraid; but if it can be done, I should think it a great advantage.

Does your Lordship consider it an extreme worth trying?—Yes.

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Is it a practice in the country to allow prosecutors' briefs to counsel at the sessions?—It is in our riding, and with great advantage; no doubt a great deal of time is saved, and the trials conducted with much greater decency and propriety. I have heard that there are counties in England where the trials are by no means so well conducted, and that from the very absence of counsel; where the magistrates, from a motive of economy, will not allow those fees; the result is, that the trials are conducted by the magistrates themselves, and that leading questions are put, and all those things which are carefully avoided where the court is under proper control from the counsel,—the trials there are said to be by no means conducted in a satisfactory manner. This I speak from information, not from experience.

Your Lordship considers it to be important to have uniformity of practice?—Yes, I am quite sure the money spent in fees to counsel is exceedingly well expended by the courts. At the West Riding sessions we have a bar of nearly 40 barristers, and of course there is a considerable choice of talent.

Has your Lordship two courts?—Yes, always; we get through the business in time with difficulty. The sessions at Pomfret begin at 10 o'clock on Monday morning; we have sometimes sat in court until 9 or 10 at night on some of the days; and even 12 o'clock on Saturday night, to get the business done.

The chairman of the second court, in what profession of life is he; is he a layman or a clergyman?—The gentleman who has sat lately as chairman of the second court at Pomfret is a clergyman; but in the West Riding in the other three quarters of the year it is an ambulatory court. It begins in the north of the Riding, then comes to the centre, and then to the southern division. Of course there are different magistrates in all these different places,—some lay, some clergyman. In the centre division there is a Mr. Rhodes, a clergyman, an exceedingly able man, who is chairman. I am generally chairman of the southern division, in which I live; and as to the northern division, it is one of very little moment; sometimes one, sometimes another takes the chair. At Pomfret, in the spring, it is the general sessions for the whole riding; I have presided there between twenty and thirty years.

Assuming that it is expedient to increase the severity of secondary punishments, do not you think in this country it would be very unlikely that you would be able to inflict imprisonment for life?—Very.

It would be inconsistent with the manners of the people?—Yes.

Do not you think it would often happen, that juries would convict, though they knew that the punishment was imprisonment for life, when they would not find a capital verdict?—I am afraid that is true. I think that conduct is not to be defended. The juries ought not to look at the punishment; they ought to consider whether the fact they are to try is proved, and whether the man is guilty or not guilty, and if a juryman does his duty, that is what he ought to mind. Still their feelings are enlisted, and they will act on them One thing to be said against imprisonment for life is, that you cannot make it a certain punishment, for, do what you will, men imprisoned for life will be for ever trying to get a remission, and compassion will arise; the circumstances and feelings at the moment of the commission of the crime or conviction will be lost sight of, and, after a certain time, the chances are that he will have his sentence remitted.

You think juries are influenced by scruples of this kind, that where life is taken away, if an error be committed it is irretrievable, but that if a man were subjected merely to imprisonment, though mischief and injustice may be done, yet it is not to the same extent?—No doubt those are the feelings; there are a great number of feelings interpose between the sense of what might deter other persons and the hardship on the individual who has to suffer. The only way to look at the punishment of death, is to say, is it an example or not? if an example, it is defensible; if it is not, it is not defensible.

If you bring your code nearer to what is the general feeling of mankind, is not the probability that juries would act more in accordance with the code?—Yes; at the same time I am not sure, do what you will, if you have severe punishments, that the feelings of the jury will not lead them to acquit a prisoner; perhaps not so often, as in cases where the punishment of death would follow.

One reason for asking as to that was, the conviction that it would be inefficient, the man getting out afterwards by compassion or by petition; therefore, in framing a code of secondary punishments, the object would be to make it extremely severe, not so much by duration as by labour or by solitary confinement?—It has happened to me, with respect to transportation, to know men in my own neighbourhood who have been sent to Australia for life, and for heavy crimes; a great number of them keep writing to me to use my interest to get them pardoned, and the hope of pardon is never extinguished to the last moment of their lives, if they want to come home.

Wednesday, 17th February 1836.

Henry Gawler, Esq.; Examined.

Examination of *Henry Gawler*, Esq.

YOU are a magistrate?—I am. I have acted for 17 or 18 years for the county of Southampton near Andover.

Were you one of the Commissioners on the original inquiry into the Poor Laws?—I was.

Have you turned your attention at all to the subject of juvenile delinquency, and the best mode

mode of dealing with it?—I have frequently had very young persons belonging to the agricultural classes, charged with offences, brought before me in the capacity of magistrate

Has it occurred to you whether it might be desirable to make a distinction between very young persons charged with offences and others?—Yes, undoubtedly; I think there must be a great distinction made, from the reluctance both in the magistrates and prosecutors to send them to a prison when they are detained for any delinquency, at least to a common prison.

Does that arise from the unwillingness to subject them to the contamination of a gaol?—Yes, from their mixing with a bad set of people, and also from the expense incurred; for the charges attending committals are considerable.

Does your experience lead you to know, whether the mixing with such people is not generally ruinous to the young persons exposed to the contamination?—Yes, and the consequence is, that punishment is rarely inflicted upon them. Their parents are aware of this reluctance, both in the prosecutors and magistrates, to expose young persons to this species of correction; and are thus induced to encourage their children in the commission of offences, which consist in stealing hedges and wood, and turnips, and so on.

After a young person has been once committed to prison, do you think, in general, he can well return to the paths of honesty?—They are so rarely committed, it is difficult to speak to that; but in the very few cases in which they have been sent to prison they have returned worse than when they went there.

The consequence generally has been, that they escape without any punishment at all?—Yes; for the jurisdiction at present belongs solely to the justices of the peace, and there is frequently some difficulty in getting even a summons, and a good deal of expense attending it; and as the depredations are generally committed on the common race of farmers, who do not like to subject themselves to expense or trouble, unless the commission of offences is flagrant or frequent they will not meddle with them.

Has it occurred to you, that the course of proceeding might in any way be improved?—I have often thought, since the establishment of the unions, that a jurisdiction might be given to them to punish those offences, and very safely so, for they generally consist of persons who are on the juries, and generally the chairman and the deputy chairman have sufficient knowledge of the laws for such purposes, and in many cases as much knowledge as the common run of justices.

Would you propose to give them summary jurisdiction?—I would give each head of the parish, the representative of that parish in the union, the power of summoning them before the general union to be tried there; and I would give each person who presided over one parish a power of summoning such delinquents throughout the union. By such means a power competent to compel an offender to appear would be easily accessible.

Would you extend this generally to all offences committed by very young persons?—I would to all offences not felonies. I am so little conversant with the practice in London and great towns, I should not wish to speak as to them; but in the country districts I should have no difficulty in doing it; and I should be inclined, certainly, to extend the jurisdiction of such an union to all offences under what is called the Trespass Act.

Would you extend it to petty felonies?—I doubt that.

Would it be desirable, in your opinion, that the magistrates should have a summary power?—Yes; I would give the magistrates always a concurrent power with the unions, that prosecutors may go to either. I would not deprive the magistrates of their present power, because it may be convenient sometimes to go to them.

Would you restrict the summary power with respect to juvenile offenders, as exercised by the magistrates, to cases of misdemeanors, or extend it to petty felonies; and do you not conceive that it might be done in the case of acquiescence by the parties in the jurisdiction of the magistrate, with power to appeal?—I think there is an aversion in the public mind to give that sort of jurisdiction in felonies without the interference of a jury. I am not aware that it would produce any mischief.

Do not you think it might operate beneficially in keeping very young persons out of gaol to inflict at once that kind of punishment which might tend to reclaim them without sending them to be confined amongst a number of bad companions previous to trial?—It would perhaps be very easy to have a separate part in the poor-house for solitary confinement, and a person authorized to whip them. I think that whipping is the punishment the parents dread more than any other, and for the purpose of preventing such punishment from being inflicted, they would discourage their children from the commission of offences. They have great affection for their children.

Even those who induce them to commit those offences?—Yes; they cannot bear to have any whipping inflicted. I think that is what they dread the most.

Do you think that whipping is, in other respects, a punishment that answers its purpose?—I think it will answer very well, and that the parents would dread it a great deal more than solitary confinement; and if you do imprison them, they are living at the expense of the public.

In all cases of petty felonies, you would still allow the law to take its course, by sending the offender before a jury?—Yes. I think the public, generally speaking, would not be satisfied with a trial for felonies without some species of jury; perhaps one consisting of four or five persons, or even three persons, might be easily collected out of the neighbourhood where the justices sit.

Might not a summary power be entrusted to the magistrates in such cases, giving the parties power to appeal?—Yes, I think it might be safely done. I am only averse to it by reference to the public feeling, which I think is against intrenching further on the course of trial by jury.

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Do you not think there is a great feeling on the part of the public against the frequent committal and the appearance of young persons at the bar; children are sometimes placed before a jury so young that it is necessary to place them on a stool to be seen by the jury; do not you think that the public are dissatisfied at the frequent committal of very young persons?—Yes; but chiefly from the great intermixture with other persons, and their being placed in a public gaol. There is a power in the magistrates to take bail for common felonies, and they generally get bail where the case is not of a flagrant description. They may be committed perhaps more in London than in the country. I should have no fear of justices abusing the power, if they had it; it is only with a view to the popular sort of objection which I fear exists.

Is there any other suggestion you would wish to make?—No.

Do not you think there is almost a false delicacy on the part of the magistrates (the same feeling that led them in some degree to decline interfering in administering the Poor Laws) as to the committing children to prison?—No, I think that it results entirely from their fears of the consequences to the morals of the children, and not from willingness that they should altogether escape punishment.

You were understood to say, that you thought the class of persons who would constitute the board at the union would be more likely to come to a proper conclusion?—Yes, I think that justices are very apt to underrate these offences; they do not sufficiently weigh the evil that falls upon a farmer whose hedges and crops are subject to perpetual depredation. The farmer knows more of it than his landlord, who cares very little about it; but if those farmers, who are the great sufferers, had also the power of determining on the quantity of punishment, they would generally be less scrupulous.

The view taken in some quarters is, that a summary power should be given to two magistrates, with regard to minor offences committed by juvenile offenders?—I have no objection myself; all the objection I should ever raise is, that I think the popular opinion is averse to it. I do not think there would be the least mischief whatever in it.

You think there would be no objection to giving a concurrent jurisdiction to magistrates with the union?—Yes; I think the magistrates should have a concurrent jurisdiction.

The principal feeling with regard to juvenile offenders must arise in large commercial towns; you have not much experience except in rural districts?—No, the cases with which I am conversant are entirely in the agricultural districts. The children are brought up as thieves from the encouragement given to them; the parents encourage them because they know they will not be punished, and the children get into habits of idleness and thieving; their morals are extremely injured by that.

You conceive that many children are brought up as thieves, and that the remedy for the evil is attended with so many inconveniences that it is not put into execution?—No, the expense is so great; the constable will charge 16*s.* for going over to Winchester with a child who has done sixpenny-worth of damage perhaps.

You have not had any experience as to the effect of flogging by way of reformation?—No, for it is not done, but I know that the parents are extremely fond of their children, and that they have the greatest objection to their being beaten; the farmers do sometimes beat them when they catch them.

Do you think there would be any objection to having some one room, or some portion of the workhouse used as a place for solitary confinement, in the case of juvenile offenders?—No, there would, I have no doubt, be plenty of room for that.

Would there not be a difficulty in getting up that kind of machinery?—No, I should say they should be shut up in a room by themselves, and the constable of the parish ordered to give them a little whipping.

Do the parents abhor this system of whipping from a sense of shame, or a fear of suffering?—It is a love of their offspring; I do not know a set of people who are really more affectionate to their children than the labouring classes.

Would the people in workhouses make any objection to their being used for purposes connected with a gaol?—No, I should think not; I do not know how they can get on with a workhouse without some appropriate place for those who misbehave themselves.

Notwithstanding you should give the magistrates the power of trying felonies, you still would not give the unions that power?—No, it would be putting them to a great deal of trouble, and they do not like to be taken away from their businesses, but they would not object to punish the sort of offences that chiefly affect the farmers.

Might they not punish them a little too severely as being sufferers?—No, I think not, especially if they are under the direction of some gentlemen of rank, which the chairman and deputy chairman generally are; if they are a little severe it would be no harm.

At what age should you be disposed to draw the line?—I should carry it as far as fourteen years old.

You would not make any distinction between girls and boys?—No, for the girls are as mischievous as the boys.

With respect to punishments where there is imprisonment in default of payment, you think that is not a good punishment as it respects children, depending merely on the ability of the parent to pay the penalty?—It is objectionable on such ground.

The person to whom they applied in each parish should have the right of issuing the summons?—Yes, but this power in each guardian should extend throughout the union, I mean that of summoning before the meeting which takes place every week.

Are the magistrates in your part of the country ever present when a boy is whipped?—No, I never saw an instance of a boy being whipped.

It is left to the discretion of the gaoler?—I believe so, but I really do not know who superintends

superintends it; it is at eighteen miles distance; we have no gaol at Andover in which that could be done; we have merely a place for temporary confinement.

Is it usual to sentence to whipping?—No, they sentence to the treadmill, and to that the offenders have a very great objection.

Have you been in the habit of attending the sessions much?—No, not much; I have occasionally.

Have you any magistrate of professional education there?—Yes, Mr. Richard Pollen is chairman.

Has he practised as a barrister?—Yes, many years; he attended the Hampshire sessions in full business.

Have you any rule among the magistrates as to what persons you commit to the assizes and what persons to the sessions?—No, we generally send it to the tribunal which happens to sit next after the committal; and if we think that it is a case of any nicety, we generally send it to the judges.

You are in the habit of committing occasionally to the sessions?—Yes.

You make the proximity of the sessions or the assizes, rather than the amount of the offence, the rule?—Yes, except in capital cases, or cases of apparent difficulty.

How many do you generally meet at petty sessions?—That is very uncertain; sometimes two, sometimes five.

How often are they held?—Once a week. I persuaded them to attend once a week.

During the sitting of Parliament do they proceed?—Yes, there are two there now. It very often requires no more than one for common cases.

You are sometimes obliged to adjourn, perhaps, for want of attendance?—Yes; but then some of the petty sessions in other places are not held more than once a month; in parts of Wiltshire, I believe, that is the case; but there are great inconveniences frequently resulting from their not being oftener held.

Provided magistrates were to try petty felonies, there might be a difficulty in getting two magistrates till the petty sessions came round?—Yes, there might be.

What would become of the boy in the meantime, in that case, supposing it were a case of felony?—He must be committed to the gaol, or bailed.

It might be a great tax on the magistrates' time if they were liable to be summoned for the trial of petty felonies?—Felonies occur very seldom in our district.

How far are you from any great town?—We are eighteen miles from Winchester, and eighteen miles from Salisbury. We have a great fair which brings us some business, Wey Hill fair. They might make the justices an excellent jurisdiction, by taking care as to the men they appoint; but when every man who has 500 acres of land thinks himself entitled to be appointed a magistrate, that cannot be the case.

Friday, 20th May 1836.

Edward Archer Wilde, Esq.; Examined.

YOU are an attorney in extensive practice?—I am.

You were under-sheriff?—I was, four years before I was sheriff, and afterwards sheriff in the year 1828. I think it right here to state that I have had no experience of criminal procedure since 1828, and my answers must be taken with this qualification.

Do you think there are any competent means of a prisoner reviewing the evidence on which he is convicted?—I do not consider that at present there are any sufficient means. The prisoner convicted in London and Middlesex may present a petition to the King in Council, through the Home Secretary, which may of course state all the grounds, either of fact or in law, upon which the conviction ought not to have taken place, and craving the mercy of the Crown; or if tried at the assizes, may present a similar petition to the judge who tries him. This cannot be considered as in the nature of an appeal. From the state of destitution and ignorance in which prisoners generally are, and from want of a court with proper officers, the prisoners have not the means of bringing their cases in a proper state for reconsideration; and I think I may state that the prisoners generally consider that the only benefit they can derive from a petition so presented is from the mercy of the Crown. Practically speaking, unless sheriffs, magistrates, and governors of prisons, and their officers, or charitable individuals, exert themselves in collecting and authenticating the grounds upon which a prisoner seeks for the relief, and subsequently take the trouble of communicating with the Secretary of State, the prisoners have little or no chance of a successful result to their application. This applies as well to those who are innocent as to those who merely seek for a mitigation of the sentence.

From the experience you have personally had, do you think it just and proper, or even necessary, that there should be some regular and settled mode by which prisoners, even after conviction, may obtain a revision of their cases in particular instances?—I do; and I am perfectly satisfied that many persons have suffered punishments where they have been positively innocent of the crime with which they were charged, and which, if there had been any court of appeal, with of course proper officers appointed, to whom the parties accused might have stated their grounds of appeal, there would have been a reversal of their conviction or sentence.

In your judgment, are the generality of prisoners aware of the means by which a revision may be occasionally obtained by an application to the Secretary of State?—I have no doubt that it is known in prison conversation that there is what is called a revision of the case (this

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is in capital felonies, but not otherwise), but it is only done in the form of a petition, and is therefore rather an appeal to mercy, than the assertion of a right, and it is attended with considerable difficulties to the prisoners, from their poverty and destitution.

Have you had opportunities, from filling the offices of sheriff and under-sheriff, of knowing what the situation is of persons who have been convicted, and the difficulty of obtaining a revision of their case?—I have had that opportunity; for during the time I was in office, both as sheriff and under-sheriff, I never failed attending in court at the trial of prisoners at the sessions at the Old Bailey, and I was constantly through the prison of Newgate.

Now, from the experience you have had, in your judgment, do you think it essential to justice that revisions should occasionally take place after conviction?—Yes, I think, in all important cases to the prisoners, where, of course, if injustice is done, it would be more serious than in minor offences, although, upon principle, justice should of course be equal to all.

You think it is therefore more desirable in capital cases?—Yes, in cases of capital punishment it is highly called for.

Are there some instances which have fallen within your own knowledge on that subject in which you have personally interfered?—There are.

Would you have the goodness to state any?—There were two men tried, of the names of Anderson and Morris, for the capital offence of robbing a person in Westminster of some very trifling sum, 1 *l.* 2 *s.*, connected with violence on his person. The prosecutor stated, that he met a woman in Westminster, and that she took him to a house where he was robbed by the prisoners, and considerable violence was used, having ultimately thrown him out of the house after having plundered him. He gave such evidence (I was present at the trial), that the judge, the Recorder Knowlys, called on the prisoners for their defence. They had counsel, and the prisoners at the bar gave an entirely different account of the transaction from the prosecutor. The prisoners asserted their innocence. During this moment a noise was heard at the outer door of the court, and with some difficulty a female came rushing into the court, who was apparently the witness the prisoners wished to call, and she, it appeared, was the individual who had taken the prosecutor to the house in Westminster. She gave an entirely different account of the transaction to that of the prosecutor, stating, that he had gone with her to this house, which she had improperly taken him to, being the house of Morris, with whom she was cohabiting, and that when Morris came home, and found a man there, he kicked him out, and that, in truth, that was the real transaction. The Recorder took a strong impression from what had passed against the prisoners, and in a very few moments, after a very short address to the jury, they found the prisoners guilty, together with a woman who was also a prisoner with them, she being in their company and in the house at the time. Upon the jury finding the prisoners guilty, the recorder immediately made an address to the witness, Hannah Morris, by telling her she was a bad, corrupt woman, and ordered her into custody to be tried for perjury. Having heard the case tried, it appeared to me that the story she had told was true. I therefore, after the court was up, took the governor of Newgate into the prison, where she repeated all the facts she had deposed to. One most material fact was, that the prosecutor a day or two after the alleged robbery, had taken the parties up before a magistrate at Queen's-square office, and that they were only charged with the common assault. This fact, of course, was easy to be ascertained; and ultimately, after inquiring into every fact to which she had deposed, it turned out that her statements were true. I, therefore, finding that the two male prisoners had been ordered for execution, thought it my duty to submit the facts to the Secretary of State, Sir Robert Peel, urging, that at all events, inasmuch as the Recorder had ordered this woman to be tried for perjury, that there ought to be a respite until that trial was over, to ascertain whether the prosecutor or the witness had sworn truly. After several communications with Sir Robert Peel, but not until half-past eleven o'clock on the night before they were to have been hanged, as on the following morning, was I able to procure a reprieve. If I had not had the assistance of the governor of the prison (the late Mr. Wontner) and his deputy, Mr. Barrett, the facts and circumstances establishing the innocence of these prisoners would never have been made to appear.

Both the prisoners were to have been executed?—Yes. Two days after the time when they would have been executed the sessions came on, but the prosecutor never dared to appear to support the indictment against Hannah Morris. All the documents connected with that case are to be found at the Home Office; and it was at the sessions, no doubt, of May, 1828, during the year I was sheriff. Another case was that of a man of the name of Smith, who had been indicted and found guilty of forgery, and ordered for execution, he having pleaded guilty under an express promise that his life should be spared if he pleaded guilty. Although the relations of the prisoner were respectable, yet for the want of some proper court of appeal why the sentence should not be carried into execution, it was not until four or five days, or a very short period before the day appointed for his execution, I having heard his condemned sermon, that a respectable relation of his applied to me, as sheriff, to exert my influence to arrest the execution. On inquiry, it appeared that the case was instituted by the committee of bankers, and that as many prisoners had got acquitted from the difficulty of proving the utterance, the then solicitor for the committee of bankers thought it right to authorize the city marshal, Mr. Cope, the present governor of Newgate, to go to the prisoner and state to him, that if he would plead guilty his life should be spared, or in other words, that he should be transported. On finding the facts to be as represented, I communicated with the Secretary of State, Sir Robert Peel, and he made an appointment for an interview with Lord Lyndhurst, the then Lord Chancellor, who ultimately

considered

considered it necessary to summon to his private room, at the House of Lords, the prosecutor, the solicitor to the committee of bankers, the city marshal, and others; and after an examination, it being ascertained that the facts were as I had represented, the individual was respited during His Majesty's pleasure. The person who applied to me on behalf of the prisoner was the prisoner's brother-in-law, and a highly respectable tradesman in Cornhill, and he had been (as he stated to me) occupied many days in endeavouring to ascertain a proper channel through which the case might be properly submitted. There were also two men indicted, of the names of Mallet and Farthing, the particulars of whose case are at the Home Office. They were found guilty, and ordered for execution. The prisoners were poor destitute Irishmen, and the offence with which they were charged was of the most revolting description. By the humane assistance, however, which in all cases was afforded, of the officers of Newgate, such documents and proofs were sent to me, that I thought it my duty in like manner to submit them to Sir Robert Peel, who, I knew, from the experience which I had had, would cause the case to be properly investigated, and ultimately these prisoners were respited.

Were they convicted on circumstantial evidence?—Yes; and the prosecution appeared to have originated in a conspiracy on the part of the prosecutors.

How was the falsity of the charge made to appear in that case; from the improbability of circumstances?—Partly by the improbability of the story on the part of the prosecutor, and partly by direct evidence submitted to the Secretary of State.

Had you yourself any doubt of the innocence of those persons?—I had none.

Did they receive a pardon, or what became of them?—I believe they received no more than a respite. I have understood it to be a general rule that when prisoners, who are capitally convicted and ordered for execution, are respited, they are always transported for life. That occurred in the case of Anderson and Morris. Feeling satisfied of their innocence, I wrote to Sir Robert Peel, and they were afterwards pardoned; but not until they had been nine months under transportation.

Was that the case of the robbery?—Yes.

As to the forgery, what became of the young man?—He was transported for life.

And the third case?—The result of that I do not remember, except that they were not executed. There was another man who was capitally indicted for the robbery of a woman; I think his name was Brown, and who, upon the depositions of facts, was respited on the ground of his innocence; but that was not until his master, Mr. Lingham, a wine-merchant, had been exerting himself for many days to procure a remission of his sentence. The documents are at the Home Office.

Are you aware whether the evidence which is obtained subsequently to the conviction is not often in such an undigested state, and requires so much sifting, that a great deal of pains and some legal experience are necessary to make it intelligible and satisfactory to the Secretary of State?—Certainly.

From your own personal experience on the subject, and your general observations and knowledge, would it be desirable to provide some more certain means for inquiry in cases of doubt after conviction?—I think it indispensably called for. From the want of it the sheriffs and the officers of the prison, who, of course, are the only persons in constant communication with the prisoners, are often placed in a most painful situation in having to judge how far, consistently with the discharge of their own duties, they ought to interfere. I wish it however to be understood, that not only my co-sheriff, Mr. Spottiswoode, and myself, but likewise former sheriffs, have felt it their duty to communicate with the Secretary of State on the ground of there being no proper court of appeal. I confined my applications to Sir Robert Peel to cases where I believed the parties to be innocent. I think that if the documents at the Home Office are examined, many instances will be found in which, by the exertions of former sheriffs, the lives of many persons ordered for execution have been saved.

Is it your belief that many innocent persons do suffer from the want of a proper mode of inquiry?—I think many innocent persons have suffered; the term "innocence" I use with reference to the offence with which they were charged.

Have you ever considered what means might be adopted to remedy this evil?—Whether there might be any court of appeal for the revision of convictions is a very difficult question. It is also a question whether the appeal should extend to all, or whether to capital cases only. In the consideration of this question it must be remembered, that the guilty as well as the innocent will always avail themselves of a court of appeal.

When you speak of a court of appeal or any means of revising a former sentence, do you speak, or would you recommend some establishment for the purpose of a mere discretionary inquiry, or a court of appeal with a power to grant a new trial?—One great defect would be remedied by there being some mode established by which prisoners might state the grounds on which they thought sentence ought not to be executed. With respect to capital felonies, it is not only necessary that the *facts* connected with the conviction should be the subject of inquiry, but the *law* as laid down by the Judge at the time of trial, both as to the offence and the evidence, as in civil cases. As the law at present stands, a man may be apprehended in London for a capital offence, tried, convicted and executed in less than a week.

Would it be useful in your judgment, in order to prevent wrong convictions from taking place, that the prisoner's counsel should have the power of commenting on the evidence?—I think, that while the prosecutor is entitled to have counsel, the prisoner should also be allowed to have counsel to address the jury. I have no doubt that if the prisoners had counsel, many guilty persons would be found guilty who would otherwise get acquitted.

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Examination of *E. A. Wilde*, Esq.

The general impression is, that of sympathy by the Judge and jury, because the prisoner has not the benefit of counsel.

Do you not conceive that the comments of counsel upon the evidence, and the different views that may be taken of it, may be a material aid and assistance to the Judge in his summing up to the jury?—I do. I believe it was a saying of Lord Eldon's, that he got more benefit by detecting fallacies, by hearing the arguments of those who agreed with him, than he did from the arguments of those who differed from him; and therefore it is necessary to hear both sides.

Do you not conceive that that is a principle particularly applicable to cases of long and complicated evidence?—I do.

May not the real state of facts, which can only be known to the prisoner himself and those he instructs, escape the penetration of the Judge?—I think that they may escape the penetration of the Judge, and it is not surprising that it should be so; the difference between the Judge and the counsel being, that the Judge's mind is directed to the whole case, while that of the counsel is addressed more particularly to that which he knows is beneficial with reference to a particular point.

May that not be a point on which the whole case materially depends?—Yes, and particularly in those cases which, perhaps, Judges think the strongest, cases of circumstantial evidence.

In your judgment, what is the impression made on a jury by the refusal to allow the prisoner to be heard by counsel; do they consider it as a hardship?—Considering the law has existed so many years, I do not think the minds of juries are addressed to it; but from the fact of there being a counsel on one side and not on the other, they naturally become embarked with the prisoner, and more particularly when the Judge seems to act on that impression.

They feel at the moment that the prisoner is placed under a disadvantage?—Yes.

In your judgment, with respect to the crime of murder, does the execution follow too rapidly after conviction?—Most decidedly so.

What are the objections on that subject that occur to your mind?—It appears to me that there are many cases of capital felony, such as house-breaking, connected with great violence, highway robbery with great personal violence, and others short of murder, which for the purposes of example, require as speedy execution as murder; but the great objection to speedy execution is, that you do not allow time for the investigation of any doubt that may exist either upon the facts or the law of the case. It at present seems to be considered, that in cases of murder, the prisoner is not to have the benefit of any review of his case, either by the Judge or the Privy Council, but that the verdict of the jury is to be conclusive.

What should you think would be a proper interval to allow in the cases of execution of murder?—I can only say that I think a reasonable time should be allowed, sufficiently long to enable the prisoner to submit to some tribunal any grounds upon which he ought not to be executed.

May not the speedy execution be of advantage in striking a greater terror, and so preventing the crime of murder, or do you think that is not much considered by those who are guilty of the crime?—I think that is one of the mistakes in the mode of looking at the question. You have no right to make the prisoner a victim to effect a collateral object. The object of hurrying the execution apparently is to produce a greater effect on the public mind with reference to that offence. The question to be considered is, what is a fit and proper time to be allowed an individual after conviction before the execution of the sentence.

You mean in a religious point of view?—In every point of view.

Supposing it did produce a greater effect, you would still be of opinion that for the purpose of inquiry it is necessary that the execution should not be so speedy?—I should; it being admitted at all times that the prisoner is entitled to every doubt, and all the mercy that can be extended to the particular case.

Within what space of time did those cases occur that you have mentioned?—Within the eight or nine months that I was sheriff.

They were within that time?—Yes, between eight or nine months.

Have you turned your attention, as a question of policy, if it might not be advisable that capital punishments should be restricted to fewer cases, so as to be more certainly executed where the parties were capitally convicted?—The fact of the number respited appears to me conclusive evidence that the Crown considers the severity of our present Criminal Law requires this constant mode of interference. I believe also that the possible consequence of the verdict of guilty occasionally deters juries from finding persons guilty; and although it is a very difficult question, and one to which I have not addressed my mind with much attention, I have entertained some doubts whether it might not be wise to adopt here something like the system of the law in France and the United States of America, which I believe authorizes juries in particular cases, not only to find the verdict, but also to determine the extent of the punishment. In cases of murder in France they may bring in a verdict of guilty with mitigating circumstances. And one serious mischief that follows from our present system of capital convictions is, that where the sentence is remitted, a much more serious punishment follows than ought to take place, it being considered reasonable, because they are relieved from the greater punishment.

Are there no people about who make it their business to try to get up applications under the pretence that they have influence, or may succeed in obtaining a remission of punishment?—There were, and may be now, a number of persons about the Criminal Courts

Courts who occasionally get access to the prisoners, and who do lead the prisoners to believe that they can render them service, and I believe on that ground extort money from them. But the principal assistance the prisoners obtain is from some of their fellow-prisoners, who are men who have had a good education, and therefore if they are there for any length of time acquire some knowledge and facility of putting statements of grievances or remonstrances into form.

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It has been suggested that sometimes few being executed out of a great number convicted, that some are selected as objects of capital punishment on account of misconduct entirely unconnected with the offence of which they are convicted, and in respect of which capital punishment is said to be inflicted; have you any knowledge or means of knowing how that is?—I have no knowledge, but I have a belief that that is so.

Taking them to be guilty, do you believe that they are selected for capital punishment occasionally on account of other misconduct, on account of bad characters?—I do; and I think that information is frequently derived from sources that ought not to influence in any manner the execution of sentences.

What kind of information do you particularly allude to; do you mean general information as to character, or information as to particular instances of misconduct, or mode of life?—I believe influence is created from mere prison inquiries, police officers, &c. from underlings of the prison; but I allude particularly to offences not capital.

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Appendix, No. 2.

Letter from *R. Spankie*, Esq. Serjeant at Law, to *J. Lonsdale*, Esq.

To *James Lonsdale*, esq., Secretary to the Commissioners on Criminal Law.

Sir,

I HAVE the honor to acknowledge the receipt of your letter of the 23d, which I only received on the 25th; and as I am unable to fix an early time to meet the Commissioners, I hope they will accept the following very hasty observations, as a proof that I do not obstinately decline giving them an opinion, which they are desirous to obtain upon an important point to which their inquiries are directed.

After some experience and observation in our criminal courts, and much reflection upon the question of allowing a full defence by counsel to prisoners on trials for felony, I am satisfied that such an alteration would not contribute to the improvement of criminal justice, nor to the protection of innocence.

I am sensible of the plausibility of the argument, which proceeding on the concession that the assistance of counsel is beneficial to the parties in civil actions, and to the prisoners or defendants in treason and misdemeanor, presses the absurdity of denying such advantages to a person accused of felony.

I do not think myself bound to demonstrate the fallacy of the argument, nor to prove that the present system is not wrong, though there be an apparent violation of theoretical consistency.

The argument might be put quite as strongly the other way, that the practice in treason and misdemeanor is wrong; and that the practice in cases of felony is right. Experience, in truth, is the best guide, and the practical result will afford sufficient grounds either for adhering to the established course, or for making a change in favor of uniformity.

Much of the reasoning I have heard and read, certainly does not decide in favour of the advantage of counsel in cases of misdemeanor. A great proportion of cases of misdemeanor are, in effect, civil suits for the determination of some right, from which the idea of moral criminality is excluded.

In the misdemeanors that are of the family of crime, I am not sure that the parade and array of counsel have eminently contributed to just decision, and the protection of innocence. I understand that, in order to make this case square with the theory, the whole order of proceeding must be changed, and that the balance hitherto preponderates vastly on the side of injustice.

Treason is a case *sui generis*. The aid of counsel and full defence, with many other aids to the prisoner, were conceded by Parliament after the revolution, on the recent and personal remembrance of prosecutions for treason, conducted with intolerable oppression, and when it undoubtedly was just and expedient to afford even extraordinary protection to private citizens in a free state, struggling with the whole power of government, and, as in public accusations, with the prejudices perhaps of a large portion of the community.

In their nature and definitions, according to the law of England, treason and misdemeanor present great and difficult distinctions in the estimate of moral criminality. They afford a latitude of construction, not merely on the facts, but the intentions necessarily involved in the facts to constitute the crime charged, that might, with incompetent or subservient judges, withdraw from the jury all effectual cognisance of the question of guilt. The full assistance of counsel therefore may be justified by the nature of the inquiry before the jury in treason and misdemeanor.

In felony, generally speaking, the offences are not of arbitrary institution, but such as the *jus gentium*, the law of all civilized nations, and the common sense of mankind, have acknowledged as criminal. The facts constituting the crime are well defined, even where the technical crime of felony has been excessively and improperly multiplied. The cases of difficulty are comparatively rare, and these turn upon questions of evidence, where the just conclusion

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Letter from *R. Spankie*, Esq., Serjeant at Law, to *J. Lonsdale*, Esq.

conclusion may not present itself to the inexperience of the jury, and whose inexperience it is now thought should be supplied by a speech from an advocate, and ought not to be trusted in the hands of an impartial and intelligent judge.

My first objection to the proposed alteration does not, however, depend on these distinctions, well or ill-founded. I deny that any real inconvenience arises from the existing law; and I am of opinion, that if there were any just ground of complaint against the present mode of trial, the administration of criminal justice, which, at least before the higher tribunals, is tolerably good, would be greatly deteriorated.

The administration of criminal justice is conversant in the investigation of facts; and wherever the defence of the prisoner on felony depends on the just application of the law to the facts, he has now the assistance of counsel.

The object proposed, therefore, is to afford him the benefit of counsel in addressing the jury upon the facts as applicable to the charge.

The inquiry on the trial of a crime turns upon the truth of positive facts. How far they are credibly proved by oral testimony or written evidence; and how far, where the evidence is circumstantial, it conduces to the just conclusion of guilt or innocence.

The real question then is, whether the present mode of trial in cases of felony is or is not better calculated to attain a satisfactory result, by the verdict of a jury, the prisoner having the benefit of counsel to assist him, in point of law, to cross-examine the witnesses for the prosecution, and to examine his own witnesses in defence, than if counsel were, in addition, also permitted to speak on the whole case.

It can hardly be denied that there is at present sufficient opportunity afforded for the investigation of *facts*, for the previous inquiry into the character of witnesses, either as a foundation on which to cross-examine, or to furnish an opportunity for exposing, by testimony, their want of veracity. The complaint is, that the prisoner is deprived of counsel to comment on the facts, to apply them correctly, and to point out the just deductions which they ought to furnish. In short, of what is called the *probatio artificialis*, so far as that artificial proof depends on the arguments of counsel.

It is not fair, however, to say that the prisoner is wholly deprived of the benefit of this species of proof. It is not only in conducting the trial by the rules of law that the function of the presiding judge consists. It is his duty to state not merely the evidence, but the fair result of the evidence to the jury, pointing out the true bearing of the facts, with an indulgent leaning in favour of the accused. There is no danger of his omitting those observations, on which the prisoner's counsel would insist, and of which they rarely fail to remind him.

The advantage of the present system is, that it presents the model of a dispassionate inquiry into the truth, relieved from the obstreperous contention of counsel. If the prosecutor feels undue anxiety to convict a prisoner, his counsel rarely sympathises with such a feeling, and the impartiality of the judge is little doubted. The jury decide upon the case, after listening to the evidence, and the summing up of the judge. An impartial auditor is much more frequently surprized at an unaccountable acquittal, than shocked by an unexpected verdict of guilty.

That there may be a failure of justice under this mode of trial, both in the escape of guilt, and the conviction of innocence, is perfectly possible, because there may be false testimony believed to be true; there may be true testimony treated as false; and there may be erroneous inferences, in which the judge and the jury differ, or both concur; but what is this, but to say that human beings are not infallible.

That the instances are *frequent*, in which real innocence has not the means of repelling or explaining apparent grounds of condemnation, I can by no means admit. That the bye-standers arraign a conviction in which they would not, at the moment, have concurred, is common enough; but is that any proof that the verdict is wrong? Where the judge has good ground to distrust the conclusion of the jury, or when judicious bye-standers (who afford a very effective court of appeal), apprehend that there has been a failure of justice to the prejudice of innocence, there generally is a very vigorous effort made to obtain a rehearing, in a manner much more favourable to the prisoner than a new trial. Too much, at all events, should not be attributed to an appeal decided in favour of the prisoner *ex parte*.

Particular instances are referred to, on which gentlemen at the bar record their experiences of some conviction of innocence, when a speech would have set all right. I confess I distrust these recollections, founded upon individual opinion, against the verdict of a jury, in which the judge concurs. I doubt much more, however, the omnipotence of counsel to correct impressions, which have imposed on the natural sagacity of the jury, and the experienced discrimination of the judge. I object totally, indeed, to inferences founded on cases not fully reported, cited for the occasion, and in favour of which there is no presumption of accuracy.

But are we sure, or is it even probable, that a full defence, by counsel, would tend to prevent the occasional failure of justice, where it occurs, by leading to the more certain conviction of guilt, or better guarding the safety of innocence.

In ordinary cases of felony the facts admit of little controversy; but it may be assumed that in every case, where counsel is retained to examine witnesses, they would be employed to make a speech. The class of prisoners for whom the boon is intended, would generally do well to take the benefit of this chance-medley.

A speech for the prisoner would in such cases do little harm perhaps, though it could do no good. But in the cases of felony generally, the prisoner would be in the hands of gentlemen, very young in the profession, who cultivate a branch of practice which now teaches

teaches caution and discretion, but which would become a school of vicious eloquence. The leaders of the bar could not devote themselves to a branch of practice which would be so gratifying to the ambition of youth. There would be no want of volunteers in this field of fame. The most guilty of the criminals would, no doubt, elect to have a speech in defence, just as, in their maladies, people of this class would elect to take the physic of any quack to whom they could procure access, in perfect incompetency to judge whether for life or for death. It is probable that, in doubtful cases, the prisoner would experience the alienation, which the disgust excited by the extravagance of his advocate might produce in the minds of a judge and jury, who would then be relieved from the anxiety and responsibility now imposed, of watching the fate of one who is committed to their more exclusive protection.

In every sort of crime, where the wealth of the delinquent enabled him to employ counsel, or where the accidental circumstances of the crime excited an extraordinary interest, counsel of the first eminence would, at great expense, be retained. The public in this country, in all countries indeed, are easily excited to violent interest in the prosecution or the defence of signal crimes. Subscriptions would never be wanting to defend a sentimental murderer, or a patriotic firer of barns and wheatstacks. We should have Betty Cannings at every assizes in every county in England; and the mischievous tendency to excitement, which it is difficult to restrain, would be encouraged by the opportunity of rhetorical display, and the gratification of local dissensions.

I apprehend that the whole temper with which criminal justice is now conducted, would be altered; it would be in vain to expect from the judges any considerable check to the exorbitancies that would ensue; they have already quite enough to do in that department. The bar would be corrupted by the temptation to address speeches, not only to juries, but to the audience; not only to the audience, but to political parties, or religious sects, all over the country, through the press; and they would desire nothing better than the glory of maintaining the independence of an advocate under the frowns of power, and defying the authority of judges, abundantly timorous in a contest with the organs of popularity.

It appears to me, therefore, that in great cases, and in small, the effect of allowing counsel in felonies would totally destroy the temper, moderation, and sobriety of the administration of criminal justice. The counsel for the prosecution would follow the bad example of the counsel for the prisoner. In a public contest the strict discharge of duty would yield to the fame of eloquence and the ardour of victory; the authority of the judge would be despised; the jury would be exposed to the corruptions of the worst arts of the forum; they would be studiously placed in opposition to the judges; they would be flattered, or threatened, or deceived into the usurpation of an irresponsible power, subversive of the laws, and formidable equally to innocence and to guilt.

It seems to be quite consistent and candid in those who are in favour of a full defence by counsel, to concede the fitness of allowing motions for new trials in all criminal cases. The cases, civil cases and misdemeanors, where the failure of justice demands a new trial, are, according to my observation, much more numerous than in criminal cases of felony, where no new trial can be had; the reason I apprehend to be the superior caution and anxiety of judges and juries, acting on a more extensive responsibility than in the cases where advocates share it with them more fully. If counsel were permitted to speak in defence, the necessity of new trials would be apparent; for extra official and voluntary interference would greatly cease when the prisoners had regular and professional defenders; if motions for new trials were permitted, when would the discussion cease? when would sentence be executed? but if consistency is to govern, a new trial would be of right.

But what would be the consequence of these innovations? the metropolitan court would sit without vacation; the assizes and sessions would extend into each other; the supply of judges would be insufficient for the eternal task of sitting and condemning; it would become necessary to institute a class of criminal judges devoted to the odious function of condemning and punishing, tainted with the exhalations of the charnel-house, never refreshed and invigorated by diversity of pursuit, and opportunities of leisure; such judges would lose the high reputation, which English judges of the criminal law, the general judges of the laws of the land have hitherto enjoyed, and they would deserve to lose it.

I say nothing of the total derangement of the system of justice by the separation of one of the great branches of it; I say nothing of the infinite expense to counties; of the protracted periods of the assizes or other criminal courts; if it be necessary for a good administration of justice that it should be expensive, I shall never mention the word economy; but it is a serious matter, if justice should be depraved in proportion as it became more expensive.

The inconvenience to the country would be enormous by the increased demand for the attendance of jurymen; and if the time should be prolonged, as it appears to me it inevitably would be under the proposed change, it would be necessary to recompence the common jury by some *Triobolus* for the unceasing task that would be required of them; this too, we must be content to bear, if the proposed alteration is calculated to produce a real improvement.

I cannot think, however, that any benefit will be obtained by the alteration. It may be desirable to prevent the prosecution from the undue advantage of an opening speech, which indeed only passes for an undue advantage, by admitting in counsel a disposition to procure a conviction by something beyond the strict performance of duty, and which would be so greatly aggravated by competition with the prisoner's counsel.

Appendix, No. 2.

Letter from *R. Spankie*, Esq., Serjeant at Law, to *J. Lonsdale*, Esq.

In many cases a candid and distinct exposition of facts in an opening speech, in a complicated case, is advantageous to an innocent man, by apprizing his counsel what they have to meet, and how to apply their cross-examination; if, however, there is any danger of abuse, let the opening speech be restrained, or denied altogether.

How far giving the prisoner's counsel the last word would correct the ill effects of allowing speeches in felony at all, may admit of doubt. The duty of the judge would impose upon him the obligation of exposing the sophistry or misrepresentation of a skilful advocate, and if he has the last word there are besetting sins. This would introduce into criminal trial feelings and duties not perfectly calculated to secure impartiality; the judge is not the counsel for the prisoner as a retained advocate is expected to be, but he does protect him by allowing him all fair advantage, and taking care that he suffer no wrong; it would be his duty to sustain public justice against the talents of an advocate; and the popular prejudice in favour of the accused. Impartiality might be seriously endangered; the reputation of it would vanish.

But it would occupy too much time to discuss the effects of these checks and counter-checks in a system so little adapted to the genius of our laws, the character of our judges, the temper of this nation, to the whole instruments with which the criminal justice of England has hitherto been administered.

I can see no good in the proposed experiment. There is no general abuse or inconvenience established. A few solitary instances, of very questionable authority, are cited; and it is more than doubtful, if the assistance of speeches by counsel would have produced a different result. Occasional failures from error, passion, or stupidity, must be found wherever justice is administered by mortal men.

When I see, therefore, that hardly any evil really exists in the present system, and when I consider that the change carries with it no security for the correction even of the mischief to which it is to be applied, I do not feel that either general arguments of uniformity or consistency in its favour, or the success of the experiment in countries very different in every political and moral circumstance, by which men in nations are distinguished from each other, are sufficient to induce me to hesitate in the declaration of my entire hostility to the plan.

Balancing the certain good we relinquish against the probable evils of change, I see nothing but very vague representations of fact, and very doubtful grounds of speculation. Are these adequate justifications of so vast and sweeping a change as this? I think not; *primum nescio, deinde timeo, postremo non committam*, as far, at least, as my humble opinion goes, that the administration of criminal justice in England should be exposed to so complete a revolution as the proposed innovation appears to me calculated to produce.

I have the honour to be, &c.

Serjeants Inn, 28th May 1835. *R. Spankie.*

Appendix, No. 3.

Appendix, No. 3.

Examination of Alderman *Harmer*, 18 May 1819.

EVIDENCE given by Mr. Alderman *Harmer*, before the Select Committee of the House of Commons appointed to consider of so much of the Criminal Law as relates to Capital Punishments in Felonies, &c.; 18th May 1819.

YOU are a solicitor, residing in Hatton-garden?—I am.

You have had considerable experience in crown practice at the Old Bailey?—I have.

For how many years?—Twenty years, within a few months, for myself; and upwards of three years previous to that time in the office of Messrs. Fletcher and Wright, to whom I was last articled.

Have you any observations to make with respect to the effect of capital punishments?—I have. First, as to forgery: it appears to me that the punishment of death has no tendency to prevent this crime. I have, in many instances, known prosecutors decline proceeding against offenders, because the punishment is so severe. Instances have come within my knowledge of bankers and opulent individuals, who, rather than take away the life of a fellow-creature, have compromised with the delinquent. Instances have occurred of a prosecutor pretending to have had his pocket picked of the forged instrument. In other cases prosecutors have destroyed, or refused to produce it; and when they have so refused, they have stated publicly that it was because the person's life was in jeopardy. I will relate a very recent circumstance that occurred under my observation at the Old Bailey. A person through whose hands a forged bill had passed, and whose appearance upon the trial was requisite to keep up the necessary chain of evidence, kept out of the way to prevent the conviction of the prisoner; it was a private bill of exchange. I also know another recent instance, where some private individuals, after the commitment of a prisoner, raised a thousand pounds for the purpose of satisfying some forged bills of exchange; and they declared, and I have good reason to know the fact, that if the punishment had been any thing short of death, they would not have advanced a farthing, because he was a man whose conduct had been very disgraceful; but they were friends to the man's family, and wished to spare them the mortification and disgrace of a relative being executed, and therefore stepped forward and subscribed the before-mentioned sum. I have frequently seen persons withhold

withhold their testimony, even when under the solemn obligation of an oath to speak the whole truth; because they were aware that their testimony, if given to its full extent, would have brought the guilt home to the parties accused; and they have, therefore, kept back a material part of their testimony. In all capital indictments, with the exception of murder and some other heinous offences, I have often observed prosecutors show great reluctance to persevere, frequently forfeiting their recognizances; and indeed I have, on many occasions, been consulted by prosecutors as to the consequences of refusing to conform to their recognizances, that is, to appear and prosecute the prisoner.

When you speak of the cases of murder and other heinous offences, do you mean offences accompanied with violence to the person, or which are likely in their consequences to inflict serious injury?—Certainly; those are the offences to which I allude. I know that many persons who are summoned to serve as jurymen at the Old Bailey have the greatest disinclination to perform the duty, on account of the distress that would be done to their feelings in consigning so many of their fellow-creatures to death, as they must now necessarily do, if serving throughout a session; and I have heard of some who have bribed the summoning officer to put them at the bottom of their list, or keep them out altogether, so as to prevent them from discharging this painful duty; and the instances, I may say, are innumerable, within my own observation, of jurymen giving verdicts, in capital cases, in favour of the prisoner directly contrary to the evidence. I have seen acquittals in forgery, where the verdict has excited the astonishment of every one in court, because the guilt appeared unequivocal, and the acquittal could only be attributed to a strong feeling of sympathy and humanity in the jury to save a fellow-creature from certain death. The old professed thieves are aware of this sympathy, and are desirous of being tried, rather on capital indictments, than otherwise. It has frequently happened to myself, in my communications with them, that they have expressed a wish that they might be indicted capitally, because there was a greater chance of escape. In the course of my experience, I have found that the punishment of death has no terror upon a common thief; indeed it is much more the subject of ridicule among them than of serious deliberation: their common expressions among themselves used to be, "such a one is to be twisted;" and now it is "such a one is to be top't." The certain approach of an ignominious death does not seem to operate upon them, for after the warrant has come down for their execution, I have seen them treat it with levity. I once saw a man, for whom I had been concerned, the day before his execution; and on my offering him condolence, and expressing my sorrow at his situation, he replied, with an air of indifference, "Players at bowls must expect rubbers." Another man I heard say, that it was only a few minutes, a kick and a struggle, and it was all over; and that if he was kept hanging for more than an hour, he should leave directions for an action to be brought against the sheriffs and others; and others I have heard state, that they should kick Jack Ketch in their last moments. I have seen some of the last separations of persons about to be executed, with their friends, where there was nothing of solemnity in it; and it was more like parting for a country journey than taking their last farewell. I heard one man say (in taking a glass of wine) to his companion, who was to suffer next morning, "Well, here's luck." The fate of one set of culprits, in some instances, had no effect even on those who were next to be reported; they play at ball, and pass their jokes, as if nothing was the matter. I mention these circumstances to show what little fear common thieves entertain of capital punishment; and that so far from being arrested in their wicked courses, by the distant possibility of its infliction, they are not even intimidated at its certainty; and the present numerous enactments to take away life appear to me wholly inefficacious. But there are punishments which I am convinced a thief would dread, and which, if steadily pursued, might have the most salutary effect; namely, a course of discipline totally reversing his former habits. IDLENESS is one of the prominent characteristics of a professed thief—put him to labour. DEBAUCHERY is another quality, abstinence is its opposite—apply it. DISSIPATED COMPANY is a thing they indulge in—they ought, therefore, to experience solitude. They are accustomed to UNCONTROLLED LIBERTY OF ACTION—I would, consequently, impose restraint and decorum: and were these suggestions put in practice, I have no doubt we should find a considerable reduction in the number of offenders. I say this, because I have very often heard thieves express their great dislike and dread of being sent to the House of Correction, or to the Hulks, where they would be obliged to labour, and be kept under restraint; but I never heard one say he was afraid of being hanged. Formerly, before Newgate was under the regulations that it now is, I could always tell an old thief from the person who had for the first time committed crime. The noviciate would shudder at the idea of being sent to Newgate, but the old thief would request that he might be committed at once to that prison by the magistrate because he could there associate with his companions, and have his girl to sleep with him, which some years back used to be allowed or winked at by the upper turnkeys; but since the late regulations, certainly, I have not heard of such applications being made by thieves, because now they are as much restrained and kept in order in Newgate as in other prisons. From my observation, I am quite certain that a thief cannot bear the idea of being kept under subordination. As to transportation, I, with deference, think it ought not to be adopted, except for incorrigible offenders, and then it ought to be for life. If it is for seven years, the novelty of the thing, and the prospect of returning to their friends and associates, reconciles offenders to it, so that, in fact, they consider it no punishment; and when this sentence is passed on men, they frequently say, "Thank you, my Lord." Indeed this is a common expression, used every session by prisoners, when sentenced to seven years' transportation.

Have you any particular observations to make on the offences of stealing in shops, and

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Examination of Alderman *Harmer*, 18 May 1819.

and privately stealing in dwelling-houses?—I have; the stealing in a dwelling-house above the value of 40*s.*, and privately stealing in a shop to the value of 5*s.*, is capital; and though I have frequently been present where the evidence has in my mind amounted to demonstration, and it has struck me that many of the articles were of such value as to imperiously call upon the jury for a verdict of guilty, they have, from motives of compassion, given a verdict contrary to such evidence, by reducing the value of the article stolen so low, as to lessen the offence to grand larceny.

What are the offences in which you think there is neither a general reluctance to prosecute or to convict?—Murder, arson, burglary; but not in its extended sense, such as breaking a pane of glass or lifting a latch, but where it is committed by a professed housebreaker, who breaks into a house in the middle of the night; highway robbery accompanied with violence; cutting and other offences under Lord Ellenborough's Act, where it is the clear intent of the offender to commit murder, but the interposition of Divine Providence or accident only prevents its accomplishment.

Do you not think that the offenders who have the least fear of death are the most dissolute and idle?—Certainly, they are.

And therefore the most likely to feel confinement and hard labour very much?—Certainly; I believe it would be felt by them as the greatest punishment that could be inflicted.

Have you made any observation with respect to the expense and trouble that might be saved to prosecutors, by trying accessaries after the fact in the same county with the principals?—I have; some years ago an Act of Parliament passed to enable the prosecutor to try the accessary *before* the fact, in the same county with the principal. This Act has been found extremely useful; but it appears to me that it would very much facilitate the purposes of justice, if the accessary *after* the fact were also to be liable to be tried with the principal, because prosecutors, after convicting the principal in one county, are now frequently put to very great expense in being obliged to go to another county to prosecute the receiver, and have all the chances of a failure of justice, in losing their witnesses by death or other accidental causes.

Can you state the average number of persons for whom you have been professionally engaged, yearly, at the Old Bailey?—I cannot with certainty; but on a moderate computation, I should think one hundred prisoners yearly; and, during my experience at the Old Bailey, I have had personal communication with two thousand or more prisoners.

Latterly you have been employed in many prosecutions also?—I have.

Have you not also had frequent opportunities of observing the feelings of prosecutors and of prisoners?—Certainly; for the last eight years my business for prosecutions has been progressively increasing.

But when you were employed professionally for the prisoners, had not you an opportunity of observing the feelings of prosecutors also?—Certainly; from attending the examinations, I had an opportunity of observing the wishes and feelings of prosecutors.

Are the Committee to understand you as stating that you consider capital punishments to be efficacious only in those cases where the general feelings of the public go along with them?—Certainly; the thieves observe the sympathy of the public, and it seems to console them, and they appear less concerned than those who witness their sentence. I have been present on very many occasions when the sentence of death has been passed, and the criminals have been far less affected than the auditors.

Do you think that the general feeling goes along with the infliction of the punishment of death, in the cases of crime unaccompanied with violence?—Certainly, it does not.

Do you conceive that the infliction of the punishment of death in those cases, tends rather to excite the public feeling against the criminal laws?—No doubt it does; there are, I believe, very few advocates for the generality of the present capital punishments.

Do you mean to apply that observation to those who have had the most experience of the effect of those capital punishments?—I should think I might safely so apply it.

Appendix, No. 4.

COPY of a LETTER from *John Pickering*, Esq. to *A. Amos*, Esq. Professor of Law, and one of His Majesty's Commissioners for revising the Criminal Law, &c. London.

Appendix, No. 4.

Letter from *J. Pickering*, Esq. to *A. Amos*, Esq.

My dear Sir, Boston, United States, January 7, 1835.

I received the day before yesterday your obliging letter of the 3d of December, forwarded by my friend B. Rand, esq.; but being then engaged in a trial, which was not finished till last evening, it has been wholly out of my power to reply to it at an earlier moment. I am obliged to add, too, that the necessity of being in attendance while our court is sitting, and the early period at which you will be expected to make your report on the Criminal Law, will, I fear, prevent my answering your various and important inquiries in so full a manner as to be useful to you.

It happens, however, the commission (of which I am a member) appointed to revise and consolidate the laws of this state (Massachusetts) have just finished and printed three *parts* of their work, one of which comprises the Criminal Code *of the State:* and I beg leave to present you with two copies of the whole work, as far as it is printed, and to refer you to it for a part of the information which I should have communicated in a different form, had time permitted it to be done in season for your purpose. The *advertisement* prefixed to *Part Second* of the Report,

Report, and the *analyses* accompanying each of the parts, will give you all the necessary information as to the arrangement and distribution of the several subjects of the work; and the *notes* subjoined to each *chapter* will explain the grounds of many of our existing laws and the proposed amendments. The *dates* affixed to the *sections* are the dates of the particular statutes which have come under revision, and they will enable you to form some judgment of the practical utility of those statutes, so far as the mere length of time is evidence of it. Those dates, however, do not in all cases accurately denote the origin of the statutes; because many of the provisions (which are in fact common law rules and principles) have been in operation here, either as common or statute law of the State from the first settlement of this part of the country, and have been modified and re-enacted several times; and our present revision being taken from the latest re-enactment, will, in many instances, indicate a particular provision to be of more modern origin than would be historically true. Besides which, I need not observe to you, that in determining the practical utility of laws in any country, many other elements, in addition to the length of duration, must be taken into the estimate.

You observe that you are already in possession of numerous details respecting our system of *secondary* punishments, and that you are desirous of being furnished with "American statistics upon the subject of *capital* punishments." The attention of the political and speculative writers of this country has not been so exclusively directed to this particular class of punishments as it has lately been with you; and our statistical details are at present imperfect in comparison with those which we possess respecting the inferior classes of crimes. Whether this greater degree of interest taken in the subject in your country proceeds from the fact that you have so large a class of capital offences, compared with ours, I cannot pretend to determine.

The whole list of capital crimes in this State (Massachusetts) is now reduced to the following: treason, murder, including petit treason, which is punished as murder; robbery, being armed with a dangerous weapon with intent to kill, &c.; rape, including the violation of a female child under ten years of age, with or without consent in the *latter* case; arson, unless when the defendant can prove that there was no person lawfully in the dwelling-house; burglary, being armed with a dangerous weapon, or making an actual assault upon a person lawfully in the house, or entering with intent to commit a felony, being so armed, or committing such assault.

I have remarked, that I here speak of our own State only; but the habits, institutions and laws of all the Eastern, or New England States, differ so little from each other, that for the purposes of your inquiry, it may be assumed, that the list above given represents the present opinion and feeling of all that part of the United States respecting the cases in which capital punishments ought to be inflicted. I may add that this has been the state of public opinion in Massachusetts, and I think in New England generally, on the subject of capital punishments for at least thirty years past.

The opinion of the community has generally made a strong line of distinction between offences against human life and those against property. Accordingly, so far as I am informed, very few persons here would at present abolish capital punishments in cases of *murder*, *robbery*, &c., and, on the other hand, very few, if any, would restore it in the cases of *forgery*, which has long ceased to be a capital crime with us, and now subjects the party to a punishment (by imprisonment) which with you would perhaps be thought a very light one. Yet, hitherto, the community has not experienced any inconvenience from this change in the punishment of forgery, so great as to induce them to restore the ancient punishment of death. This will perhaps appear the more extraordinary to you, when you are informed that, in addition to the numberless transactions in private notes and other securities of an extremely active business-community, we have more than three hundred local banks (dispersed through the different States), each of which has the right to issue engraved bank notes as the Bank of England has. Forgeries of these bank notes are the most common cases of that crime; but the vigilance of the public is so incessant, and the dissemination of information so rapid and effectual by means of newspapers in every village, travellers of every description, bank agents and other persons interested, that the report of the crime always travels in advance of the culprit, let him take what direction he will; and he rarely effects his escape. This certainty of detection, and the certainty of being punished, in consequence of the greater willingness of juries to convict than if the punishment were death—to which may be added, in the case of bank note forgeries, the necessity of a combination among several workmen, some one of whom may be found to betray the rest—impose a strong check upon the prevalence of the crime of forgery, notwithstanding the apparent facilities for committing it.

In respect to *burglaries*, you will perceive by the report of our commissioners, that we have, in fact, "a graduation of punishments," according to "aggravations of offence," comprehended under that general name. Burglaries, subjecting the party to the punishment of death, cannot be said to be a very common crime; and the temptation to housebreaking generally in our large towns has probably been lessened, in some degree, by the practice, which is now very common, of depositing money and sometimes articles of plate, &c., for safe keeping, in banks, instead of keeping it in one's own house, as was anciently the custom.

You inquire as to the allowing of speeches of counsel upon the trial of felonies. It has long been our settled practice to allow them in *all* criminal cases; and so essential do we consider the right of being heard by counsel in such cases, that nearly every one of our twenty-four States has a provision in its *constitution* to secure that right from any infringement by the legislatures of the States. The extent to which a party may exercise that right may perhaps differ in the different states. The practice in *Massachusetts* is, very briefly, as follows.

Appendix, No. 4.

Letter from *J. Pickering*, Esq. to *A. Amos*, Esq.

Our prosecuting officers are, 1. An attorney-general, who takes charge of the criminal business cognizable by the highest court of the state, called the Supreme Judicial Court, and two district attornies for different districts, each of which comprises two or three adjoining counties; these district attornies take charge of all the criminal business in their respective counties, except *capital* cases. We allow but two counsel, on each side, to conduct the trial in court. The prosecuting officer begins by a concise statement of the case he expects to make out in proof, and then introduces his witnesses; the defendant's counsel (the junior, when there are two,) opens his defence in the same manner and produces his evidence; after which no further evidence is admitted. The defendant's counsel then makes his closing speech, in which he comments at large on the evidence, and to such an extent, in ordinary cases, as the court think pertinent; and in capital cases the indulgence allowed to the closing speech for the prisoner is, practically speaking, limited only by his counsel's own sense of propriety. After the closing speech for the prisoner, the prosecuting officer replies to it at large, and the case is then summed up by the judge.

I ought to add, that in capital cases it is the practice of our courts to assign counsel for the prisoner, if he has not already retained any.

This is an outline of our mode of conducting criminal trials, and I am not aware of any substantial inconvenience resulting from it. It is true that the time of the courts is occasionally wasted in listening to the idle declamation of raw and inexperienced practisers, but this is an evil of little consequence, as we think, in comparison with the mischief of placing the criminal in any degree within the power of the judge, and putting the latter in the two incompatible relations of judge and counsel.

Some enlightened men among us have thought that the prisoner ought to have the benefit of the last speech, and that the prosecuting officers should not have the right to reply. This opinion, however, is not yet so general as to have produced any movement towards a change of practice in this particular.

These general remarks are all that I am able to offer you on the highly important subject of your commission, upon the short notice given me of your views. The experience of the people of this country, descended as we are from Englishmen, and having lived for two centuries under English law, modified by the peculiar circumstances in which we have been placed—circumstances which have left our political and civil state free to develope itself, unfettered by those ancient and artificial rules which we imagine may have, in some measure, restrained a corresponding developement in your country, may doubtless be of some value to you in your great plans of improvement; but, in order to make that experience as useful as possible, it might be desirable that an extended, and at the same time careful and minute survey should be taken of all the elements of our social condition, which have any influence upon the operation of our laws, and which we are inclined to think (perhaps under a national bias) your travellers in this country and your speculative writers have not examined with sufficient exactness for practical use. Such an extended survey, however, would require a more deliberate consideration of this great subject than I should have opportunity to give it, even if I had any portion of the ability that would be requisite for the satisfactory performance of such a work.

In aid of your researches, I beg leave to send you a volume containing the Annual Reports of the *American Prison Discipline Society*, which abound with the most important statistical details respecting our Criminal Law in general, though not upon the particular subject of capital punishments; on this point, however, you will find in their Fourth and Seventh Reports (at pages 31 and 23), some statements that may perhaps be useful. I am inclined to think that your Government Agent, Mr. Crawford, who visited this country the last year and Mr. Newman, who accompanied him (and whom I had the pleasure of seeing), possess a greater collection of facts in relation to our capital punishments than you will find, at the present moment, with any other persons even in this country. I can state, however, upon the information of the intelligent secretary of the Society I have mentioned, Mr. Louis Dwight, that a Report is expected to be made to that Society, in May next, upon the subject.

In respect to our laws generally, I am informed that a large collection of Statutes and Reports were some time since sent from this country to Mr. Roscoe, who can perhaps furnish you with such as you may wish to refer to.

With the two copies of our Commissioners' Report and the Prison Discipline Reports, I send you a little volume called "The New England and New York Law Register," containing an account of our Courts, Law Officers, &c., which may perhaps prove useful in respect to various details of our judicial establishments in this part of the United States. The two copies of our *Report* will go by two of the Liverpool packets from New York in the course of the present month, and will be addressed to you, "To the care of Kennett and Co. Booksellers, London."

I cordially join you in the desire you express "to promote a reciprocity of kind feeling" between the English and American bar. A residence of two years in London strongly impressed me with the advantages which I thought would result from the people of the two countries being made more thoroughly acquainted with each other; and the liberality which ought ever to belong to the bar, cannot but make a more intimate connexion between the members of our profession in both nations mutually agreeable, and, I hope, not without mutual advantage.

If Mr. Rand should still be in London, be so good as to thank him for obligingly forwarding your letter; and believe me,

My dear Sir,
Very faithfully yours,
Jn° Pickering.

Appendix, No. 5.

Remarks.

We had intended to have inserted, by way of Appendix, a statement of punishments for the principal offences in some of the United States, contained in the Fourth Annual Report of the Board of Managers of the Prison Discipline Society of Boston; but Mr. Crawford having, in the Appendix to his Report on the Penitentiaries of the United States, (ordered to be printed by the House of Commons, 11th August 1834), and to which we beg to refer, furnished a statement of a similar kind with respect to a greater number of the States, we have felt it unnecessary to give that of the Prison Discipline Society on the present occasion. We have, however, extracted the following Remarks of the Prison Discipline Society, on the statement contained in their Report.

"Remarks.

"*We remark, in view of this abstract, the inequality of the laws in regard to capital punishments.*

"In Maine, treason; murder, or being accessary thereto before the fact; rape, or being accessary thereto before the fact; burning dwelling-house in the night time, or being accessary thereto before the fact; burglary, or being accessary thereto before the fact, when the offender is armed with a dangerous weapon, or makes an assault; robbery, when the offender is armed with a dangerous weapon, and intends to kill,—are punished with DEATH.

"In New Hampshire, treason and murder,—are punished with DEATH.

"In Vermont, treason; murder; false witness affecting life, if life be taken; arson, where any person suffers death in consequence, or is injured in his or her body or members; and killing a person in a duel,—are punished with DEATH.

"In Massachusetts, treason; murder, or being accessary before the fact; killing in a duel; robbery, where an assault is made with a dangerous weapon, with intent to kill or maim, or if the person robbed is struck or wounded with such weapon; arson, or burning a dwelling-house in the night time, or accessary thereto before the fact; rape, and accessary before the fact; carnally knowing and abusing a woman child under ten years of age, and being accessary thereto before the fact; burglary, when armed with a dangerous weapon, and those accessary before the fact, and aiding and abetting,—are punished with DEATH.

"In Rhode Island, murder; arson, or accessary before the fact; rape, or accessary before the fact; robbery, or accessary before the fact; burglary, or accessary before the fact; treason, sodomy, second offence,—are punished with DEATH.

"In Connecticut, treason, murder; perjury, with intent to take life; arson, causing death, or endangering the life of any person; burning any building other than a dwelling-house, and causing death; cutting out the tongue, or putting out the eye, &c. with malice, and rape,—are punished with DEATH.

"In New Jersey, treason, murder; sheriff or other officers guilty of voluntary escapes, in capital cases; rescue of persons guilty of capital crimes, and second offence of manslaughter, sodomy, rape, arson, burglary, robbery and forgery,—are punished with DEATH.

"In Delaware, treason, murder, rape, burglary, arson, burning in a dwelling-house, court-house, or any office in which public records are kept; kidnapping, or assisting, second offence,—are punished with DEATH.

"In Pennsylvania, murder, in the first degree, is punished with DEATH.

"In Maryland, treason is punished with death, or confinement to hard labour in the penitentiary, not less than six nor more than twenty years. Insurrection, or rebellion by free negroes, mulattoes or slaves, and by white persons with them,—are punished with death. Murder of the first degree and aiding; rape or being accessary; carnal knowledge, and abuse of a female child under ten years, are punished with death, or confinement in the penitentiary not less than one nor more than twenty-one years. Arson is punished with death or penitentiary, not less than five nor more than twenty years. Wilfully burning any mill, distillery, or any out-house, not being part of a dwelling-house, or burning any stack of hay, &c., or aiding, is punished with death, or penitentiary not more than twelve nor less than three years.

"In Virginia, treason; slaves conspiring to rebel or to murder any free person; free persons advising or conspiring with a slave, in rebellion or murder; murder in the first degree; killing a person in a duel; rape by a slave; carnally knowing or abusing a female child under ten years of age; or accessary before the fact by a slave; buggery with man, or beast by a slave; wilfully setting fire to any house in a town by night or day; slaves wilfully burning any barn, stable, shop, corn-house, &c.; feloniously breaking any warehouse or storehouse, and taking money, goods, chattels, &c., or aiding and abetting, by a slave; and arson,—are punished with DEATH. Accessaries to arson, if a free person, not less than ten nor more than twenty-one years; if a slave, DEATH.

"In Mr. Livingston's code for Louisiana, no crime is punished with death.

"*We remark, secondly, the inequality of the punishments for those crimes, which in some of the States are, and in others are not, punished with death.*

"TREASON, which, in all the States mentioned above, with two exceptions, is punished with death, is punished in Pennsylvania, for the first offence, with imprisonment not less than three nor more than six years; and for the second offence, not exceeding ten years.

"ARSON, in Maine, Massachusetts, Rhode Island, Connecticut, New Jersey, Delaware, Maryland

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Remarks.

Maryland and Virginia, is punished with death; in New Hampshire, with solitary confinement not more than six months, and hard labour for life; in Vermont, if life is not lost in consequence, nor person nor limb injured, with hard labour not exceeding ten years, and fine not exceeding $1,000, or either of said punishments; and in Pennsylvania, with imprisonment in the penitentiary for first offence, not less than one nor more than ten years, and for the second offence, not more than fifteen years; by the code for Louisiana with imprisonment for life.

"RAPE, in Maine, Massachusetts, Rhode Island, Connecticut, New Jersey, Delaware, Maryland, and if by a slave in Virginia, is punished with death; in New Hampshire, is punished with solitary confinement not less than six months, and afterwards with hard labour for life; in Vermont, with hard labour not exceeding ten years, and fine not exceeding $1,000, or either of said punishments; in Pennsylvania, for the first offence, with imprisonment not less than two nor more than twelve years; and in Virginia, if by a free person, with imprisonment in the penitentiary not less than ten nor more than twenty years; by the code for Louisiana with hard labour for life.

"BURGLARY, when the offender is armed with a dangerous weapon, in Maine and Massachusetts, and whether thus armed or not, in Rhode Island and Delaware, and for second offence in New Jersey, is punished with death; in New Hampshire, it is punished with solitary confinement not more than six months, and hard labour for life; in Vermont, with imprisonment in the state prison not exceeding fifteen years, and fine not exceeding $1,000, or either of said punishments; in Connecticut, state prison not exceeding three years, or if attended with personal abuse, or armed with a dangerous weapon, for life, or for a term of years not exceeding seven; in Pennsylvania, first offence, imprisonment not less than one nor more than ten years; for second offence, not exceeding fifteen years; in Maryland, with restoration of property, or paying the value, and imprisonment in the penitentiary not less than three nor more than ten years; and in Virginia, with restoration or payment, and imprisonment in the penitentiary not less than five nor more than ten years; by the code for Louisiana, with imprisonment not less than ten nor more than fifteen years.

"SODOMY, second offence in Rhode Island, second offence in New Jersey, by a slave in Virginia, is punished with death; in Maine, with solitary imprisonment not exceeding one year, and imprisonment at hard labour not exceeding ten years; in Connecticut, state prison for life; in Massachusetts, solitary not more than one year, and hard labour after not exceeding ten years; in New Jersey, fine and solitary imprisonment to hard labour not exceeding twenty-one years; in Delaware, solitary imprisonment not exceeding three years, and whipped publicly sixty lashes, on bare back, well laid on; in Pennsylvania, first offence, not less than one nor more than five years, second offence, not more than ten years; in Maryland, imprisonment in the penitentiary not less than one nor more than ten years; in Virginia, imprisonment in the penitentiary not less than one nor more than ten years.

"ROBBERY, in Maine and Massachusetts, when the offender is armed with a dangerous weapon and intends to kill, is punished with death; in Rhode Island, with death; in New Hampshire, it is punished with solitary confinement not more than six months, and afterwards with hard labour for life; in Vermont, state prison not exceeding fifteen years, and fine not exceeding $1,000, or either of said punishments; second conviction, state prison for life, or not less than seven years; in Connecticut, state prison not exceeding seven years; in New Jersey, fine and solitary imprisonment to hard labour not exceeding fifteen years; in Delaware, on or near the highway, or in a dwelling-house, fine not less than $1,000, nor more than $5,000, set on the pillory one hour, sixty lashes on the bare back, well laid on, imprisonment not exceeding four years, and afterwards sold as a servant for fifteen years—if committed in any place other than as above, fine not less than $500 nor more than $2,000, thirty-nine lashes as before, imprisonment not more than two years and afterwards sold as a servant for ten years; in Pennsylvania, first offence, not less than one nor more than seven years, second offence, not more than twelve years; in Maryland, restoration or payment of the value, and imprisonment in the penitentiary not less than three nor more than ten years; in Virginia, restoration or payment, and imprisonment in the penitentiary not less than five nor more than ten years; by the code for Louisiana, with imprisonment at hard labour not less than seven nor more than fifteen years.

"MAYHEM, in Connecticut, when the tongue is cut out, or the eye is put out, with malice, is punished with death; in Maine, it is punished with solitary imprisonment not exceeding one year, and imprisonment to hard labour, or in the county gaol not exceeding ten years; in New Hampshire, solitary not less than six months, and to labour after not less than one year nor more than twenty years; in Vermont, state prison for life, or a term of years not less than seven; in Rhode Island, with fine not less than $50 nor more than $2,000, and imprisonment not more than two years; in Massachusetts, solitary not exceeding one year, and confinement to hard labour or imprisonment in county gaol for any time not exceeding ten years; in New Jersey, fine not exceeding $1,000, or imprisonment at hard labour not exceeding seven years, or both; in Delaware, fine not exceeding $2,000 nor less than $400 whipped on the bare back, sixty lashes, well laid on, imprisoned not exceeding two years, and afterwards sold as a servant not less than four years, nor more than seven years; in Maryland, penitentiary not more than ten years; in Virginia, penitentiary not more than ten nor less than two years, and fine not exceeding $1,000.

"DUELLING, killing a person in a duel, in Vermont and Virginia, is punished with death; in Maine, fighting a duel, giving a challenge, or acting as a second, is punished as a felonious assaulter, and disqualified, for twenty years, from holding any office under the State government; in New Hampshire, accepting a challenge, imprisonment in the common gaol not exceeding one year, and disqualified from holding any office for five years—not mentioned

in

in the late general law of New Hampshire; in Connecticut, sending or accepting a challenge to fight a duel, fine of $3,000, and bonds to keep the peace and be of good behaviour during life, and disabled ever after from holding any office—delivering a challenge, the same punishment, except not finding securities for good behaviour; in Rhode Island, though death does not ensue, carried publicly in a cart, with a rope about his neck, to the gallows, and sit thereon for one hour, and be imprisoned not exceeding one year, either, or both; in Massachusetts, when death shall not ensue, and challenging to a duel, though no duel be fought, and a second, aider or abetter, punished as a felonious assaulter, solitary not more than one year, and hard labour not exceeding twenty years, and disqualified from holding office for twenty years—accepting a challenge, though no duel ensue, and thus aiding and abetting, imprisonment in common gaol not more than one year, and disqualified from holding any office for five years; in New Jersey, challenging to fight a duel, though no duel be fought, or knowingly being the bearer of a challenge, or in any way aiding or abetting, fine not exceeding $500, or imprisonment to hard labour not more than two years, or both—fighting a duel when death does not ensue, or being a second, or aiding or abetting in such duel, fine not exceeding $1,000, and imprisonment at hard labour not exceeding four years, or both; in Delaware, giving or accepting a challenge, carrying or delivering such challenge, engaging in and fighting a duel, or being a second, whether the duel take place or not, or any way concerned in aiding or encouraging, fine $1,000, imprisonment three months, and for ever disqualified from holding any office in the State; in Maryland, fighting a duel and killing an antagonist, or wounding him, so that he shall die thereof within twelve months and a day, and aiding and abetting, penitentiary not less than five nor more than eighteen years—challenging or accepting a challenge to a duel, declared incapable of holding any office, civil or military, in the State; in Virginia, challenging to a duel, or accepting a challenge, for ever disqualified for office; by the code for Louisiana, if in a duel the criminal kill his antagonist, he shall be imprisoned not less than two nor more than four years, and forfeit for ever his political rights, and his civil rights of the first and third class, and if such death or mortal wound be by treachery, he shall be deemed guilty by assassination, and shall suffer the punishment of that crime.

"*We remark, thirdly, the disproportion between the penalty for passing counterfeit money and adultery.*

"In Maine, having in possession, or bringing into the State counterfeit bank bills with intent to pass, is punished with solitary confinement not more than three months, and hard labour not more than three years, and by fine not exceeding $1,000, and imprisonment in common gaol not more than one year; and adultery is punished with solitary imprisonment for a term not exceeding three months, and confinement to hard labour not more than five years.

"In New Hampshire, bringing into the State, or having in possession counterfeit bills, with intent to pass, is punished with solitary confinement not more than four months, and hard labour not less than two nor more than five years; and adultery is punished with confinement in common gaol not exceeding one year, by a fine not exceeding $400, and may be required to recognize with sureties for a term not exceeding five years, or by one or more of said punishments.

"In Vermont, counterfeiting bank bills or notes is punished with confinement in the state prison not exceeding fourteen years, and fine not exceeding $1,000, or either; and adultery with confinement in state prison not exceeding three years, and fine not exceeding $1,000 or either of said punishments.

"In Massachusetts, passing any counterfeit bank bill is punished with solitary confinement not more than thirty days, and hard labour after not more than three years, or by fine not exceeding $1,000, and binding to good behaviour for two years; and adultery, by the law of 1812, with solitary confinement not more than three months, and hard labour afterwards not exceeding five years.

"In Connecticut, passing counterfeit bills is punished with confinement in state prison not over three years; and adultery, if a man, in state prison—if a woman, in common gaol not exceeding five nor less than two years.

"In Rhode Island, passing forged notes or bank bills is punished with setting in the pillory, and while there having a piece of each ear cut off, branded with the letter C, imprisoned not more than six years, and shall be fined not exceeding $4,000, or any or all of said punishments; and adultery, with fine not exceeding $200, and imprisonment not longer than six months.

"In New Jersey, using any false token or writing to obtain money or goods, with intent to cheat or defraud, may be punished with solitary imprisonment in the cells of the state prison not exceeding nine months; and adultery, with fine not exceeding $100, or imprisonment not exceeding six months.

"In Delaware, passing, or attempting to pass false or forged notes, may be punished with fine not less than $500 nor more than $2,000, set on pillory one hour, solitary imprisonment not exceeding three months, and wear on the outside garment, between the shoulders, for a term not less than two nor more than five years, the letter F, not less than six inches long and two inches wide, the F to be of a scarlet colour; while adultery is punished with a fine of $100.

"In Maryland, knowingly passing a counterfeit bank bill is punished with confinement in the penitentiary not less than five nor more than ten years; and adultery, by the law of 1715, was punished with a fine of £.3 or 1,200 lbs. of tobacco.

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"In Virginia, passing or offering to pass counterfeit coin or bank notes, with intent to defraud, is punished with imprisonment in the penitentiary not less than ten nor more than twenty years; and adultery is punished with a fine of $20.

"In the code for Louisiana, whoever shall pass or offer to pass any counterfeit coin, knowing it to be such, is punished by imprisonment at hard labour not less than seven nor more than fifteen years; and adultery with fine not less than $100 and not exceeding $2,000, or imprisonment not more than six months, or both.

"*We remark, fourthly, the importance of having the laws made known.*

"How few of those, who may be subject to the penalty of the law, know what the law is! How few indeed even know what crimes are punished with death! The subject is so much in the dark, that probably few of the more intelligent part of the citizens could give any thing like a correct statement of the principal provisions of the criminal law, in the State in which they live. Mr. Livingston suggests that this is a subject which should be made familiar in the common schools; and why not? In one short reading lesson the criminal law of a given State, in an abstract form, might be comprehended, in its principal provisions. Why not then make this vastly important subject familiar to all classes from infancy to manhood? The thought of having human beings subject to the awful punishment of death, or even to that of imprisonment for life, for crimes committed in an hour of passion, the penalty of which they never understood, is revolting to the ordinary feelings of humanity. And yet this is the necessary consequence of suffering the criminal law to remain amidst other laws, in statute books, which the common people never see, without bringing it out in some form, in which they can see it, or rather in which it shall be made known to them.

"*We remark, fifthly, the importance of having the language of the law so plain, that the common people can understand it.*

"The plain English of the words is what they most need, who are most liable to the penalty annexed to crime, provided the penalty is to have any effect in deterring from the commission of crime. A religious service in Latin is as good among the American people, who do not understand it, as the criminal law in Latinized words to those who may be subject to the penalty, but do not understand such words. The laws ought therefore to be made, and made known, in plain English."

EXPERIENCE of *England* and *Wales*, and several of the *United States*, compared.

(Extracted from the 10th Annual Report of the Prison Discipline Society, Boston.)

A TABLE, comparing the POPULATION of *England* and *Wales* with the POPULATION of several of the *United States*, and showing the Number condemned to DEATH in *England* and *Wales* annually, for Seven Years, from 1823 to 1829 inclusive, and the Average Number condemned to several PENITENTIARIES in the *United States*, for a period of Ten Years, from 1814 to 1823 inclusive; by which it appears that *England* and *Wales* condemn more than Half as many to Death, according to the Population, as the States mentioned condemn to the Penitentiaries.

	England and Wales.	New Hampshire.	Vermont.	Massachusetts.	New York.	Pennsylvania.	Virginia.	Population of the States.
Population - - -	13,894,574	244,161	235,764	523,287	1,372,812	1,049,303	1,065,366	4,490,593
Number condemned to Death in England and Wales - - - -								
Number condemned to Penitentiaries in the United States - - -	- -	22	35	96	243	306	58	760

Experience of Pennsylvania.—No crime is punished with death, except murder in the first degree; while murder in the second degree, high treason, arson, rape, burglary, sodomy, robbery, are punished with imprisonment, mostly for a term of years, not exceeding 21 for second offence. Murder in the second degree, second offence, is punished with imprisonment for life.

Does this system deluge the land with crime?—Eastern Penitentiary received, in 1833, 76 prisoners, of whom, for horse stealing, 17; larceny, 25; felony, 1; burglary, 14; passing counterfeit

counterfeit money, 4; manslaughter, 3; murder, 2; robbery, 4; forgery, 5; rape, 1; total, 76.

Of the above, no one was sentenced for life; two only for a term equal to 12 years each; one for eight years; three for seven years; and all the others for a less term of years. The average sentence was two years, seven months and ten days.

The above is not a bloody list of crimes, compared with that in Massachusetts for the same time.

Western Penitentiary of Pennsylvania received, in 1833, 67 prisoners; of whom, for larceny, 39; robbing the mail, 2; horse stealing, 7; murder, 8; fraud, 1; attempt to kill, 1; assault to ravish, 1; manslaughter, 2; murder in second degree, 1; burglary, 1; passing counterfeit money, 2; rape, 1; accessary to rape, 1: Total, 67.

Of the above, no one was sentenced for life; two only for a term of years equal to twelve; two for ten years; one for nine years; three for eight years; two for seven years; and all the others for a less term of years. Average sentence, three years, two months and five-sixths of a month, nearly.

Population of Pennsylvania in 1830, 1,348,233. Whole number of commitments to both the State Prisons, 143; commitments to the State Prison, one to 9,428 of the population. This is a favourable result, more so than can be found in either of the New England States, except New Hampshire, except in regard to the cases of murder.

The secretary of the commonwealth has obligingly favoured us with a certified copy from the records, of the cases of capital punishment in Pennsylvania for fifty-six years, by which it appears that the law abolishing them, except for murder in the first degree, took effect on the 22d of April 1794; and from that period to the present time, the average number of cases of capital punishment is less than one annually. It will be seen, also, by examining the table, that the average number of cases, during the fourteen preceding years, was one annually for murder; so that it appears from the table, that capital punishments for murder did not increase in Pennsylvania after the change in the law, although the population greatly increased.

LIST of CRIMINALS executed within the Commonwealth of *Pennsylvania*, as taken from Executive Minutes of Record in Secretary's Office.

YEAR.	Murder.	High Treason.	Robbery.	Burglary.	Rape.	Arson.	Uttering and passing Counterfeit Money.	Offence not stated.	Whole number executed.	YEAR.	Murder, first degree.	Whole number executed.*
1778	1	2	1	2	–	–	–	–	6			66
1779	6	1	4	2	–	–	3	2	18	1806	3	3
1780	–	2	–	5	–	–	–	–	7	1809	4	4
1781	–	–	1	5	1	1	–	–	8	1812	1	1
1783	2	–	1	2	–	–	–	2	7	1816	1	1
1784	–	–	1	–	–	–	–	1	2	1817	3	3
1785	1	–	–	–	–	–	–	–	1	1818	4	4
1786	2	–	–	–	–	–	–	–	2	1822	2	2
1788	–	–	–	1	1	–	1	2	5	1823	2	2
1789	1	–	–	–	–	–	–	–	1	1824	4 †	3
1792	1	–	–	–	1	–	–	–	2	1826	1	1
1795	–	–	–	–	–	–	–	–	2	1828	1	1
1797	–	–	–	–	–	–	–	–	1	1829	2	1 ‡
1798	–	–	–	–	–	–	–	–	3	1830	2	2
1799	–	–	–	–	–	–	–	–	1	1832	3	3
								Carried up - - -	66	1834	1	1 §
										Whole number executed - - -		98

Secretary's Office, Harrisburg, May 8, 1835.

I HEREBY certify to all whom it may concern, That the foregoing are true extracts taken from, and carefully compared with, the records of the proceedings of the governor and of the supreme executive council of the commonwealth of Pennsylvania, now in my keeping. In testimony whereof, I have set my hand, and caused the seal of the said office to be hereunto affixed, the day and year aforesaid.

James Findlay,
Secretary of the Commonwealth.

Experience of New Hampshire.—No crime is punished with death except murder and treason. Such has been the law of New Hampshire for many years. The old and bloody law

* By Act of the 22d of April, 1794, capital punishments were abolished in all cases except those of murder in the first degree. † One reprieved, and died in prison. ‡ One pardoned.

§ This execution took place in the gaol yard, agreeably to an Act of the 10th of April 1834. Previous executions were public.

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law of February 8, 1791, was modified and ameliorated June 19, 1812, and the law of 1812 was revised and re-enacted, in all its essential features of mildness, January 2, 1829. By these new and mild laws, burglary, robbery, rape and arson are punished with solitary confinement not more than six months, and hard labour for life; which were before punished with death.*

Has this system deluged the land with crime?—The following Table answers the question, by showing the population of five of the New England States, and the number committed to their State Prisons respectively. The other New England States punish more crimes with death.‖

YEAR.	MAINE.		N. HAMPSHIRE.		VERMONT.		MASSACHUSETTS.		CONNECTICUT.	
	Pris.	Population.	Pris.	Population.	Pris.	Population.	Pris.	Population.	Pris.	Population.
		399,437		269,328		280,657		610,408		297,675
1820	-	- -	18	- -	49	- -	71	- -	—	—
1821	-	- -	23	- -	30	- -	84	- -	—	—
1822	-	- -	16	- -	30	- -	91	- -	—	—
1823	-	- -	26	- -	29	- -	107	- -	—	—
1824	26	- -	19	- -	38	- -	86	- -	—	—
1825	56	- -	24	- -	35	- -	96	- -	—	—
1826	58	- -	13	- -	44	- -	81	- -	—	—
1827	35	- -	12	- -	22	- -	80	- -	—	—
1828	55	- -	20	- -	32	- -	104	- -	34	—
1829	47	- -	11	- -	24	- -	79	- -	66	—
1830	-	- -	31	- -	-	- -	115	- -	73	—
1831	-	- -	24	- -	-	- -	71	- -	55	—
1832	-	- -	19	- -	-	- -	76	- -	65	—
1833	-	- -	16	- -	-	- -	119	- -	52	—
1834	-	- -	13	- -	-	- -	—	- -	54	—
	1 in 8,683		1 in 16,208		1 in 8,770		1 in 7,016		1 in 5,222	

Although the sentence of death was in many cases taken away, was not a sentence of great severity given in the State Prison? And is not the small proportion of crime in New Hampshire to be attributed to this?—The average sentence in the State Prison for 13 years, from November 23, 1812, to September 1825, in the whole number of commitments, not including three who were sentenced for life, was two years ten months and twenty-six days.

Was not a large proportion of the sentence to solitary confinement?—Of those received during the period of thirteen years above mentioned, 191 had no term of solitary confinement at all; one had two months' solitary, and 65 had from one to thirty days' solitary.

Did not the crimes of those who were committed to the State Prison, after this amelioration of the criminal code, become of a very aggravated character, showing that those crimes which had been punished with death, and were now punished with imprisonment, such as arson, burglary, robbery and rape, were now very common?—From the time of the reform in the criminal code, in 1812, for 13 years, the crimes of those committed to the state prison, including all committed, were as follows:—For stealing, 192; passing counterfeit money, 24; assault, 10; forgery, 8; burglary, 3; arson, 3; perjury 1. It is difficult to find in the history of prisons one, where, for so long a time, and among an equal number of convicts, so few were sentenced for the crimes of arson, burglary, robbery and rape. Eight criminals (for crimes not punishable with death in New Hampshire) were punished with death in Massachusetts from 1812 to 1831.

Experience of Massachusetts.—Treason, murder, robbery with dangerous weapons, arson, or burning a dwelling-house in the night time, rape, carnally knowing a woman-child under ten years of age, and burglary when armed with a dangerous weapon, are punished with death.

The following list of persons have been condemned to death, and executed in Massachusetts, since 1794, under the jurisdiction of the State and United States courts; the name, crime, and time of execution, are given. The number under the jurisdiction of the State courts is 26, of whom 10 are for other crimes than murder. Those under the jurisdiction of the United States courts, but executed in Massachusetts, i. e. 14, are all for piracy and murder.

NAMES

* In Maine, treason, murder, arson, burglary, robbery, and rape are punished with DEATH.
In Vermont, treason, murder, and arson are punished with DEATH.
In Massachusetts, treason, murder, arson, burglary, robbery, and rape are punished with DEATH.
In Connecticut, treason, murder, arson, and rape are punished with DEATH.

Appendix, No. 5.

NAMES.	CRIMES.	WHEN EXECUTED.	Remarks.
Henry Pyner	Rape	Executed Nov. 5, 1813.	
Ezra Hutchinson	- ditto	„ Nov. 18, 1813.	
Jonathan Jewett, jun.	Murder	Committed suicide in prison, Nov. 10, 1815.	
Henry Phillips	- ditto	Executed March 13, 1817.	
Peter Johnson	Rape	„ Nov. 25, 1819.	
Michael Powers	Murder	„ May 27, 1820.	
Stephen M. Clark	Arson	„ May 10, 1821.	
Michael Martin	Highway Robbery	„ Dec. 20, 1821.	
Samuel Clisby	Robbery	„ March 7, 1822.	
Gilbert Close	- ditto	„ - ditto.	
Samuel Green	Murder	„ April 25, 1822.	
Horace Carter	Rape	„ Dec. 8, 1825.	
John Halloran	Murder	„ March 3, 1826.	
Samuel P. Charles	- ditto	„ Nov. 22, 1826.	
Robert Bush	- ditto	Committed suicide in prison, Nov. 14, 1828.	
John Boies	- ditto	Executed July 7, 1829.	
John F. Knapp	- ditto	„ Sept. 28, 1830.	
Joseph J. Knapp, jun.	- ditto	„ Dec. 31, 1830.	

LIST of CRIMINALS capitally Executed, under Sentence of the United States Circuit Court for *Massachusetts* District, from the adoption of the Federal Constitution, in 1789, to June 11, 1835.

NAMES.	CRIMES.	WHEN EXECUTED.
John Baptiste Collins	Piracy and Murder on the high seas	July 30, 1794.
Manuel Furtado	- - ditto	- ditto.
Augustus Poleski	- - ditto	- ditto.
Samuel Tully	Piracy on the high seas	Dec. 10, 1812
John Williams	Piracy and murder on the high seas	Feb. 18, 1819.
John P. Rog	- - ditto	- ditto.
Francis Frederick	- - ditto	- ditto.
Nils Peterson	- - ditto	- ditto.
William Holmes	Murder on the high seas	June 15, 1820.
Thomas Warrington	- - ditto	- ditto.
Edward Rosewaine	- - ditto	- ditto.
Perry Anthony	- - ditto	Dec. 21, 1824.
Winslow Curtis	- - ditto	Feb. 1, 1827.
John Duncan White*	Murder on the high seas.	
Joseph Gadett	- - ditto	July 1, 1831.
Thomas Collinette	- - ditto	- ditto.
Henry Joseph	- - ditto	Dec. 2, 1834.
James Otis	- - ditto	Pardoned.
Pedro Gilbert	Piracy on the high seas	June 11, 1835.
Manuel Boyga	- - ditto	- ditto.
Manuel Castillo	- - ditto	- ditto.
Angel Garcia	- - ditto	- ditto.
Juan Montenegro	- - ditto	- ditto.
Bernardo De Soto †	- - ditto.	
Francisco Ruiz †	- - ditto.	

Has this system of capital punishments diminished the number or aggravation of the offences for which persons have been sent to the State Prison?—It does not thus appear, so far as an opinion can be formed by comparing the number and crimes in the Massachusetts Prison, as stated in the following tables, with the number and crimes of the Pennsylvania and New Hampshire Prisons, as stated previously.

The crimes of the 277 convicts in confinement in the State Prison at Charlestown on the 30th of September 1834, were as follows:—

Larceny	184	Murder, sentence commuted	3
Common and notorious thief	3	Attempt to poison	1
Passing and having in possession counterfeit money	19	Attempt to rape	7
Assault, with intent to kill	7	Burglary	21
Felonious assault	2	Forgery	10
Assault and battery, with intent to murder	2	Adultery	6
		Bestiality	1

Burning

* John Duncan White committed suicide the night before the day of execution.

† Condemned to death, but not executed, June 11, 1835; De Soto having received a reprieve for 60, and Ruiz for 30 days.

Appendix, No. 5.

Remarks.

Burning barn	1	Assault, with intent to rob	1
Malicious burning	1	Manslaughter	2
Obtaining goods under false pretences	1	Felonious assault and battery	1
Escaping from the House of Correction in Suffolk county	1	Felonious assault, with intent to kill	1
Assaulting, beating and biting	1		277
Burning a dwelling-house	1		

The crimes of the 119 convicts committed to the prison at Charlestown, during the year ending September 30, 1834, were as follows:—

Larceny	87	Attempt to rape	2
Passing or having in possession counterfeit money	4	Assault with intent to rob	2
Forgery	6	Burning a dwelling	1
Burglary	4	Escaping from the House of Correction in Suffolk county	1
Assault, with intent to kill	2	Manslaughter	2
Assaulting, beating and biting	1		
Adultery	6	Making	119
Common and notorious thief	1		

The average length of sentence in Massachusetts of the above list, not including one life sentence, was three years, one month and one-third of a month.

It appears, therefore, by comparing the experience of Massachusetts, New Hampshire and Pennsylvania, as here stated, that the number of crimes punished with death is greatest in Massachusetts; the number and aggravation of offences of the convicts in the State Prison, except in regard to those committed for murder in Pennsylvania, is little or no better; the average length of sentence is greater; and, therefore, if any thing can be inferred from this experience, that severity of punishment has not deterred from crime; that Massachusetts, where seven crimes are punished with death, is no more secure in person and life, than Pennsylvania, where only one, and New Hampshire, where only two crimes are punished with death.

Inferences on the Subject of Capital Punishments.—From the facts here stated on the subject of capital punishments, particularly from Pennsylvania, New Hampshire and Massachusetts, it appears probable that they may be diminished with safety, in some degree, from the present number punished with death in Massachusetts.

It appears still more probable, if not certain, by comparing the facts from Pennsylvania New Hampshire and Massachusetts, with those from England and Wales, that the number of crimes punished with death in England and Wales might be greatly diminished, without danger to the public peace.

It does not appear, however, from any of the facts stated, that the punishment of death for murder could be abolished with safety, because no state or nation here mentioned has done it.

On the contrary, every state in the union, and nearly every nation on earth, punishes murder with death.

CRIMES punished with DEATH in the several *New England* States.

——	Maine.	New Hampshire.	Vermont.	Massachusetts.	Connecticut.
Treason	Death	Death	Death	Death	Death.
Murder	Death	Death	Death	Death	Death.
Arson	Death	Imprisonment for life	Death *	Death	Death.†
Burglary	Death ‡	Imprisonment for life	Imprisonment	Death	Imprisonment.
Robbery	Death ‡	Imprisonment for life	Imprisonment	Death ‡	Imprisonment.
Rape	Death	Imprisonment for life	Imprisonment	Death	Death.

* Death, if life is lost

† Death, if life is lost, or life endangered.

‡ Death, if armed with a dangerous weapon, or an assault is made.

Appendix, No. 6.

LIST of OFFENCES punishable with DEATH by the present Law.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
*Except in respect of forging the royal seals and sign manual. The 2 & 3 W. 4. c. 123. takes away the penalty of death for forgery in all but the two cases of wills and powers of attorney to transfer stock, but leaves the quality of the offences enumerated in the 11 Geo. 4. & 1 W. 4. c. 66, without alteration. To forge the royal seals and sign manual is declared by the last-mentioned Act to be high treason; consequently that offence is now high treason, without the penalty of death. †No offence has been comprised in this list, which is punishable capitally under the annual Mutiny Acts. ‡The Acts here specified contain the principal treasons at the present day. There are some other Acts relating to treasons (connected with the Popish religion, &c.) which, though strictly speaking in force, being in effect obsolete, it has not been thought necessary to include in this list.	High Treason* †- - - - - - -	25 Edw. 3. st. 5. c. 2. 1 Ann. st. 2. c. 17. 6 Ann. c. 7. s. 1. 7 Ann. c. 21. s. 8. 36 Geo. 3. c. 7. 54 Geo. 3. c. 146. 57 Geo. 3. c. 6.‡
See also 5 Geo. 4. c. 113, *post*.	Piracy - - - - - - - -	28 Hen. 8. c. 15. 11 & 12 W. 3. c. 7. 4 Geo. 1. c. 11. s. 7. 8 Geo. 1. c. 24. 18 Geo. 2. c. 30.
This offence seems to be in existence. See 16 Car. 1. c. 4. s. 2. This offence, though a felony, does not cause the forfeiture of the offender's lands or goods. See sec. 8. of 2 Jac. 1. c. 31.	- - Being infected with the plague, and commanded by the mayor, bailiffs, constable or other head officer of any city, borough, town corporate, privileged place or market town, or by any justice of peace, constable, headborough or other officer of the county (if any such infection be out of any city, borough, &c.), to keep house, wilfully and contemptuously, contrary to such commandment, going abroad and conversing in company, having any infectious sore upon one uncured.	2 Jac. 1. c. 31. 16 Car. 1. c. 4. s. 2.
The prosecution for any of these offences must be commenced within 12 months after the offence committed.	- - Any persons, to the number of twelve or more, being unlawfully, riotously and tumultuously assembled together, to the disturbance of the public peace, and being required or commanded by any one or more justice or justices of the peace, or by any sheriff of the county, or his under sheriff, or by the mayor, bailiff or bailiffs or other head officer or justice of the peace of any city or town corporate where such assembly shall be, by proclamation, to be made in the King's name, in the form directed in the 1 Geo. 1. stat. 2. c. 5. (an Act to prevent tumults and riotous assemblies, and for the more speedy and effectual punishing the rioters) to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, to the number of twelve or more (notwithstanding such proclamation made), unlawfully, riotously and tumultuously remaining or continuing together by the space of one hour after such command or request made by proclamation.	1 Geo. 1. st. 2. c. 5. s. 1.
	- - With force and arms, wilfully and knowingly opposing, obstructing, or in any manner wilfully and knowingly letting, hindering or hurting any person or persons that shall begin to proclaim, or go to proclaim, according to the proclamation directed to be made by the said Act of 1 Geo. 1. st. 2. c. 5, whereby such proclamation shall not be made.	1 Geo. 1. st. 2. c. 5. s. 5.

Appendix, No. 6.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	- - Any person or persons so being unlawfully, riotously and tumultuously assembled to the number of twelve as aforesaid or more, to whom proclamation should or ought to have been made, if the same had not been hindered as aforesaid, continuing together to the number of twelve or more, and not dispersing themselves within one hour after such let or hindrance so made, having knowledge of such let or hindrance so made.	1 Geo. 1. st. 2. c. 5. s. 5.
	By force, setting at liberty or rescuing, or attempting to rescue or set at liberty, any person out of prison who shall be committed for or found guilty of murder, or rescuing or attempting to rescue any person convicted of murder going to execution or during execution.	25 Geo. 2. c. 37. s. 9.
	Within this realm, or in any of the islands, countries, forts or places thereunto belonging, wilfully and maliciously setting on fire or burning, or otherwise destroying or causing to be set on fire, &c. or aiding, procuring, abetting or assisting in the setting on fire, &c. of any of His Majesty's ships or vessels of war, whether the said ships or vessels of war be on float or building, or begun to be built in any of His Majesty's dock-yards, or building or repairing by contract in any private yards for the use of His Majesty, or any of His Majesty's arsenals, magazines, dock-yards, rope-yards, victualling offices, or any of the buildings erected therein or belonging thereto; or any timber or materials there placed for building, repairing or fitting out of ships or vessels; or any of His Majesty's military, naval or victualling stores, or other ammunition of war, or any place or places where any such military, naval or victualling stores, or other ammunition of war, is, are or shall be kept, placed or deposited.	12 Geo. 3. c. 24.
	Maliciously and advisedly endeavouring to seduce any person or persons serving in His Majesty's forces, by sea or land, from his or their duty and allegiance to His Majesty, or to incite or stir up any such person or persons to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever.	37 Geo. 3. c. 70. 57 Geo. 3. c. 7.
	In any manner or form whatsoever, administering or causing to be administered, or aiding or assisting at the administering of any oath or engagement, purporting or intending to bind the person taking the same to commit any treason or murder, or any felony, punishable by law with death.	52 Geo. 3. c. 104. s. 1.
	Any convict, who, being ordered to be confined in the General Penitentiary at Millbank, shall at any time during the term of such confinement break prison or escape from the place of his or her confinement, or in his or her conveyance to such place of confinement, or from the person or persons having the lawful custody of such convict, and be for so doing punished by such addition to the term of confinement as is directed by the 59 Geo. 3. c. 136 (An Act for the better regulation of the General Penitentiary for Convicts at Millbank), being afterward convicted of a second escape or breach of prison.	59 Geo. 3. c. 136. s. 17.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
The offences here detailed are declared to be Piracy, Felony and Robbery. See 5 Geo. 4. c. 113.	-- Any subject or subjects of His Majesty, or any person or persons residing or being within any of the dominions, forts, settlements, factories or territories now or hereafter belonging to His Majesty, or being in His Majesty's occupation or possession, or under the government of the United Company of Merchants of England trading to the East Indies, except in such cases as are permitted by the 5 Geo. 4. c. 113 (An Act to amend and consolidate the Laws relating to the abolition of the Slave Trade), upon the high seas, or in any haven, river, creek or place where the Admiral has jurisdiction, knowingly and wilfully carrying away, conveying or removing, or aiding or assisting in carrying away, &c. any person or persons as a slave or slaves, or for the purpose of his, her or their being imported or brought as a slave or slaves into any island, colony, country, territory or place whatsoever, or being sold, transferred, used or dealt with as a slave or slaves; or (except as aforesaid) upon the high seas, or within the jurisdiction aforesaid, knowingly and wilfully shipping, embarking, receiving, detaining or confining, or assisting in shipping, &c. on board any ship, vessel or boat any person or persons for the purpose of his, her or their being carried away, &c. as a slave or slaves, or being imported or brought as a slave or slaves into any island, &c., or of being sold, &c. as a slave or slaves.	5 Geo. 4. c. 113. s. 9.
A valuable security is defined by the 5th sec. of the 7 & 8 Geo. 4. c. 29. to be "any tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the kingdom of Great Britain or of Ireland, or of any foreign state, or in any fund of any body corporate, company or society, or to any deposit in any savings bank, or any debenture, deed, bond, bill, note, warrant, order or other security whatsoever, for money or for payment of money, whether of this kingdom or of any foreign state; or any warrant or order for the delivery or transfer of any goods or valuable thing."	-- Robbing any other person of any chattel, money, or *valuable security*.	7 & 8 Geo. 4. c. 29. s. 6 & 4.
In the case of all offences punishable with death under the 7 & 8 Geo. 4. c. 29. every principal in the second degree, and every accessory before the fact, is punishable with death, in the same manner as the principal in the first degree is punishable by that Act. *See* Sec. 61.		
By the 9th sec. of 7 & 8 Geo. 4. c. 29, an infamous crime is defined to be Buggery, committed either with mankind or beast, and every assault with intent to commit, and every attempt or endeavour to commit the said abominable crime; and every solicitation, persuasion, promise or threat offered or made to any person, whereby to move or induce such person to commit or permit the said abominable crime. This offence is to be deemed robbery. *See* Sec. 7.	-- Accusing or threatening to accuse any other person of any *infamous crime*, with a view or intent to extort or gain from him, and by intimidating him by such accusation or threat, extorting or gaining from him any chattel, money, or valuable security.	7 & 8 Geo. 4. c. 29. s. 4 & 7.
By sec. 11 of 7 & 8 Geo. 4. c. 29, it is declared that it shall be deemed burglary to enter the dwelling-house of another, with intent to commit felony, or being in such dwelling-house to commit any felony, and in either case to break out of the said dwelling-house in the night-time.	-- Burglary.	7 & 8 Geo. 4. c. 29. s. 11.
For the definition of a valuable security, see above.	-- Stealing any chattel, money, or *valuable security*, to any value whatever, in any dwelling-house, any person therein being put in fear.	7 & 8 Geo. 4. c. 29. s. 12.

Appendix, No. 6.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	- - Plundering or stealing any part of any ship or vessel which shall be in distress or wrecked, stranded or cast on shore, or any goods, merchandize or articles of any kind belonging to such ship or vessel.	7 & 8 Geo. 4. c. 29. s. 18.
	- - Unlawfully and maliciously setting fire to any church or chapel, or to any chapel for the religious worship of persons dissenting from the united Church of England and Ireland duly registered or recorded; or to any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn or granary; or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender or of any other person, with intent thereby to injure or defraud any person.	7 & 8 Geo. 4. c. 30. s. 2.
	- - Unlawfully and maliciously setting fire to any mine of coal or cannel coal.	7 & 8 Geo. 4. c. 30. s. 5.
In the case of all offences punishable with death under the 7 & 8 Geo. 4. c. 30, every principal in the second degree, and every accessory before the fact, is punishable with death, in the same manner as the principal in the first degree is punishable by that Act.—*See* Sec. 26.	- - Any persons riotously and tumultuously assembled together to the disturbance of the public peace, unlawfully and with force demolishing, pulling down or destroying or beginning to demolish, &c. any church or chapel, or any chapel for the religious worship of persons dissenting from the United Church of England and Ireland duly registered or recorded; or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malthouse, hop-oast, barn or granary; or any building or erection used in carrying on any trade or manufacture or any branch thereof; or any machinery, whether fixed or movable, prepared for or employed in any manufacture or in any branch thereof; or any steam-engine or other engine for sinking, draining or working any mine or any staith, buildings, or erection used in conducting the business of any mine, or any bridge, waggon-way or trunk for conveying minerals from any mine.	7 & 8 Geo. 4. c. 30, s. 8.
	- Unlawfully and maliciously setting fire to or in anywise destroying any ship or vessel, whether the same be complete or in an unfinished state; or unlawfully and maliciously setting fire to, casting away or in anywise destroying any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel or on the freight thereof, or upon any goods on board the same.	7 & 8 Geo. 4 c. 30. s. 9.
	- - Exhibiting any false light or signal with intent to bring any ship or vessel into danger; or unlawfully and maliciously doing any thing tending to the immediate loss or destruction of any ship or vessel in distress; or destroying any part of any ship or vessel which shall be in distress, or wrecked, stranded or cast on shore, or any goods, merchandize or articles of any kind belonging to such ship or vessel; or by force preventing or impeding any person endeavouring to save his life from such ship or vessel (whether he shall be on board or have quitted the same.)	7 & 8 Geo. 4. c. 30. s. 11.
	- - Unlawfully and maliciously setting fire to any stack of corn, grain, pulse, straw, hay or wood.	7 & 8 Geo. 4. c. 30. s. 17.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
Petit Treason is to be deemed to be Murder only, and punished accordingly. See 9 Geo. 4. c. 31. s. 2.	Being convicted of Murder or of being an accessory before the fact to murder.	9 Geo. 4. c. 31. s. 3.
By the 4th sec. of 9 Geo. 4. c. 31, it is enacted, "That every person convicted of murder, shall be executed according to law on the day next but one after that on which the sentence shall be passed, unless the same shall happen to be a Sunday, and in that case on the Monday following."		
In the case of prisoners convicted of murder, the Court is to direct such prisoners to be buried within the precincts of the prison in which they shall have been confined after conviction; and the sentence to be pronounced by the Court is so to express it. 2 & 3 W. 4. c. 75; 4 & 5 W. 4. c. 26.		
	Unlawfully and maliciously administering or attempting to administer to, or causing to be taken by any person, any poison or other destructive thing; or unlawfully and maliciously attempting to drown, suffocate or strangle any person; or unlawfully and maliciously shooting at any person; or by drawing a trigger, or in any other manner attempting to discharge any kind of loaded arms at any person; or unlawfully and maliciously stabbing, cutting or wounding any person, with intent in any of the cases aforesaid to murder such person; or counselling, aiding or abetting the committing of any of the said offences.	9 Geo. 4. c. 31. s. 11.
It is, however, declared that if in case death ensued from the committing any of these offences, such offences would not amount to murder; the offender is to be acquitted of felony. See 9 Geo. 4. c. 31. s. 12.	- - Unlawfully and maliciously shooting at any person; or by drawing a trigger or in any other manner attempting to discharge any kind of loaded arms at any person; or unlawfully and maliciously stabbing, cutting or wounding any person, with intent, in any of the cases aforesaid, to maim, disfigure or disable or to do some other grievous bodily harm to such person; or with intent to resist or prevent the lawful apprehension or detainer of the party so offending, or of any of his accomplices, for any offence for which he or they may respectively be liable by law to be apprehended or detained; or counselling, aiding or abetting such offender.	9 Geo. 4. c. 31. s. 12.
	Unlawfully and maliciously, with intent to procure the miscarriage of any woman then being quick with child, administering to or causing to be taken by her any poison or other noxious thing, or using any instrument or other means whatever with the like intent; or counselling, aiding or abetting therein.	9 Geo. 4. c. 31. s. 13.
	Buggery, committed either with mankind or with any animal.	9 Geo. 4. c. 31. s. 15.
	Rape.	9 Geo. 4. c. 31. s. 16.
	Unlawfully and carnally knowing and abusing any girl under the age of ten years.	9 Geo. 4. c. 31. s. 17.
	Forging, counterfeiting or altering, or procuring to be forged, &c., or knowingly or wilfully acting or assisting in the forging, &c. any declaration, warrant, order or other instrument, or any affidavit or affirmation required to be made by the 2 & 3 W. 4. c. 59. (An Act to transfer the management of certain annuities on lives from the receipt of His Majesty's Exchequer, to the management of the Commissioners for the Reduction of the National Debt, and to amend an Act for enabling the said Commissioners to grant Life Annuities and Annuities for terms of years,) or by the Commissioners for the Reduction of the National Debt, under any of the provisions of the said Act, or under any authority given to them for that purpose; or forging, &c., or causing or procuring to be forged, &c., or knowingly or wilfully acting or assisting in the forging, &c. any certificate or order of any officer of the Commissioners for the Reduction of the National Debt, or the	

Appendix, No. 6.	OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
		name or names of any person or persons in or to any transfer of any annuities, or in or to any certificate, order, warrant or other instrument for the payment of money for the purchase of any annuities under the provisions of the said Act, or in or to any transfer or acceptance of any such annuities in the books of the Commissioners for the Reduction of the National Debt, or in or to any receipt or discharge for any such annuities, or for any payment or payments due or to become due thereon, or in or to any letter of attorney or other authority or instrument to authorize, or purporting to authorize, the transfer or acceptance of any annuities, or any life annuities of whatsoever kind, or authorizing or purporting to authorize the receipt of any life annuities, of whatsoever kind, granted under the said Act or any of the Acts therein recited, or any payment or payments due or to become due thereon; or wilfully, falsely and deceitfully personating any true and real nominee or nominees; or wilfully uttering or delivering or producing to any person or persons acting under the authority of the said Act, any forged register or copy of register of any birth, baptism or marriage, or any forged declaration, affidavit or affirmation, knowing the same to be forged, counterfeited or altered with intent to defraud His Majesty, his heirs or successors, or with intent to defraud any person or persons whomsoever.	2 & 3 W. 4. c. 59. s. 19.
		Forging or altering, or offering, uttering or disposing of, knowing the same to be forged or altered, any will, codicil or testamentary writing, with intent to defraud any body corporate or person whatsoever; or forging, or altering or uttering, knowing the same to be forged or altered, any power of attorney, or other authority, to transfer any share or interest of or in any stock, annuity or other public fund, which now is or hereafter may be transferable at the Bank of England or South Sea House, or at the Bank of Ireland, or to receive any dividend payable in respect of any such share or interest, with intent to defraud any body corporate or person whatsoever, or procuring, aiding or assisting in the commission of the said offences.	2 & 3 W. 4. c. 123. s. 2.
By 5 & 6 W. 4. c. 51, the Commissioners are empowered to give relief to the Island of Dominica, as well as the places mentioned in 2 & 3 W. 4, c. 125, and the forging any certificate of the Commissioners, with respect to that island, is punishable in the same manner as directed by 2 & 3 W. 4. c. 125.		- - Forging, counterfeiting or altering, or causing or procuring to be forged, &c., or knowingly and wilfully acting or assisting in the forging, &c. any certificate or certificates of the commissioners appointed by the 2d & 3d Will. 4, c. 125, (An Act for enabling His Majesty to direct the issue of Exchequer Bills to a limited amount for the purposes and in the manner therein mentioned, and for giving relief to Trinidad, British Guiana and St. Lucie,) or any of them, or any receipt or receipts to be given by the cashier or cashiers of the Governor and Company of the Bank of England, in pursuance of the said Act; or wilfully delivering to the Auditor of the receipt of His Majesty's Exchequer for the time being, or to any officer appointed by him, or to the said Commissioners, by the said Act appointed, or any of them, or to any officer or officers appointed by them or any of them in the execution of the powers of the said Act; or uttering any such forged certificate or certificates, receipt or receipts, knowing the same to be forged, with intent to defraud His Majesty, his heirs or successors, or any body or bodies politic or corporate, or any person whomsoever.	2 & 3 W. 4. c. 125. s. 65.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.	Appendix, No. 6.
	Any persons to the number of three or more, armed with fire-arms, or other offensive weapons, within the United Kingdom, or within the limits of any port, harbour or creek thereof, being assembled in order to be aiding and assisting in the illegal landing, running or carrying away of any prohibited goods, or any goods liable to any duties which have not been paid or secured, or in rescuing or taking away any such goods as aforesaid after seizure from the officers of the customs or other officers authorized to seize the same, or from any person or persons employed by them or assisting them, or from the place where the same shall have been lodged by them, or in rescuing any person who shall have been apprehended for any of the offences made felony by the 3 & 4 Will. 4, c. 53, (An Act for the Prevention of Smuggling), or any Act relating to the Customs, or in the preventing the apprehension of any person who shall have been guilty of such offence; or any persons to the number of three or more, so armed as aforesaid, within the United Kingdom, or within the limits of any port, &c. thereof, so aiding or assisting, or aiding, abetting or assisting therein.	3 & 4 W. 4. c. 53. s. 58.	
	Maliciously shooting at any vessel or boat belonging to His Majesty's navy or in the service of the Revenue, within 100 leagues of any part of the coast of the United Kingdom; or maliciously shooting at, maiming or dangerously wounding any officer of the army, navy or marines, being duly employed for the prevention of smuggling, and on full pay, or any officer of Customs or Excise, or any person acting in his aid or assistance, or duly employed for the prevention of smuggling, in the due execution of his office or duty; or aiding, abetting or assisting therein.	3 & 4 W. 4. c. 53. s. 59.	
	Forging or counterfeiting, or causing or procuring to be forged, &c., or willingly acting or assisting in the forging, &c. any receipt or receipts of the whole of or any part or parts of the contributions towards the sum of Fifteen Millions (part of the sum of Twenty Millions authorized to be raised by the 3 & 4 Will. 4. c. 73 [An Act for the Abolition of Slavery throughout the British Colonies, &c.]) either without the name or names of any person or persons being inserted therein as the contributor or contributors thereto, payer or payers thereof, or of any part or parts thereof, or any certificate or other instrument to be issued by the Commissioners for the reduction of the National Debt; or altering any number, figure or word therein; or uttering or publishing as true any such false, forged, counterfeited or altered receipt or receipts, &c., with intent to defraud the Governor and Company of the Bank of England or the Commissioners for the reduction of the National Debt, or any body politic or corporate, or any person or persons whatsoever, or willingly acting or assisting therein respectively.	5 & 6 W. 4. c. 45. s. 12.	

Appendix, No. 7.

EXTRACTS from the revised STATUTES of *Massachusetts.*

TITLE I. CHAP. 125.—*Of Offences against the Lives and Persons of Individuals.*

Punishment of Murder.

Section 1. EVERY person who shall commit the crime of wilful murder shall suffer the punishment of death for the same. [1804, c. 123. § 1.

Body of a murderer, when to be dissected.

How to be disposed of.

Sect. 2. In every case of a conviction of the crime of murder committed in a duel, the court shall, and in all other cases of a conviction of murder they may, in their discretion, order the body of the convict, after his execution, to be dissected: and it shall be the duty of the sheriff, in such case, to deliver the dead body of such convict to a professor of anatomy and surgery in some college or public seminary, if requested; otherwise it shall be delivered to any surgeon who may be attending to receive it, and who will engage for the dissection thereof. [1804, c. 123. § 1. pt. 2.

Murder in a duel out of the State.

To be prosecuted where the death happened.

Sect. 3. Every person, being an inhabitant or resident of this state, who shall by previous appointment or engagement made within the same, fight a duel without the jurisdiction of the state, and in so doing shall inflict a mortal wound upon any person, whereof the person so injured shall afterwards die within this state; and every person engaged as a second in such duel shall be deemed guilty of murder within this state, and may be indicted, tried and convicted in the county where such death shall happen.

Former conviction or acquittal may be pleaded in bar.

Sect. 4. Any person indicted under the preceding section may plead a former conviction or acquittal of the same offence in any other state or country; and such plea, if admitted or established, shall be a bar to all further or other proceedings against such person for the same offence within this state.

Punishment of Manslaughter.

Sect. 5. Every person who shall commit the crime of manslaughter, shall be punished by fine, not exceeding one thousand dollars, or by imprisonment in the state prison not more than ten years, or in the county gaol not more than three years. [1804, c. 123. § 3. 1818, c. 124. § 2.

Assault, maiming or disfiguring.

Sect. 6. If any person with malicious intent to maim or disfigure, shall cut out or maim the tongue, put out or destroy an eye, cut or tear off an ear, cut or slit or mutilate the nose or lip, or cut off or disable a limb or member of any other person, every such offender, and every person privy to such intent who shall be present aiding in the commission of such offence, shall be punished by fine not exceeding two thousand dollars, or by imprisonment in the state prison not more than ten years, or in the county gaol not more than three years. [1804, c. 123. § 4.

Assault with intent to murder or to maim, &c.

Sect. 7. If any person shall assault another with intent to murder, or to maim or disfigure his person, in any of the ways mentioned in the next preceding section, he shall be deemed a felonious assaulter, and shall be punished by fine not exceeding two thousand dollars, or by imprisonment in the state prison not more than ten years, or in the county gaol not more than two years. [1804, c. 123. § 5.

Attempt to murder, by poisoning, &c.

Sect. 8. If any person shall attempt to commit the crime of murder by poisoning, drowning or strangling another person, or by any other means not constituting the crime of assault with intent to murder; every such offender shall be punished by imprisonment in the state prison not less than five years, or by fine not exceeding two thousand dollars and imprisoned in the county gaol not more than two years. [1832, c. 62.

Robbery, being armed, &c.

Sect. 9. If any person shall assault another, and shall feloniously rob, steal and take from his person any money or other property which may be the subject of larceny, such robber being armed with a dangerous weapon with intent, if resisted, to kill or maim the person robbed; or if being so armed, he shall wound or strike the person robbed, he shall suffer the punishment of death for the same. [1818, c. 124. § 1.

Assault with intent to rob or to murder, being armed.

Sect. 10. If any person being armed with a dangerous weapon, shall assault another, with intent to rob or to murder, he shall be deemed a felonious assaulter, and shall be punished by imprisonment in the state prison not more than twenty years. [1818, c. 124. § 3.

Robbery, not being armed.

Sect. 11. If any person shall by force and violence, or by assault and putting in fear, feloniously rob, steal and take from the person of another, any money or other property, which may be the subject of larceny, (such robber not being armed with a dangerous weapon) he shall be punished by imprisonment in the state prison for life. [1804, c. 143. § 7.

Assault with intent to rob or to steal, not being armed.

Sect. 12. If any person, not being armed with a dangerous weapon, shall assault another with force and violence, and with intent to rob, or to steal, he shall be deemed a felonious assaulter, and shall be punished by imprisonment in the state prison not more than ten years. [1804, c. 143. § 9.

Sect. 13. If any person shall either verbally or by any written or printed communication, threaten to accuse another of any crime or offence, or shall threaten any injury to the person or property of another, with intent thereby to extort money, or any pecuniary advantage whatever, he shall be punished by imprisonment in the state prison, or in the county gaol, not more than two years, or by fine not exceeding three hundred dollars. Attempts to extort money by threats.

Sect. 14. If any person shall ravish and carnally know any woman of the age of ten years or more, by force and against her will, or shall unlawfully and carnally know and abuse any woman child under the age of ten years, he shall suffer the punishment of death for the same. [1805, c. 97. § 1. Rape or abuse of a female child.

Sect. 15. If any person shall assault any woman or female child, with intent to commit the crime of rape, he shall be deemed a felonious assaulter, and punished by fine not exceeding one thousand dollars, or by imprisonment in the state prison for any term of years, or for life, or in the county gaol, not more than three years. [1805, c. 97. § 3. 1815, c. 86. Assault with intent to commit a Rape.

Sect. 16. Every person who without lawful authority shall forcibly seize and confine, or shall inveigle or kidnap any other person with intent either to cause such person to be secretly confined or imprisoned in this state against his will, or to cause such person to be sent out of this state against his will, or to be sold as a slave, or in any way held to service against his will; and every person who shall sell, or in any manner transfer for any term the service or labour of any negro, mulatto or other person of colour, who shall have been unlawfully seized, taken, inveigled or kidnapped from this state to any other state, place or country, shall be punished by fine not exceeding one thousand dollars, or by imprisonment in the state prison not more than ten years, or in the county gaol not more than two years. [1784, c. 72. § 10. and see 1787, c. 48. Kidnapping or selling for a slave, &c.

Sect. 17. Every offence mentioned in the preceding section may be tried either in the county in which the same may have been committed, or in any county in or to which the person so seized, taken, inveigled, kidnapped or sold, or whose services shall be so sold or transferred, shall have been taken, confined, held, carried or brought. And upon the trial of any such offence, the consent thereto of the person so taken, inveigled, kidnapped or confined, shall not be a defence, unless it shall be made satisfactorily to appear to the jury that such consent was not obtained by fraud nor extorted by duress or by threats. Offence where to be prosecuted.

Sect. 18. If any person shall mingle any poison with any food or medicine with intent to kill or injure any other person, or shall wilfully poison any spring, well or reservoir of water with such intent, he shall be punished by imprisonment in the state prison not more than two years, or by fine not exceeding five hundred dollars. Poisoning food, medicines, springs, wells, &c.

Sect. 19. Every person who shall make an assault with intent to commit any burglary, robbery, rape, manslaughter, mayhem or any felony, the punishment of which assault is not hereinbefore prescribed, shall be punished by imprisonment in the state prison not more than five years, or in the county gaol not more than two years, or by fine not exceeding five hundred dollars. Assaults not before mentioned, how to be punished.

Chap. 126.—*Of Offences against Private Property.*

Sect. 1. Every person who shall wilfully and maliciously burn, in the night time, the dwelling-house of another, or shall set fire to any other building, by the burning whereof such dwelling-house shall be burnt in the night time, shall suffer the punishment of death. But if the defendant shall prove on the trial, and the jury shall find *that at the time of committing the offence there was no person lawfully in the dwelling-house so burnt, the punishment instead of death shall be imprisonment in the state prison for life.* [1804, c. 131. § 1. and 1830, c. 72. § 1. Malicious burning of a dwelling-house in the night. Punished with death. When no person was lawfully in the house, punishment.

Sect. 2. Every person who shall wilfully and maliciously burn, in the day time, the dwelling-house of another, or any building adjoining such dwelling-house, or shall set fire to any building by the burning whereof such dwelling-house shall be burnt in the day time, shall be punished by imprisonment in the state prison for life. [1804, c. 131. § 2. pt. 1. Burning a dwelling-house in the day time, &c.

Sect. 3. Every person who shall wilfully and maliciously burn, in the night time, any meeting-house, church, court-house, town-house, college, academy, gaol or other building erected for public use; or any banking-house, warehouse, store, manufactory or mill of another, (being with the property therein contained of the value of one thousand dollars,) or any barn, stable, shop or office of another, within the curtilage of any dwelling-house; or any other building, by the burning whereof any building mentioned in this section shall be burnt in the night time, shall be punished by imprisonment in the state prison for life. [1804, c. 131. § 2. pt. 2. Burning in the night a meeting-house, church, court-house, town-house, college, academy, gaol, bank, warehouse, store, manufactory, mill, &c. of the value of 1,000 dollars. Barn, stable, shop, office, &c. within the curtilage, &c.

Sect. 4. Every person who shall wilfully and maliciously burn, in the day time, any building, mentioned in the last preceding section, (the punishment for which, if burnt in the night time, would be imprisonment in the state prison for life,) shall be punished by imprisonment in the state prison not more than ten years. [1804, c. 131. § 3. Burning in the day time any building mentioned in the preceding section.

Sect. 5. Every person who shall wilfully and maliciously burn, either in the night time or in the day time, any banking-house, warehouse, store, manufactory, mill, barn, stable, shop, office, outhouse or other building whatsoever, of another, other than is mentioned in the Burning in the day or night certain buildings of less value than 1,000 dollars, or not within the curtilage.

the last section but one, or any bridge, lock, dam, or flume, or any ship or vessel of another, lying within the body of any county, shall be punished by imprisonment in the state prison not more than ten years. [1804, c. 131. § 3.

Or any bridge, lock, flume, or any ship, &c. lying within the county.

Burning wood, lumber, fences, stacks of corn, hay, &c. or standing grain, grass, trees, under-wood, soil, &c.

Sect. 6. Every person who shall wilfully and maliciously burn or otherwise destroy or injure any pile or parcel of wood, boards, timber or other lumber; or any fence, bars or gate, or any stack of grain, hay or other vegetable product, or any vegetable product severed from the soil, and not stacked; or any standing trees, grain, grass or other standing product of the soil, or the soil itself, shall be punished by imprisonment in the state prison not more than three years, or in the county gaol not more than one year, or by fine not exceeding five hundred dollars. [1804, c. 131. § 4. pt. 1.

Burning property insured to injure the insurers.

Sect. 7. Every person who shall wilfully burn any building or any goods, wares, merchandize or other chattels, which shall be at the time insured against loss or damage by fire, with intent to injure the insurer, whether such person be the owner of the property burnt or not, shall be punished by imprisonment in the state prison not more than ten years.

Burglary, being armed or making an assault.

Punished with death.

Sect. 8. Every person who shall break and enter any dwelling-house in the night time, with intent to commit the crime of murder, rape, robbery, larceny or any other felony, or after having entered with such intent, shall break any such dwelling-house in the night time, any person being then lawfully therein, and the offender being armed with a dangerous weapon at the time of such breaking or entry, or so arming himself in such house, or making an actual assault on any person being lawfully therein, shall suffer the punishment of death. [1805, c. 101. § 1.

Burglary, not being armed nor making an assault.

Sect. 9. Every person who shall break and enter any dwelling-house in the night time, with such intent as is mentioned in the preceding section, or who having entered with such intent shall break such dwelling-house in the night time, (the offender not being armed nor arming himself with a dangerous weapon, nor making an assault upon any person then being lawfully in such house), shall be punished by imprisonment in the state prison not more than twenty years. [1805, c. 101. § 2. and 1830, c. 72. § 2.

Breaking in the night an office shop, &c. not adjoining a house, or a ship, and stealing.

Sect. 10. Every person who shall break and enter, in the night time, any office, shop or warehouse, not adjoining to or occupied with a dwelling-house, or any ship or vessel within the body of any county, with intent to commit the crime of murder, rape, robbery, larceny or any other felony, shall be punished by imprisonment in the state prison not more than fifteen years. [1804, c. 143. § 4.

Entering a house, &c in the night, without breaking, or breaking and entering in the day time and putting in fear.

Sect. 11. Every person who shall enter, in the night time, without breaking, or shall break and enter in the day time any dwelling-house or any outhouse thereto adjoining and occupied therewith, or any office, shop or warehouse, or any ship or vessel within the body of any county, with intent to commit the crime of murder, rape, robbery, larceny or any other felony, the owner or any other person lawfully therein being put in fear, shall be punished by imprisonment in the state prison not more than ten years. [1804, c. 143. § 5.

Entering, &c. as in the preceding section, without putting in fear.

Sect. 12. Every person who shall enter any dwelling-house, in the night time, without breaking, or shall break and enter, in the day time, any dwelling-house or any outhouse thereto adjoining and occupied therewith, or any office, shop or warehouse, or any ship or vessel within the body of any county, with intent to commit the crime of murder, rape, robbery, larceny or any other felony, (no person lawfully therein being put in fear) shall be punished by imprisonment in the state prison not more than three years, or in a county gaol not more than two years, or by fine not exceeding five hundred dollars. [1805, c. 101. § 4.

Stealing in the day-time in a dwelling-house, or breaking in the night a public building, and stealing.

Sect. 13. Every person who shall steal, in the day time, in any dwelling-house, office, bank, shop or warehouse, ship or vessel, or shall break and enter, in the night time, any meeting-house, church, court-house, town-house, college, academy or other building erected for public use, and steal therein, shall be punished by imprisonment in the state prison not more than five years, or in a county gaol not more than two years, or by fine not exceeding three hundred dollars. [1804, c. 143. § 6. 1830, c. 72. § 3.

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THIRD REPORT

FROM

THE COMMISSIONERS

ON

CRIMINAL LAW.

JUVENILE OFFENDERS.

Presented to both Houses of Parliament by Command of His Majesty.

LONDON:

PRINTED BY W. CLOWES AND SONS, STAMFORD STREET,

FOR HIS MAJESTY'S STATIONERY OFFICE.

1837.

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COMMISSION.

WILLIAM the FOURTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith. To Our Trusty and Well-beloved *Thomas Starkie*, *Henry Bellenden Ker*, *William Wightman*, *Andrew Amos*, and *David Jardine*, Esquires, greeting: Whereas We did, by Our Letters Patent under the Great Seal of Our United Kingdom of Great Britain and Ireland, bearing date the Twenty-third Day of July, in the Fourth Year of Our Reign, authorize and appoint you, the said *Thomas Starkie*, *Henry Bellenden Ker*, *William Wightman*, and *Andrew Amos*, together with our Trusty and Well-beloved *John Austin*, Esquire, or any three or more of you, to digest into one Statute all the Statutes and Enactments touching Crimes, and the Trial and Punishment thereof, and also to digest into one other Statute all the Provisions of the Common or Unwritten Law touching the same, and to inquire and report how far it might be expedient to combine both those Statutes into one Body of the Criminal Law, repealing all other Statutory Provisions, or how far it might be expedient to pass into a Law the first-mentioned only of the said Statutes, and generally to inquire and report how far it might be expedient to consolidate the other Branches of the existing Statute Law, or any of them: And Whereas We did, by Our said Letters Patent, declare Our will and pleasure to be, that they, or any three or more of them, should within the space of one Year after the date of that Our said Commission, or sooner, if the same could reasonably be, certify to Us, in Our Court of Chancery, on Parchment, under their Hands and Seals respectively, their several Proceedings in the matter, as the same should be respectively completed and perfected, particularly how far it might be expedient to combine both the Statutes so digested into one Body of the Criminal Law, repealing all other Statutory Provisions; or how far it might be expedient to pass into a Law the first-mentioned only of the said Statutes; and generally how far it might be expedient to consolidate the other Branches of the existing Statute Law, or any of them: And Whereas We have deemed it expedient to appoint you the said *David Jardine* to be one of Our Commissioners for the purposes aforesaid, in the room of the said *John Austin*, resigned, and to extend the period within which the said Commissioners were therein required to make their Report.

Know ye, therefore, that We, reposing great trust and confidence in your zeal, ability, and discretion, have authorized and appointed, and by these Presents do authorize and appoint you, the said *Thomas Starkie*, *Henry Bellenden Ker*, *William Wightman*, *Andrew Amos*, and *David Jardine*, or any three or more of you, to digest into one Statute all the Statutes and Enactments touching Crimes, and the Trial and Punishment thereof, and also to digest into one other Statute all the Provisions of the Common or Unwritten Law touching the same, and to inquire and report how far it may be expedient to combine both those Statutes into one Body of the Criminal Law, repealing all other Statutory Provisions, or how far it may be expedient to pass into a Law the first-mentioned only of the said Statutes, and generally to inquire and report how far it may be expedient to consolidate the other Branches of the existing Statute Law, or any of them. And for the better effecting the purposes of this Our Commission, We do by these

Presents give and grant to you, or any three or more of you, full power and authority to call before you, or any three or more of you, such Persons as you shall judge necessary, by whom you may be the better informed on the subject of this Our Commission, and every matter connected therewith; and also to call for, have access to, and examine all such Official Books, Documents, Papers, and Records, as may afford the fullest information on the subject, and to inquire of and concerning the Premises by all other lawful ways and means whatsoever. And We do hereby give and grant to you, or any three or more of you, full power and authority, when the same shall appear to be requisite, to administer an Oath or Oaths to any Person or Persons whatsoever to be examined before you, or any three or more of you, touching or concerning the Premises. And Our further will and pleasure is, that you, or any three or more of you, do and shall, within the space of one Year after the date of this our Commission, or as soon after as the same can reasonably be, certify to Us, in our Court of Chancery, on Parchment, under your Hands and Seals respectively, your several Proceedings in this matter, as the same shall be respectively completed and perfected, particularly how far it may be expedient to combine both the Statutes so digested into one body of the Criminal Law, repealing all other Statutory Provisions, or how far it may be expedient to pass into a Law the first-mentioned only of the said Statutes, and generally how far it may be expedient to consolidate the other branches of the existing Statute Law, or any of them. And We will and command, and by these Presents ordain, that this Our Commission shall continue in full force and virtue; and that you Our said Commissioners, or any three or more of you, may, from time to time, proceed in the execution thereof, and of every matter and thing therein contained, although the same be not continued from time to time by adjournment. And We do hereby direct and appoint that you, or any three or more of you, may have liberty to certify your several Proceedings, from time to time, to Us, in Our said Court of Chancery, as the same shall be respectively completed and perfected. And We do hereby command all and singular Our Justices of the Peace, Sheriffs, Mayors, Bailiffs, Constables, Officers, Ministers, and all Our loving subjects whatsoever, as well within Liberties as without, that they be assistant to you and each of you in the execution of these Presents. And for your assistance in the due execution of this Our Commission, We have made choice of Our Trusty and Well-beloved *James Lonsdale*, Gentleman, to be Secretary to this Our Commission, and to attend you, whose service and assistance We require you to use from time to time, as occasion shall require. In witness whereof We have caused these our Letters to be made Patent. Witness Ourself, at Westminster, the Twenty-first Day of October, in the Seventh Year of our Reign.

By Writ of Privy Seal,

EDMUNDS.

THIRD REPORT.

TO THE KING'S MOST EXCELLENT MAJESTY

IN HIS HIGH COURT OF CHANCERY.

IN conformity with the Letter of Lord John Russell, one of Your Majesty's Principal Secretaries of State, dated the 23rd day of November, 1836, directing us to consider whether it would be advisable to make any distinction in the Mode of Trial between Adult and Juvenile Offenders; and if not, whether any class of Offenders can be made subject to a more summary proceeding than trial by Jury; and to furnish an early and separate Report to be laid before Your Majesty,—we humbly submit to Your Majesty the result of our Considerations on this subject.

We humbly report to your Majesty, that we are of opinion that it would not be advisable to make any distinction in the mode of trial between adult and juvenile offenders, except by increasing the summary jurisdiction of magistrates in the manner hereinafter mentioned; and that the extension of such summary jurisdiction, within certain limits, would be a safe and beneficial alteration of the law, and would tend materially to diminish juvenile crime.

We humbly submit to your Majesty, that the summary jurisdiction of magistrates should extend to the following particulars:—

1. That upon charges of larceny, where the value of the property stolen does not exceed 10*s.*, and where the age of the culprit does not exceed 15 years, a single justice of peace should have a discretionary power to dismiss the prisoner altogether, (although a felony may be proved,) if the circumstances of the offence are of so trivial a nature as in his judgment to be unfit for prosecution by indictment; or to take sureties for the good behaviour of the prisoner, or bail for his appearance at a future day for trial.

2. That upon charges of larceny, where the culprit, after hearing the information and evidence against him, voluntarily confesses the offence, a single justice of peace should have a discretionary power to take such confession, and to sentence the prisoner forthwith to be imprisoned in execution for any period not exceeding 6 months, if the value of the property stolen does not exceed 10*s.*; and for any period not exceeding 12 months, if the value of the property stolen is above 10*s.* and does not exceed 5*l.*

3. That on summary charges of larceny, where the value of the property stolen does not exceed 10*s.*, and where the age of the culprit does not exceed 15 years, two justices of peace, sitting together, should be empowered to hear the evidence for the prosecution and the defence, and to adjudicate thereon, if they think proper; and in case of conviction, to sentence the offender forthwith to be imprisoned in execution for any period not exceeding six months.

Having thus, in the outset, stated the opinions we have formed after a careful consideration of this difficult subject, we now proceed to submit in detail to your Majesty the reasons upon which they are founded.

We conceive it would be foreign to the objects now referred to us to enter into any statement or discussion respecting the causes to which the prevalence of juvenile delinquency is to be attributed. From the Report of the Inspectors of

Prisons for the Home district,* as well as from evidence furnished to ourselves,† we are satisfied that imprisonment before trial, during which young and comparatively innocent persons are exposed to the evils of idleness and the contamination of bad associates, without being subjected to the salutary discipline applicable to convicted criminals, is a fertile source of juvenile crime. This is the point to which it appears to us that legislative provisions upon this subject can with most advantage be directed; other remedies for this serious evil must be sought in preventive measures of police, and, above all, in the religious and moral education of the children of the poor. With this conviction, we confine ourselves in the present Report to the examination of the question, whether the abolition or abridgment of imprisonment for safe custody, in the case of juvenile offenders, can be effected by the adoption of any peculiar mode of trial.

Having thus stated our general view of the object of the inquiry, we proceed to submit to Your Majesty the reasons upon which we found our opinion, as above expressed, "That it would not be desirable to make any distinction in the mode of trial of adult and juvenile offenders, except by increasing the summary jurisdiction of magistrates."

Persons of intelligence and practical experience have suggested the expediency of trying young persons before magistrates, at petty sessions, by a jury of six or eight. Our first objection to this plan is, that it would very imperfectly remove the evils attendant upon the present practice. The object is to avoid imprisonment for safe custody; but if a boy be brought before a magistrate upon a charge of theft, and it is proposed to try him at petty sessions by a jury, the hearing must at all events be postponed until the petty sessions are assembled, and the jury are summoned and appear. The magistrate, therefore, must either commit the prisoner to custody in the mean time, or he must take bail for his appearance at a future day. If he commits him to gaol, the evil sought to be avoided at once occurs, though certainly in a less degree, in consequence of the diminished period of imprisonment; and, if he entrusts him to the constable, the culprit is taken in the country to the public house, and in towns to places of temporary confinement, where contamination from bad society takes place to almost as great an extent as in gaols. The only way by which this objection could be removed would be by the provision of proper means of confinement in the immediate neighbourhood of the place where the preliminary inquiry occurred,—a provision which implies considerable expense. If, on the other hand, the magistrate should be empowered to take bail, there seems no reason why his authority should not be extended to taking bail for the prisoner's appearance at the next Quarter Sessions or Assizes, in which case there would be no occasion for altering the present mode of trial in order to obviate the evil of imprisonment for safe custody. The only bail which could usually be given, or indeed could be reasonably required from very young persons would be the security of their parents or domestic friends; and we conceive that security of this description could be procured almost as readily for a longer as for a shorter period.

But the most formidable obstacle to adopting any summary mode of trial before magistrates with a jury, arises from the complicated machinery which it necessarily involves, and the expense and inconvenience of which would far outweigh any advantage to be derived from it. Supposing the difficulty of disposing of the prisoner in the interval between the information and the Petty Sessions to be removed, another difficulty arises respecting the jury. Six or eight persons, as the case may be, are to be summoned as jurors; there must, therefore, be a summoning officer, and a summons in writing. A great and unequal burthen would be thrown upon jurymen in large towns and jurymen in rural districts. Provision must be made for enforcing the attendance of jurors, for equalizing the burthens of their attendance at Petty Sessions, and at Assizes and Quarter Sessions. Regulations must also be made for enforcing the attendance of witnesses. Much difficulty, and perhaps expense, would also occur in securing the presence of magistrates; for though their present duties, which in some parts of the country are sufficiently onerous, are gratuitously discharged by them, they might not readily submit to the heavy additional imposition of weekly, or still more frequent attendances at Petty Sessions, to be held at different parts of a large district. In addition to this, several ministerial

* Ordered by the House of Commons to be printed, 22d March, 1836.
† See Appendices to this and our Second Report on the Criminal Law.

officers, whose services must of course be remunerated, and many specific regulations would be necessary for conducting such courts, however simply organized, with necessary decorum and regularity.

It may possibly be urged as a reason for the adoption of this modified trial by a jury, in preference to increasing the summary jurisdiction of magistrates, that it preserves to the accused the constitutional form of trial to which he is by law entitled. To this it might be observed, that the constitutional form of trial is equally abandoned by diminishing the number of the jury; but, admitting it not to be desirable in general to withdraw any class of offenders from the ancient and popular tribunal, it must be remembered that the choice in this instance lies between two evils, and the practical question is, whether the advantage gained by the diminution of imprisonment for safe custody in the case of young persons, is not cheaply purchased by a sacrifice of the benefit to be derived by themselves and the public from their trial by a jury. Considering the simplicity of the offences in question, and the trivial nature of the circumstances on which they generally depend, we can discover no great or peculiar advantage to the offender or the public in investigating them by a jury; and, on the other hand, both the offender and the public derive an important and undeniable advantage by the adoption of a course with which a trial by jury is inconsistent. Under such circumstances, it appears to us that a departure from the general and constitutional course is fully justifiable.

The great majority of offences committed by children are petty thefts, and those mischievous and wanton acts which come under the general denomination of vagrancy. The latter are already subject to summary conviction by the provisions of the Vagrant Act* and the Petty Trespass Act.† But with respect to petty thefts, where they constitute larceny, the Magistrate has now no power to discharge the offender or to punish him summarily, but is bound by law to send the case for adjudication to another tribunal. However small the value of the article stolen, if the offender is above seven years of age, and if his offence is a felony, he must be committed to take his trial at the Assizes or Sessions. He must remain for weeks or perhaps months in prison without being subject to compulsory discipline; and though his guilt may be so clear as not to be denied even by himself, the whole machinery of an indictment, a grand jury and petty jury must be applied to investigate the facts before he can be punished for his crime. While it is obvious that the adoption of this course in the case of young offenders is, in various ways, productive of positive evils, especially in the destruction of morals incident to imprisonment before trial, there are no advantages to counterbalance them. The formality of a solemn trial adapted to crimes of magnitude, when applied to such cases, derogates from the dignity of a superior court of justice, and has not the effect of deterring from transgressions of the law; for the slightness of the offence, and the youth of the offender, usually render him more an object of compassion than a fit subject of punishment; and if the jury do not, under such feelings, acquit him altogether, they recommend him to mercy on account of his youth, and the sentence passed upon him by the court is little more than nominal. In trivial felonies, therefore, committed without any collateral circumstances of aggravation, a solemn trial by a jury cannot, we think, be of use in the way of example; and as to the reformation of the offender, the direct tendency of the proceeding, by subjecting him to the demoralization of a prison, is the reverse; so that neither of the two great objects of penal laws, namely, the prevention of crime and the reformation of the criminal, are accomplished by the present mode of trying very young persons for trivial offences. Indeed, where the theft results not from any inveterate habit of stealing, or settled want of principle, but from sudden temptation or childish indiscretion, or the incitement of others, it may often be less mischievous to society, to pass over the offence altogether, than to make it the subject of prosecution.

For the above reasons, and after a full consideration of the evidence which has been given upon this subject by practical men on various occasions, and particularly the opinions expressed by Lord Wharncliffe, Mr. Sergeant D'Oyly, Mr. Gawler, and Mr. Alderman Harmer, in the Appendix to our Second Report on the Criminal Law, and of Sir Frederick Adair Roe and Mr. Mayne, in the Appendix to this Report, we are convinced that the most salutary mode of diminishing juvenile crime would be by entrusting to magistrates, within certain limits and restrictions, the discretionary powers which we have suggested at the commencement of this Report. We cannot conceive that there will be any danger in making

* 5 King Geo. 4, c. 83. † 7 and 8 King Geo. 4, c. 30.

this small addition to the summary jurisdiction of justices of the peace; the powers which they already possess under the Vagrant Act and the Petty Trespass Act, and which, generally speaking, are exercised by them with propriety, are more extensive and far less defined than those with which it is proposed to invest them in the case of juvenile offenders; while the offences to which their summary authority, under those statutes, is applicable, are much more likely to furnish motives for an improper and excessive use of it, than petty thefts committed by children.

Our first proposition is,

"That a single magistrate, upon charges of larceny, where the value of the property stolen does not exceed 10*s*., and where the age of the culprit does not exceed 15 years, should have a discretionary power to dismiss the prisoner, (although a felony may be proved,) if the circumstances of the offence are of so trivial a nature as in his judgment to be unfit for prosecution by indictment, or to take sureties for the good behaviour of the prisoner, or bail for his appearance at a future day for trial."

To a certain extent the discretion of absolutely discharging a prisoner is already assumed by many magistrates, though without any direct authority by the law; and it is now not an unfrequent practice to dismiss charges for trivial offences against children, notwithstanding the evidence adduced may have clearly established the commission of a felony. The practice is, however, by no means uniform, many magistrates considering that where a felony is proved, (however trivial it may be,) they are bound by the law either to commit or to hold to bail. If the exercise of such a discretion is desirable, it should not be left to the varying notions of different magistrates, but should be expressly sanctioned by law, and defined and limited, as far as possible, upon some rational and consistent principle. It is manifest, however, that the discretion of dismissing a juvenile prisoner from custody, and refusing to commit him to prison or to take bail for his good behaviour or appearance, must be of a wider and less definite nature than the other occasions on which we propose to add to the summary powers of magistrates. It must be governed by the circumstances of each particular case, which, being infinitely various, it would be impossible precisely to define, though the conduct of the magistrate might be regulated to some extent by specific restrictions and by general directory rules. Such a power ought not to be allowed, for instance, where it can be ascertained that the culprit has been previously convicted of felony, or where the crime has been attended with any circumstances of aggravation which may indicate hardened wickedness, and render an exemplary punishment expedient.

To those who may be alarmed at the extent of discretion with which this proposition appears to invest the magistrate, it may be pointed out, that the mere dismissal of the charge by the magistrate does not give absolute impunity to the culprit. He will still be liable to an indictment if the Prosecutor thinks proper to proceed further, or if circumstances of aggravation should appear subsequently to the inquiry before the magistrate: so that the authority of the magistrate will merely extend to refusing to send the offender to prison, or to require bail; and the only objection would be the absence of security against his escape before the next Assizes or Sessions. The objection of the probability of escape may, however, be partially removed by enlarging the powers of the magistrate with respect to bail, by which means a reasonable security may also be given to the public for the future good behaviour of the offender. We think that, within the limits above suggested, the magistrate should have the power to dismiss without bail, because cases of trivial felonies by destitute children are constantly occurring, where imprisonment until bail were given would be equivalent to imprisonment until trial. But it is highly proper that where there is reason to suppose that the parents or friends of a young offender, who is about to be discharged from a trivial accusation, are able and willing to become sureties for his good behaviour or future appearance, that the magistrate should have the power of taking such bail. A double advantage will be gained by such a provision. Not only will the public, to a certain extent, have security for the appearance and future good behaviour of the offender in the pecuniary responsibility of the sureties, but parents, relatives, or friends, who become sureties, acquire an immediate interest in vigilantly watching the conduct of their principal, in exercising a salutary control over his actions, and

in preventing his recurrence to idleness and bad company. In another point of view, too, the power of requiring bail by the magistrate will produce a beneficial effect. Where a young offender is so totally destitute of friends as to be able to produce no person to become bail for him, the magistrate might fairly infer that he was a proper object, not so much of punishment in the case of a slight offence, as of that wholesome degree of restraint and discipline in prison to which as a convicted offender he might be subjected. The magistrate might, therefore, in such a case, by virtue of the authority with which we propose that he should be invested, adjudicate summarily upon his offence, and, if satisfied of his guilt, commit him to prison, not for safe custody with a view to future trial, but in execution of a sentence, so that he might at once be subjected to the discipline imposed on convicts.

The present powers of magistrates as to taking bail for felony are defined by the Stat. 7 King Geo. IV. c. 64, and the Stat. 5 and 6 King Will. IV. c. 33, s. 3. By the former Statute two justices are empowered to admit to bail where they have doubts respecting the charge; and by the latter Statute they are authorized to take bail, "in the manner and according to the provisions of the former Statute, notwithstanding the offender shall have confessed the matter laid to his charge, or notwithstanding such justices shall not think that the charge is groundless, or shall think that the circumstances are such as to raise a presumption of guilt." We think that, with respect to juvenile offenders, these powers might be safely extended, and that within the limits as to age and value above suggested, a single magistrate should be entrusted with the discretion of admitting to bail under any circumstances, and that he should be empowered to take sureties for the good behaviour of the accused during a specified period, or bail for his appearance to take his trial, or for both.

The 2nd proposition which we submit to your Majesty is,

"That upon charges of larceny, where the culprit, after hearing the information and evidence against him, voluntarily confesses the offence, a single justice should have a discretionary power to take such confession, and to sentence the prisoner forthwith to be imprisoned in execution for any period not exceeding 6 months, if the value of the property stolen does not exceed 10*s.*; and for any period not exceeding 12 months, if the value of the property stolen is above 10*s.*, and does not exceed 5*l.*"

There seems to be no reason why the expense and trouble of a formal trial should be incurred in the numerous instances of small felonies in which prisoners at once confess their guilt. It constantly happens at gaol deliveries, either at the Assizes or Quarter-sessions, that many prisoners (and juvenile delinquents perhaps more frequently than others) plead guilty to the indictment when placed at the bar. On turning to the depositions, it often appears that such offenders have made full confessions of their guilt to the magistrate, previously to their commitment. To apply to such cases the machinery of a formal trial, involving the demoralization of a previous imprisonment for safe custody, is not only useless but injurious; it subjects an offender to the ruinous discipline of several weeks or months of imprisonment in a gaol, under the most unfavourable circumstances, for no other purpose than to give him an opportunity of repeating in a more solemn manner before superior judges the confession which he has already made before an inferior tribunal. In ordinary circumstances there is no evidence of facts which, for judicial purposes, may be so confidently relied upon as the voluntary admission of the party who is criminally affected by them; and, although instances of false confessions have unquestionably occurred, we apprehend that in this country they have been extremely rare, especially in cases of trifling larcenies. At all events, we are of opinion that it may be safely left to the magistrate to inquire whether the prisoner who pleads guilty before him to a charge of petty theft is acting under any delusion, or is induced by fraudulent motives to make a false confession. He would not probably feel himself justified in acting upon the confession alone, without any corroborative evidence; and, if well-grounded doubt or suspicion arose in his mind, he would of course exercise his discretion by committing the offender for trial. It appears to us that this provision may advantageously be extended to adult offenders, and therefore we do not propose to restrict the summary power of the magistrates in this respect within any limits as to age. We think, also, that no danger or inconvenience could arise from extending the range of cases to which the provision might apply to larcenies of property of the value of 5*l.*

The 3rd proposition above suggested is,

"That on summary charges of larceny, where the value of the property stolen does not exceed 10*s*., and where the age of the culprit does not exceed 15 years, two justices of the peace, sitting together, should be empowered to hear the evidence for the prosecution and the defence, and to adjudicate thereon if they think proper; and, in case of conviction, to sentence the offender forthwith to be imprisoned in execution for any period not exceeding 6 months."

The effect and object of this proposition is merely to give to two magistrates, in cases of petty thefts by young persons, the same summary jurisdiction which a single magistrate already possesses, with respect to various offences not amounting to felony. By several statutory provisions recently made, single magistrates are empowered to inquire into, and punish in a summary manner, numerous acts of stealing, which do not, for technical reasons, constitute larceny at common law. For instance, by the Statute 7 & 8 King Geo. 4, c. 29, the offence of stealing growing trees, shrubs, &c. which are not the subject of larceny, as being part of the realty, was made punishable by means of a summary conviction before a magistrate. The facts to be investigated upon charges made under the above Statute, were of precisely the same nature as those which constitute larcenies; and therefore, if the magistrate was competent to deal summarily with the one, he was equally competent to adjudicate upon the other. Indeed the only plausible reason for the exclusion of the latter was, that larcenies involved the serious consequences of forfeiture and infamy incident to felony at common law, and that it was considered to be unsafe and unconstitutional to allow persons to be convicted of such offences without the intervention of a jury. To meet this difficulty, which does not, however, appear to us to be of much practical importance, it might be provided that a summary conviction for larceny should not be attended with the ordinary consequences of forfeiture and disqualification resulting from a conviction of felony by a jury. Independently of this objection, we are quite unable to discover any just principle in this distinction. If it is expedient to try and punish offenders by a summary jurisdiction for stealing property which, for a mere technical reason, is not the subject of larceny, we can perceive no well-founded objection to extending such jurisdiction to petty thefts of any kind of property. It cannot be a rational distinction, that if a man steals an apple blown from a tree, the facts which constitute his offence can only be investigated by a process applicable to the highest crimes; while, if he cuts down and steals the tree itself, he may be tried and punished summarily by a single magistrate.

Considering, therefore, that the principle of trying petty thefts in a summary manner by magistrates has been sanctioned by various Statutes, we anticipate no substantial objection to expressly extending their jurisdiction to the absolute trial of trivial larcenies committed by young persons. When a charge of theft is brought by the prosecutor before two magistrates, and the case falls within the proposed limits as to the age of the offender and the value of the property stolen, the magistrates should still be enabled to use their discretion, in determining whether the offence disclosed was proper for the exercise of their summary jurisdiction, or whether it ought to undergo inquiry at the assizes or sessions. Such a discretion would be a proper check upon the prosecutor, who might frequently be disposed to press for an immediate conviction, from an apprehension of the delay, expense, and trouble incident to a formal trial, and would prevent the summary disposal of offences which required to be tried and punished in a more exemplary manner.

We also think that, as this summary hearing would be a proceeding *in invitum* against the offender, and would deprive him of his ordinary right of trial by jury, and as the magistrates would be the sole judges of the facts upon the evidence, and the arbiters of the punishment, two justices at least ought always to be present at the hearing and adjudication. It would be a reasonable precaution to provide that, in all cases of summary conviction, a simple and compendious record of the proceeding should be made according to a prescribed form. There should also be a right of appeal from the conviction either to the Quarter Sessions, or a Petty or Special Sessions consisting of three justices at the least; and upon notice of appeal being given to the convicting magistrates, a single magistrate should be authorized to bail the prisoner in the meantime. In large towns, where there are stipendiary magistrates, some other tribunal of appeal might readily be devised.

It appears to us that it would be useful to invest magistrates with the power of ordering restitution of stolen goods to the right owner, or of inflicting a fine for the purpose of enforcing such restitution, and of remanding the prisoner, in all cases of summary conviction for petty thefts.

In the suggestions above submitted to Your Majesty we propose to limit the powers of punishment entrusted to magistrates to imprisonment for 12 months in the case of confessions, and for 6 months in the case of convictions. Our persuasion of the serious evils arising from the injudicious leniency of the sentences now usually passed on young offenders is confirmed by the evidence of Sir F. A. Roe and Mr. Mayne, and induces us to think it highly deserving of consideration whether some *minimum* of imprisonment should not be prescribed. The trifling punishments often inflicted at the Central Criminal Court, and also at Assizes and Quarter Sessions in the country, in cases where the offence is clearly proved, and where there is no palliation in the circumstances besides the youth of the offender, appear to us to tend, in a most pernicious degree, to the increase of crime.

It would, no doubt, be desirable to define with greater accuracy the particular class of thefts which should become the objects of summary conviction and punishment, to the exclusion of the ordinary course of prosecution. The means of such a definition are, however, extremely scanty; and, after much consideration, we are compelled to conclude, that the only practicable limits to the discretion of the magistrates, are the age of the offender and the value of the property stolen, the former of which it may often be difficult to ascertain, while the latter furnishes a very fallible criterion of the mischief of the offence, or the malignity of the offender.

The mode of ascertaining the fact of age must, we think, be left to the discretion of magistrates; if it is shown to their satisfaction, by reasonable evidence, that the offender is within the specified age, and the fact is not disproved on the part of the accused, they should be enabled to exercise their summary jurisdiction, subject to an appeal against the decision if they have been mistaken as to the fact. In cases where there is no distinct proof of the exact age of the culprit, but where from his appearance, or from other circumstances, it is doubtful whether he comes within the prescribed limits, we believe that magistrates would not be forward to adjudicate, but would be disposed to refer the trial to the ordinary tribunal.

Considering our duty, under the terms of the reference made to us on the present occasion, to be restricted to the suggestion of such general measures as appear advisable respecting the trial of juvenile offenders, we have not entered into a detailed account of the provisions which would be necessary if it should be hereafter determined to carry our suggestions into execution. We feel confident, however, that these provisions would be simple, and would involve no difficulty in principle.

Before concluding our Report, we beg leave humbly to submit to your Majesty a suggestion respecting the suppression of crime among juvenile offenders, which has been strongly impressed upon our minds by the evidence which we have taken.

We are persuaded that it is desirable that increased powers should be given to the police to withdraw young persons from public-houses, beer-shops, penny theatres, and other notorious places of meeting for the idle and dissolute. Much advantage also might be derived from giving to the police a more distinct authority than they now possess, to disperse or apprehend as vagrants, boys wandering in companies in the streets, or loitering around theatres and other places of public amusement, without any ostensible employment. The evidence given before us by Mr. Mayne, one of the Commissioners of the Metropolitan Police, and appended to this Report, appears to us to be of the utmost importance upon the subject of preventing crimes among young persons of the lower classes.

If the experiment of increasing the summary jurisdiction of magistrates to the extent above suggested should be considered too hazardous, or if it should be thought expedient to carry it into effect in rural districts only, we apprehend that great advantage would arise in the metropolis and large towns from the establishment of tribunals for the more frequent trial by jury of offenders, by means, however, in some respects, of a simpler machinery than is now authorized by the law.

All which we humbly submit to your Majesty.

THOMAS STARKIE, (L. S.)
HENRY BELLENDEN KER, (L. S.)
WILLIAM WIGHTMAN, (L. S.)
ANDREW AMOS, (L. S.)
DAVID JARDINE. (L. S.)

Received the 10th day of March 1837.
COTTENHAM, C.

APPENDIX.

Appendix No. 1.

Appendix No. I.

Examinations.

Sir F. A. Roe, Bart. 24 January 1837.

Tuesday, 24th January 1837.

Sir *Frederick Adair Roe*, Bart. examined.

How long have you officiated as a police magistrate?—I have been about fifteen years a police magistrate; five years chief magistrate at Bow-street.

Has it occurred to you to consider whether any defects exist in the law as regards juvenile offenders; for instance, whether any mischief arises to society from the indiscriminate method by which juvenile offenders and offenders of maturer age are treated?—The number of offenders under twenty years of age is so very great that I have not contemplated any distinction of ages with that particular view.

Upon many occasions, no doubt, you have had offenders much below the age you mention before you—of ten, eleven, and twelve years of age?—There is hardly any age at which I have not had offenders before me, from seven upwards.

Those offenders of a very tender age, from seven to twelve or thirteen, are chiefly for petty thefts, probably?—A great many for petty thefts; many also for picking pockets: it may have happened that a very young boy has been made use of by burglars, for the purpose of being introduced into a house, but that is a rare occurrence.

Are those, in general, treated according to the same strict form of law as those of a riper age, as to commitment, examination, and so on?—My practice, and that of many magistrates, is, in many cases, to treat them summarily, if possible.

So as to avoid the sending them to prison preparatory to a trial there?—Yes; and, in consequence of the system recently adopted both at the House of Correction and the New Westminster Bridewell, they are managed in a way that no possible contamination takes place, the silent system being adopted at those prisons.

Of course they are committed on examination at once, and submitted to the regular prison discipline?—Yes.

Do you conceive it to be desirable that a summary jurisdiction should be exercised rather than that they should be committed to a prison to remain there preparatory to a trial?—Very desirable, especially with reference to the system of punishments which I see by the criminal returns from the Old Bailey are inflicted for offences nearly similar to, and even of greater magnitude than, those usually dealt with in a summary way. If the practice of whipping were more frequently put in force by the judgment of the court above, or even if longer punishments than the term which a magistrate acting summarily can give were adopted, (because all those punishments would be accompanied with hard labour), I should then be, perhaps, not so ready to exercise a summary power; but, when I find that committing for trial leads to no result of heavier punishment, I think it preferable to exercise the summary jurisdiction at once.

The punishment when a young offender about the age mentioned is convicted at the Old Bailey sessions is generally very trifling?—In my judgment, it is light.

Too light?—Yes, decidedly so in my opinion, forming that opinion on cases which I watch the result of, having myself committed for trial, and knowing the evidence.

What would be the general range of those punishments—a few days, or a few weeks?—A month to six weeks, and from that to two or three months, is often given, when I should have considered that as long a term might have been given by the committing magistrate; and the object of the committal being the suppression of crime, the punishment ought to have been much heavier; even in many cases transportation; for, I am satisfied, transporting juvenile offenders is the right course, and that it is better both for them and the public.

In your judgment, the punishment inflicted after a regular trial upon a commitment is not sufficient for the purposes of amendment or reformation?—I have always paid much attention to the Old Bailey returns, and I am decidedly of that opinion in many instances.

Is there not also great risk of a contamination from the imprisonment, previous to trial there, which must range from at least three weeks to a month?—No doubt there is; but I must add, that I think, out of twenty cases of criminals that come before me, eighteen are already contaminated.

Unless a separate confinement takes place in prison, of course there is great liability to contamination?—Certainly, in cases before trial.

You say that the young offenders brought before you are often punished summarily; what is the nature of the offences in respect of which they are punished in a summary manner?—The Vagrant Act, under which the principal punishment takes place, embraces a variety of offences; but the great proportion we send to prison for punishment are according to the

terms of the statute for " being found in the streets or public places, &c., with intent to commit felony," or being found " in enclosed places for unlawful purposes," also for having implements for housebreaking in possession. Gambling in the streets, or other public places, is an offence, the punishment for which is summary under that Act.

Supposing a young offender of any kind who has actually committed a felony is brought before a magistrate; what is then done, supposing the felony to be of no great amount?—Most magistrates in such cases consider that, though a felony has actually been committed, the circumstances under which it has been committed are such as justify our acting on the Vagrant Act, taking the evidence of the circumstances before the felony is committed as the foundation of the committal.

In fact, in respect of felonies to a small amount committed by children, you do not usually commit for trial?—In a great many cases, not.

Is there any general rule by which you would distinguish?—No; one acts on the discretion of the moment: sometimes a complaint of the prisoner's previous conduct, made by the master or by parents, may lead to committing him for trial, in hopes of getting him transported, and so entirely breaking off the system of crime which summary punishment would not effect.

You would be guided not so much by the amount of the theft as by the previous habits?—In a great measure; though, in the case of an important felony, I should never take upon myself to exercise the summary jurisdiction, nor where there is property of any value; a magistrate has no power to order the restoration in the event of committing summarily, which always takes place in the court above: if, therefore, the property is material, or even, being smaller, should have passed into the hands of a third person, who is reluctant to give it up, such a case must go to the court above: because there are no means of compelling restoration.

That is a circumstance by which you would be guided in your discretion as to the course you took?—Certainly; because, unless the property is restored, there is a still farther loss sustained by the complainant.

Where the child is of tender years, ranging from eight to ten or twelve, and the property stolen inconsiderable, you do not usually commit for trial for felony, but only under special circumstances?—Just so.

Ordinarily you commit under the Vagrant Act?—Yes. The practice of some magistrates is different. Some magistrates consider themselves bound in every case of felony actually proved, to commit for trial; they think they have no discretion. I am not only guided in determining what course I shall pursue by reference to the particular circumstances of the case, and the statements of previous character which I have alluded to, but also with reference to the expenses which fall upon the county in every prosecution, of however trifling a nature; and, when I think it probable that the punishment inflicted by the court will not be greater than I should direct, and consider that in a town of business like this the time of the persons who would have to go to the Old Bailey Central Court, one, two, or three days, is of great importance to them, I think I do more service in exercising the summary jurisdiction, which costs nobody a farthing, and is the cause of very little loss of time.

In these cases where a felony is committed, and where it is under such trifling circumstances that a discretion is exercised as to committing for an act of vagrancy, what is the course taken; is there an information in the ordinary course of a felony, or merely a complaint under the Vagrant Act?—The prisoner is brought before a magistrate by the constable or person apprehending him, the evidence of all the witnesses is taken in writing, and upon that the magistrate forthwith pronounces his decision.

He then elects?—Yes; but there is a defect in the law applicable to that and all cases where summary jurisdiction is exercised, that there is no power of remanding for reconsideration of the case.

You would have that power given?—Certainly; there was a Bill brought into Parliament three sessions ago, which would have remedied this and many other practical defects in the criminal law; but it was thrown out in the House of Lords at the very last stage.

Some magistrates feel themselves bound to commit in case of felony?—Some magistrates feel themselves imperatively bound in a case of felony proved to commit for trial.

In your judgment, if that were rigidly enforced, might not more mischief be done by sending young persons into a state of confinement preparatory to the trial, and afterwards procuring a conviction which is attended with very little punishment, than good from the example made by the extent of the punishment inflicted?—I think so. I should say there always will be a certain degree of jealousy in the mind of the public as to the exercise of summary jurisdiction by magistrates; but I may add that in this metropolis, with the extreme publicity which accompanies everything done by stipendiary magistrates—indeed by all magistrates acting—there can be no real ground for fear of any undue exercise of power.

You would consider that the law is defective and objectionable if, instead of having that discretion of proceeding under the Vagrant Act to commit at once, the magistrate, in every case where a felony was proved, were obliged to commit for trial?—I should consider it a very great disadvantage, as far as the protection of the public in a great metropolis is concerned. Indeed I should despair of being able to keep the town in order at all.

You seem to consider the punishment inflicted on a young prisoner so convicted, even under the Vagrant Act, is not sufficient to answer the purpose of reformation on account of the shortness?—I do; and I regret that the Vagrant Act does not give (if it might be thought fit, to two justices) the power of adding corporal punishment to the imprisonment and hard labour.

In cases which occur in the country, the magistrates would find it more difficult to proceed in a summary way under the Vagrant Act from the local circumstances?—They might, from the wording of the Act. There are a number of petty felonies committed in the country which

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would not come within the terms of it—"in a street, highway, and so on." There are offences committed in fields and places the words of the Act will not reach.

Do you consider that there is a defect there, inasmuch as the magistrate might feel himself bound to commit for a very trifling felony—stealing an egg for instance?—That is the very point I have heard many very judicious and considerate magistrates in the country complain of as a defect in the law.

The Vagrant Act might be very efficacious in a city or large town in reaching minute offenders, but that would not be the case in the country?—It is very efficacious in the country, but does not embrace many cases which occur.

In the country, where that difficulty is found, can you form any judgment what would be the best mode of remedy; for instance, whether it would be preferable to vest a kind of discretionary power in the magistrate to dismiss, on taking sureties of the peace, without committing for trial, or that there should be something like an extension of the Vagrant Act, to enable them to commit for a summary offence?—I think there might be an extension of the Vagrant Act, or a new Act authorizing the magistrate on the first apprehension of a prisoner to direct him to be committed for re-examination, if necessary, and then to be brought before two or more magistrates, at the petty sessions, and there dealt with summarily if the offence came within the provisions of the law.

Would it, in your opinion, be too much, within some very moderate limit, to allow the magistrate a discretion as to committing in the course of prosecution, or discharging an offender of tender years, say under ten years old?—That is, in fact, exercised constantly by all magistrates. If, in a doubtful case, it appears to them that the offence is so trifling as not to be worthy of prosecution, or that the evidence would not lead to a conviction, they dismiss it.

Is that done generally, in your opinion, or would some provision be requisite to induce the magistrates to exercise such a discretion?—I think that every magistrate ought to feel that he has a discretion vested in him that if it is a case that really, from circumstances, is not a proper one to be prosecuted, or where he thinks it will be merely sending to prison for detention, without the probability of a bill being found, he should feel himself justified in dismissing it.

In cases of that kind, might it not be desirable to give the magistrate the power of calling for sureties for good behaviour, and exercising a discretion upon the whole circumstances of the case, considering that, if a boy has friends who will come forward as sureties, there is then some warrant for due care being taken of his conduct; whereas, if he has no friend who will come forward to save a boy from prison, by giving security for his appearance or good behaviour, he may be considered as in a destitute situation, and a more proper object for the reformation which might be afforded by the law?—I would not go further than the law at present authorizes as to the taking sureties; and I should not consider it advantageous in this respect. Supposing that a boy is a bad boy, and can get nobody to be responsible for him, you merely put him into prison without any system of discipline; he is like a person committed previous to trial; he would become exposed to all the disadvantages of a prison without any good, for he must be turned out again at the period when the sureties required determine. It is the worst species of imprisonment, I think; he is imprisoned then without a purpose.

Might not the imprisonment subsequent to a conviction in a case like that, where the punishment was, of course, discretionary in the magistrate, be turned to good account as exercised upon a person in a destitute situation?—It would require a complete alteration of the law, if a commitment for sureties was to be substituted for commitment for trial. In the case of committing for trial there may be an acquittal, or, if a conviction, hard labour may be ordered; but if it is a commitment for want of sureties, the prisoner would be imprisoned for a time in the way I have adverted to, and discharged at the termination of the period for which the sureties are required, having been made worse by his confinement.

Might not the finding of sureties operate mainly on the magistrate as a reason for not committing, where he otherwise might have committed?—I think there is already sufficient discretion for the magistrate to discharge, if, in his opinion, it is a trifling case, and would lead to no result in prosecution, and where he knows friends will come forward to find sureties, there is, at present, power to exercise the discretion authorized by law; but I should not think it advisable, as a substitution for prosecution, and, indeed, unless the law was greatly altered, it would be of no avail. Supposing an idle, vicious boy, who had well-conditioned friends, committed an offence, and, instead of directing a prosecution, the magistrate took sureties for his good behaviour from his friends; if the boy again committed an offence, it would be a troublesome business to come on the sureties, and in most instances fail.

Do you not conceive the majority of country magistrates would feel themselves bound to commit, when a case of felony was made out of stealing a faggot of wood, or a small quantity of apples, for instance?—From the nature of the commitments I see upon the returns, I should think it was so; but if, in their charges to the grand juries, the judges took pains in throwing some light upon the course of administering the law in minor offences, I think the magistrates would see that they might with propriety exercise a certain degree of discretion.

As it appears desirable that they should have some degree of discretion, would it not be desirable that the limits should be as far as possible prescribed by law?—It is very difficult by law to define discretion.

The law might say that it might be exercised within particular limits, as to the amount of the theft, age of the offender, &c.?—I think a great mistake is often made about amount: for instance, a person may have charged a prisoner with picking his pocket of his handkerchief, or a more trifling offence; but it must be recollected, that though he may have picked a pocket of a handkerchief only, he might equally have picked a banker's clerk's pocket of £1,000, and in my view, we are not to consider the value of the property taken, so much as the circumstances attending the taking.

No doubt those circumstances are to be taken into consideration; but, in your opinion, does not it make a great deal of difference whether an attempt is made at stealing a pocket-book or an apple, or an egg, which the child knows to be of small value?—If it is in a man's pocket, or in a place where the thief previously to the taking cannot know what it is, I do not see the distinction between a banker's clerk's pocket-book, and a private gentleman's pocket-hankerchief or gloves, or card-case.

The question refers to those petty thefts where the young offender does know what he takes?—A vast difference, such as the taking of property which lies almost unprotected in open markets, goods exposed at shop-doors, or articles of food lying tempting, without anybody to watch them.

That cannot, of course, apply to a case where a thief dives into a man's pocket, and may meet with a prize in notes, or may meet with a mere album; but might not some limitation in point of amount be prescribed, and some discretion be given where the amount does not exceed a shilling, or some other small specified amount?—Yes; it might be defined as to the amount taken under circumstances of exposure.

And also in respect to the age of the offender?—Certainly.

The power to hold to bail has been lately increased very much, by giving two magistrates the power after commitment in cases of felony; is it necessary under that Act that there should be the power of committing?—Yes.

Might it not be desirable that that power should be given in the first instance, without rendering a previous committal necessary?—My opinion is, that the law had better remain as it is in that respect, that if there was that discretion, it would lead to greater endeavours, by counsel or otherwise, to influence the minds of magistrates in coming to their decision, and would, I think, be too great a latitude to give. Weak men might be unable to resist importunities.

As the law stands now, there is very considerable discretion as to holding to bail in case of felony, but none in case of misdemeanor; the magistrate must admit of bail for misdemeanor?—Yes.

Do you think any solid distinction exists between misdemeanors, which consist in obtaining by false pretences, and other similar offences and felonies?—On the contrary, I think there are many misdemeanors of a grave character which are quite as serious, and require the law to be as strict, and more so, than many felonies.

Where persons have been admitted to bail, either in case of felony or in case of misdemeanor, do you know whether it has often occurred that they have deserted their bail?—In a very small proportion; I am speaking of aggravated misdemeanors: it is not uncommon in trifling misdemeanors.

Do not you conceive that in practice the holding to bail might be more frequently practised, even in cases of felony, and therefore the inconvenience of crowded gaols, previous to trial, be in a measure mitigated?—I consider that the holding to bail in case of felony (I do not know whether it may be considered an improper term) is a per-centage in favour of the prisoner; that it is much in favour of acquittal, and to his advantage in the view of the jury.

You think that the jury take that into account?—Yes; and now that the jury are addressed by counsel, that it will be more felt; that it is an argument which may be pressed strongly in favour of the accused, as inferring that doubts had existed in the minds of the magistrates as to guilt.

But if that power were more frequently exercised, it might, perhaps, lose some part of its value in that respect?—I should doubt that.

The Commissioners may collect that the summary convictions are chiefly under the Vagran Act?—Chiefly; there is also the Police Act.

Do the provisions of that go beyond the Vagrant Act?—Yes; because that gives the power of convicting for a misdemeanor, where the person is found with property in his possession, of which he cannot give a good account, which has been stolen or unlawfully obtained.

Are convictions frequent under the summary conviction clauses of the 7th and 8th of George IV. c. 29 and 30, with respect to a number of petty offences which are there stated, such as cutting trees, stealing shrubs, and so on?—Those are, of course, much more frequently found to be efficacious in the country; but, in the parts of the metropolis lying nearest the outskirts, there are frequently offenders found who have committed offences under those Acts,—such as stealing apples, cutting trees, destroying fences.

The major part of the offences which are enacted by the 7th and 8th George IV. cap. 29, in part embody the common law distinction of what is real and what is personal; and they make it punishable to steal those annexations, the taking of which, at common law, would not amount to a felony?—Yes.

Do you think any analogous provisions could properly be extended to small larcenies. Supposing two persons to be brought before a magistrate, one charged with cutting down a tree of the value of £4, and stealing it; another charged with stealing a faggot from the same neighbourhood, which was worth 4*d.*: the one is punished as a felon with transportation and forfeiture; the other is liable to £5 plus the value of the tree: those are very much disproportioned you would say?—I should say, that, under the circumstances of the description of felony alluded to, the same principle might be extended with great advantage.

Doing away with that distinction of a severance from the freehold?—Yes.

So that, in fact, you think the law as to summary convictions might be extended even to cases, within definite limits, of larceny?—I decidedly think so.

With respect to those thefts which are committed by young persons, but which cannot be got rid of in a summary manner, either by a summary conviction, or by discharge, but where it is necessary that the parties should be kept in custody and some trial had, do you conceive

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that any improvement upon the present system might be made, by substituting a more expeditious mode of trial, either with or without a jury, that, according to circumstances, they might be tried before a jury at petty sessions?—The sooner a person can be tried after a committal the better: therefore that would be a desirable object; but I am aware, from the necessary machinery of getting a court and jury together, that some difficulty arises.

Do not you think that that machinery would be very considerable if applied to trials of that kind?—I do.

In the country might not a difficulty arise in the procuring the attendance of two magistrates, on a certain day at a certain place?—Some, but not so much as to render such a plan abortive: no doubt, the procuring of jurymen, and the necessary attendance, increases the difficulty.

Do you not think that, in case of any summary proceeding of that kind, but before a jury, it would be necessary to have a formal charge?—Decidedly: whenever a jury is summoned, I think there should be some degree of explanation to them; the suggestion made would certainly avoid one part of the machinery, viz., the grand jury, the assembling of which, I apprehend, is not contemplated.

You think, at all events, it would be desirable to dispense with the grand jury?—I do; if, by dispensing with it, a person committed for trial could be tried within a shorter period. I think that more important than the proceeding before a grand jury.

Do you think that trials of that kind might conveniently take place, dispensing with the petit jury, substituting two magistrates at petty sessions for a jury?—I have thought, and do think, that might be a substitute; but, in that case, I should say the number of justices ought to be even greater than two—three, so as to have a majority.

Might not there be a difficulty in procuring that number in the country?—Judging from the petty sessions which are held in so many divisions in every county, and the attendance which the magistracy in general give, I should think that might be accomplished without any great difficulty.

Might it not be considered necessary, where a proceeding took place before magistrates without the intervention of a jury, that parties should have a power of appeal, as is in a great number of instances now necessary upon a summary conviction?—I think it might be advisable, that, if a summary jurisdiction of that kind was created, there should be a power of appeal.

Do you think that a previous confinement in gaol, preparatory to the trial, might be avoided to a considerable extent, by allowing parties, within certain limits, to plead guilty before magistrates of the offence charged against them, so as to enable the magistrates to commit forthwith in execution?—I do not see that that would be attended with any inconvenience, although it migh lead to speculation on the part of the prisoner, thinking he should get probably less punishment.

A considerable advantage would be gained by avoiding the previous imprisonment, which is often more detrimental to morals than reformatory?—Yes; I do not think that would be attended with any great difficulty.

Is there anything else which has occurred to you which might be an improvement in the law in respect to young offenders?—The thing which has always struck my mind as one of the great difficulties, and I do not see how it is to be obviated, is, at the termination of imprisonment, whether by sentence of court or summary punishment, what is to become of the prisoners: that is the great obstacle in the way of any improvement. The enormous expense of any institution for receiving them would be such, that one can hardly venture to suggest any such thing. In Paris they have lately instituted two establishments for receiving young persons accused of crimes after their sentence; those have been very recently instituted, so that the working of them has hardly been seen at present.

Do you consider that the punishments at present inflicted on juvenile offenders have any considerable effect in preventing crime?—I am sorry to say not.

They do not operate by way of example?—Speaking roughly, without book, I observe no diminution: on the contrary, rather an increase of the number of idle, dissolute boys about the streets in this metropolis, always ready to commit crime. I do not know that it bears a particularly greater proportion than might be expected from the increase of population in the metropolis, and extension of building on every side.

Is it not desirable that punishments, when they take place, should be more severe?—My firm opinion is, that nothing but severity and uniformity are likely to operate to check the increase.

Do you think that separate confinement is more likely than any other punishment to produce that?—Separate confinement is undoubtedly looked upon with great dread, and I hope will be in result efficacious; but the carrying it to any extent must be attended with much expense. In all my answers I look at the practicability of carrying plans or changes into execution, and not at the theoretical plans.

You would diminish as much as possible the necessity of sending to gaol, especially preparatory to trial?—Certainly: in cases where there would be adequate punishment if disposed of summarily, or where, as I have before observed, it is most probable the judgment of the court above would not be heavier.

Which would give greater power for administering proper discipline to those who are tried and convicted?—Decidedly so.

Then you would inflict a more severe punishment than is now done?—Yes; when I say severe, I would not make the punishment longer, but I apprehend corporal punishment, flogging, is much the most important.

Do you think the boys mind it much?—Yes, they do.

Where they meet with considerable numbers, they do not consider their time as passing very heavily?—No, decidedly not; but in all the convicted cases in our houses of correction,

numbers, if anything, make the punishment more severe, because, as they are kept perfectly silent, the restraint and contrast is proportionably greater.

Have you been able to form an opinion as to the great source of the number of juvenile delinquencies, whether it arises from the want of employment which prevails?—I have attributed it, and my constant experience convinces me of the same thing, that it arises in a great measure from the enormous luxury and wealth of the town, from the great negligence of masters in looking after their servants and their houses, from an inability in the lower classes to devote time to the restraint of their children, and the extreme temptations from exposure of property, and want of caution in the protection of it in every class of society.

Do you think that property sometimes is exposed to a greater extent than is proper?—There is no doubt of that: there is great want of caution of masters of families, and persons of the better class in regard to the exposure of things of value, and, consequently, temptation to those dependent upon them is very strong.

With respect to property at shop-doors and so on, do you consider that too great?—Certainly.

You think mischief results from that?—I have no doubt of it.

Do you conceive that might be at all corrected, or do you know whether it is attempted to be so, by refusing the expenses of the prosecution to those who have imprudently exposed goods?—I do not attach much importance to refusing the expenses which is done sometimes; the constant answer to any remark I make as to the danger or impropriety of exposure is, that such is the competition of trade, that they are obliged to do it.

You do not think it would be much remedied if the parties were to be dealt with in that way?—No; the tradesmen feel it necessary to do so; and, further, the man who has been robbed, hopes it will not occur again to himself, and his neighbour will not take warning by the example, or perhaps has not heard of the refusal of the expenses.

It is collected from your answer, that the practice of different offices in London is different; that you exercise a discretion where a boy is brought before you to commit him as a vagrant, and that other magistrates conceive themselves bound to commit for a felony?—I would not say there is a greater difference between the views of the twenty-seven magistrates than there is in those of the fifteen judges; but, according to the constitution of men's minds, it will be found that one views the matter in a different light from another: one general principle prevails, but there are shades of difference in the practice in carrying the law into effect.

Do not you think it a defective state of the law when different persons feel themselves called upon to exercise a different discretion?—I hardly see how it can be otherwise: I have paid much attention to the administration of the law, and endeavour to get information on that point from other countries, and I find that the difference in men's views exists everywhere. If not in the mode of punishing, it is so in the terms of punishment and amount of penalties: in France, just the same as here. Perhaps, the course of punishment is more strictly defined there than with us.

Is it a wholesome state of the law that, where an offender is brought before you, and there is proved by witnesses a *primâ facie* case of felony, a magistrate should be enabled to exercise his discretion, and commit him as a vagrant?—It, perhaps, would be better that the law should be more clear in defining any particular system or jurisdiction, but the quantum of punishment, either by court or magistrate, must, in a vast number of instances, depend on the view taken of the cases from the facts proved, and every one may be different in some shades.

When a number of discreet men take upon themselves to exercise that discretion, about which there may be some doubt, may not the Commissioners be warranted in saying it would be proper to alter the law, and give the magistrates greater powers?—It may be so.

In the questions put to you, some stress has been laid upon the distinction between juvenile offenders and others, and some of the questions and some of the answers seem to have taken it for granted that it would be expedient to distinguish between the one and the other; does it not occur to you, that, if there were a line drawn in regard to the offences of juvenile offenders and others, it would be difficult to ascertain the age,—that one might be committed to Newgate at fifteen years and a day, and another discharged of less age by one day?—Undoubtedly, there might be that difficulty.

Do not you think that the law, particularly that section of the Act of the 9th Geo. IV. c. 31, respecting offences against the person, which enables you to inflict a penalty, and in default of the person convicted being able to pay, to commit to prison, operates in some instances as almost an exemption from punishment in the case of the rich, and the infliction of imprisonment on the poor?—That section of the Act which gives the power to two magistrates to convict for an assault, undoubtedly gives the advantage to the wealthy man over the poor man, who is unable to pay the penalty, but I think the penalty ought to be adjudged with reference to the defendant's situation in life and circumstances; for example, if I consider a man ought to be imprisoned for a month, I ascertain, if possible, what his wages would amount to in that time, and decide in that scale as to the amount of fine.

Do not you think that it is a bad and impolitic species of law which compels a magistrate to inflict so unequal a punishment as an unimportant penalty upon the rich, and a severe term of imprisonment upon the poor?—I think the law would have been better if it had left it in the breast of the magistrate either to fine or imprison, and that it would have been still better if he had had the power of allowing some part of the penalty in compensation, or some additional sum to the person aggrieved.

Do not you think with reference to that subject, that, in any alterations made in the criminal law, it might be wise to consider how far restitution should form part of the punishment?—It might.

You lay considerable stress upon the efficacy of flogging; is that from a theoretical notion

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or personal inquiries?—From personal inquiries, and from information I have received, that it is what the boys dread most. I wish to observe that, in the event of a legislative provision for trial before a certain number of magistrates, either with or without jury at the petty sessions to be held from time to time, it would be necessary to consider the means for providing for the detention of prisoners to be tried before that petty sessions from the time of their committal to the time of trial; in that case there would be required, in every one of the towns where the petty sessions were held, a receptacle for prisoners, and there would also necessarily be a provision to be made for the expenses incurred by the constable or whoever the party was, in carrying the prisoner backwards and forwards, which, at present, I believe, is rather ill provided for.

You would want houses built, and persons to take care of the prisoners?—Yes.

You stated that hitherto as far as your experience goes, you consider that the imprisonments and punishments that have been inflicted, more especially as regards juvenile offenders, have had not much effect in reformation; do you consider that, as arising from the defective mode of punishment, or that criminals are not susceptible, or very little susceptible of reformation?—I think it arises from a variety of causes: a great many criminals, from the neglect which they have inevitably fallen into from their birth, have become so hardened, they are not susceptible of reformation.

You would rather, in forming the scale of punishment, look to terror than the hope of reformation?—Speaking more with a view to the great masses of people in the metropolis and large towns, I really am reduced to the conviction that nothing but terror is likely to operate in deterring them.

However well intended any of the propositions that have been made, you do not expect much hope of reformation, even from the improved mode of punishment?—That is the tendency of my opinion from my experience. Though, by the returns, it may appear there are fewer apprehensions, or fewer convictions one year than another in the town, I am fully satisfied, from all the examinations and informations which are laid before me, that there is the commission of theft going on to as great an extent as ever.

Do you conceive that, by adding to the terror of the law by threatening severer punishments, any material diminution could be made of the whole body of offenders?—I will not say that it could, but I think it is the only chance.

Do not you conceive that the great object of the severer punishments is to prevent the commission of the more aggravated crimes?—No doubt, that is the view; but I think due severity and certainty of punishment for crimes, even of not so aggravated a character, the most likely mode to check the increase. It might happen that a boy, who lurked about Drury-lane constantly to pick a pocket, even if he had a certainty of getting a much more severe punishment than he does, may be so hardened as to persevere in his habits; but I think others, his associates, may be deterred by fear, if they knew any severe punishments were inflicted.

But, if he knew that for picking a pocket he would be sentenced to a very severe punishment—transportation for life, for instance—and that he might probably equally gratify his own inclinations by stealing property differently situated, and where the offence was not so visited, would he not be deterred from the heavier offence by the fear of the heavier punishment?—I think, if the inclination were such that he was induced to go on committing such offences as would be visited by a less punishment, the habit of crime so acquired would not be to be checked even by the prospect of a more severe punishment. I think there is more policy and more real humanity in comparatively great severity on the first commission of crime. If a thief found he pretty successfully stole apples from Covent Garden market, and brushes and hats from the windows, he would go on to commit more serious offences. It is quite remarkable how little the forgiveness (which is very common) seems to succeed: I constantly find parents admit their child had been guilty before, but forgiven when I question them closely.

You have referred to your knowledge of the criminal laws in other countries; you are aware that there, much more than in England, the police interfere for the prevention of crime: does not it occur to you that, at least in the metropolis and large towns, a greater discretion of interference, both as regards juvenile and other offenders, might be given to the police?—It is a very difficult question; no doubt, greater powers given to the police would enable them more efficiently to protect the public against crime; but such increase would not be palatable in this country. There is a greater degree of protection to every branch of police given in other countries: the agent of police abroad, in the *bonâ fide* execution of his duty, taking up an individual whom he suspects of intending to commit, or of having committed an offence, is nearly borne harmless, unless there are circumstances to impute blame; but here, however right the officer of police may turn out to be, and though he ultimately may be successful in his defence, if prosecuted, he is always exposed to indictment, and liable to an action, and may be forced to incur great expense, for which he may not get indemnified. I have been myself indicted for false imprisonment, and put to a considerable expense by merely preparing to defend myself when there was not a shadow of ground for a prosecution, and where the parties who preferred the bill never dared appear to prosecute me.

Has it not become essentially necessary that some alteration should be made, as it appears you consider the police here have not efficient power to interfere for the protection of the subject, or detection of crime, and that there should be greater protection thrown round the magistrate, and greater power given to him?—With regard to the magistrate, I confess I think the law wants alteration. A magistrate at present, with the most active mind and best intentions, dares not act without a complaint on oath is made to him, and some person charged. Although a most atrocious crime may have been committed, he cannot initiate any proceeding; if he directs a person to be apprehended simply on grounds of suspicion, arising in his mind from circumstances, he is liable to action and indictment. All he can do is to summon,

or, rather, request persons to come and make a statement of what they know, until somebody ventures to make a charge on oath. Now, in other countries, the authorities, by whatever name they may be designated, are not only justified but bound to make inquiry when crime has been committed. I have often felt, in the sincere wish to be of use, and in the idea that I could help to detect an offence, that, if I took any steps beyond the strict course I brought such a responsibility on myself, that I have been afraid to move. With regard to police-officers, undoubtedly, there are many cases in which it were to be wished that they were armed with greater powers of inquiry, and even of apprehension; and I should say that such a power would be attended with advantage to the public in the suppression and prevention of crime: for example, an immense quantity of plate is taken in this town in the course of twelve months, by persons going down areas apparently to sell oranges, apples, matches, or some such articles; if the area gate is open, they go down; if the house-door is open, or on the latch, they go in; they have an ostensible object, and they are prepared against making any noise by having hay, or straw, or some light materials in their baskets. Now, it would be a good thing for the police to stop and examine people they so suspected: but, suppose a respectable mechanic, with a basket, also, going along the street, is stopped by the policeman, who may suspect him, he becomes outrageous, resists, and does so legally; either a breach of the peace is the consequence, or, if not, and he is brought before a magistrate, he threatens the policeman, and in effect brings an action for false imprisonment. These risks deter the police from acting; but I have no doubt sufficient power, discreetly used by the police with a view to such inquiries, might be very beneficial in the prevention of crime.

With reference more especially to juvenile offenders, and offenders for petty offences, do you not consider the present police system, in large towns, especially the metropolis, defective?—I should say decidedly so; but I do not limit it to juvenile offenders. The immense quantity of crime committed in the way I have mentioned in houses, also by mechanics going home from their work, particularly all the out-door work, who, in innumerable instances, carry away some of their masters' property, and the daring way in which thieves mix in crowds at the theatres, churches, auctions, and all public assemblies, convinces me that it is so. It frequently happens that the police do stop them and take them; but it is, as they may be mistaken or misinformed, always with the liability either of a breach of the peace being committed, or the risk of action or indictment; and I find persons so stopped, if there are are no grounds of accusation proved, generally get very angry: they do not excuse the thing on the ground of any public good.

In the inquiries or experience you have had of other countries, do you consider that a considerable advantage arises as regards the prevention of crime, from the interference of the police?—In all the Continental countries the police have advantages, in the detection and prevention of crime, which it would be impossible for them to have here. From the circumstance of passports being necessary, they may require every person to produce his papers. Every punishment of every individual is recorded, in France; and, on an arrest, the register is searched, and all previous circumstances connected with the man's history brought forward, wherever it may take place. Every man in any trade in France and in Belgium is obliged to have his book, with his character, and reference to his masters. The regulation of lodging-houses, and the returns from every description of hotel or inn, and the control over the cabarets or public-houses are strictly enforced. All these are advantages for the protection of the public which the agents of police have abroad, but which it would be impossible to give to our police here.

Tuesday, 21st February 1837.

Richard Mayne, Esq., was examined as follows.

You are one of the Commissioners of Police?—I am.

Has it occurred to you, during the time you have been a Commissioner, to consider the present state of the law as to preventive police more especially as applicable to juvenile offenders?—Yes.

How far do you consider it at present sufficient?—I think the effect of the present state of the law in this town is, that, although the police are able continually to detect and catch the juvenile offenders, yet, being usually committed to prison only for a short period, they are merely restrained during the time they are imprisoned: they return again to the same courses immediately upon being liberated. Cases occur continually of young boys, as soon as they get out of prison, after confinement for a short period, committing fresh crimes, and being again very soon convicted of a similar offence. I have got a return here now of the offenders of all sorts for the last year who have been in custody, and the ages of each, and the crimes for which they were committed, and the number of times also which they have been in custody [*producing the same.*] I find there were nine for common larceny under ten years of age; and under fifteen there were 227; 163 for common larceny; eighteen for larceny in a dwelling-house, and thirty-four for larceny from the person.

The Commissioners collect from your answer, that you conceive the present mode of punishment, more particularly as applicable to juvenile offenders, has not either the effect of deterring or of reforming?—No, I think not; it has to a certain extent the effect of deterring, as no thief likes to be caught and imprisoned, but it has not the effect of preventing them from again committing crime.

Would you, as regards larceny, recommend, either for the first offence, or for a repetition of it, that the scale of punishment should be increased?—The cases in which I think the punishment is more especially inoperative is not for cases of larceny so much as for cases where the

Appendix No. I.

Examinations.

Richard Mayne, Esq.
21 February 1837.

proof of larceny is not complete, but the parties are convicted under the Police Act as reputed thieves and suspected persons. When a conviction takes place for larceny, it is in the power of the Court to inflict a punishment of considerable duration.

Admitting that the Court have the power, do you consider that the punishment generally inflicted is effectual or sufficient?—I think in a great many cases the punishment inflicted is for so short a period, that no good effect is produced, and the party falls again immediately into the same criminal courses. I have a Return of persons apprehended by the Metropolitan Police for felony more than once during the last year. I find there have been nine under ten years of age, eighty-three under fifteen, and 289 under twenty, in custody twice; one under ten years of age has been apprehended three times; thirty-one under fifteen years of age, and fifty-four under twenty, likewise in custody three times; of those who have been in custody four times there are none under ten years of age; but under fifteen there were nine; and under twenty there were twenty-three, four times in custody; and there have been seven persons under fifteen, and five under twenty years of age, who have been five times in custody.

Do you apprehend, as far as regards prevention of crime amongst juvenile offenders, that the present powers of the police are sufficient?—A great deal of mischief is done in the way of corruption and preparation for the commission of crime, especially of the younger thieves, by their having it in their power to assemble uncontrolled at all hours of the night, as well as by day, in public-houses and beer-shops.

Do you think it would be expedient that, under regulations, the police should have the power of preventing that?—I think it would be very desirable. There is a clause in the 3d and 4th William IV. cap. 19, sec. 31, upon the subject, but as the police are authorized by it to interfere only where they can prove that the party being a reputed thief or suspected person was in such public-house, &c., with intent to devise or plan the commission of felony, or some other offence, and proof of such intent can very seldom be safely given on oath, the clause becomes practically inoperative, and the police are not enabled to act under it even for the dispersion of the thieves.

Do you find the right of search at night very beneficial?—Very valuable; the power to stop persons carrying goods after night-fall, and inquire as to the contents of the bundle they are carrying, is one of the most useful provisions of the law for police purposes.

Has that been found useful in practice?—Yes, to such an extent, that, in the first two or three years after the establishment of the Metropolitan Police, persons were continually detected about to commit felony with housebreaking instruments upon them. Such cases very rarely occur now, and for this reason,—that the thieves leave their implements in the day-time near the place where they intend to commit the felony;—they plant them, as they call it, so as to have them at hand there at night. Most of those persons who are professional thieves are perfectly well known to the police now, and wherever the police meet them at night, they search them, and if they have any housebreaking implements about them they take them into custody, but if they are found without housebreaking implements upon them the police have no legal authority to detain them; also a great quantity of stolen property has been detected in the same way, and the fear of being stopped and searched prevents persons carrying stolen property through the streets at night in the way they used to do.

Do you conceive that it would be expedient to extend that power of searching which you now have to all public-houses where there may be disorderly persons, or where persons below a certain age may be assembled?—I think it would—there might be some restrictions as to hours; as that the power should be exercised only after certain hours at night—public-houses now may remain open all night. There is a provision which has been found very useful in the 4th and 5th William IV, cap. 85, sec. 7, by which the police are authorized to demand admittance into any public-house or beer-shop. Formerly, publicans closed their doors to the police, and refused to admit them whenever they did not wish the police to see what was going on there. Now the police have authority to insist on admittance at any time they please, and the parties are liable to a penalty if they refuse to admit them. That power has been found very useful for the prevention of gambling and disorder in public-houses and beer-shops. Servants, thieves, and women of the town often meet in public-houses and play there at night, the outer door being closed. Wherever the police have reason to suspect that such practices are going on, they insist on being admitted. The Commissioners of Police have made regulations to prevent the police abusing the power. The regulations forbid any of the Metropolitan Police, under the rank of inspector, to insist on being admitted after the doors are closed, and every case in which an inspector does so demand admittance is reported to the Commissioners, so as to ascertain how far the power is exercised properly, and that, if necessary, it may be checked.

With respect to the right of search of persons carrying parcels, what has been your experience during the time that you have had it with respect to any inconvenience to the public?—I believe for the last three or four years we have hardly had a complaint; not above three or four. At first there were more complaints. The power is an old one, but it had not been much exercised. In some cases, shortly after the first establishment of the Metropolitan Police, the men had not exercised it judiciously, and the Commissioners found fault with them. We always make every constable feel that he exercises that power on his own responsibility, and that he must use a proper discretion, so that, if he were to stop any gentleman's servant carrying a bag, or any other person under such circumstances that he had not good cause to suspect the goods were stolen, the Commissioners would let him know that he had not exercised a sound discretion in stopping the party under such circumstances, and we should correct him, and take such notice of the case to all the police as might be necessary for their future guidance.

Do you think it would be expedient, with respect to the right of dispersing persons in beer-

shops or ale-houses, that the rules should be made strict as regards young persons?—I think it would be very useful.

There cannot of course be any excuse for a dozen or two of young persons who can give no reasonable account of their occupation, being together in a public-house?—Certainly not. Many instances occur of parents complaining of boys being seduced into public-houses, and detained there drinking or idling with women, and the Commissioners have always been obliged to answer that the police have no power to interfere: we have been frequently requested by parents and masters to send policemen to those houses to prevent young boys remaining there.

Have you ever considered what would be the best plan for enabling the police to prevent boys and children under a certain age from frequenting public-houses?—Power might be given to the police to prevent them remaining there after a certain hour at night. There is also a class of houses, such as the Finish in Covent Garden, low saloons, and penny theatres, which are very mischievous, and cause great corruption, where all kinds of profligate idle people assemble, and in some remain there all night.

Supposing it were thought desirable to give authority to the police to take boys and young people from public-houses under a certain age, do you think any mischief would arise from the difficulty of ascertaining the age?—I think it could be exercised without much practical difficulty. The police might sometimes be unable to distinguish, but a great many they would feel no doubt about.

With respect to the present powers which you have, as a point of prudence, do you conceive it expedient that the police should interfere more rigorously than they now do with regard to young persons?—If there was any way of disposing of them for their own advantage afterwards, I think it might be very useful that the police should interfere in a great many cases in which they do not interfere now.

The ground upon which they do not interfere has some reference to the inefficient mode of punishing them when they do?—Yes, as in cases of vagrancy.

Have you at all considered the way in which the powers of the police are exercised in France or in Germany,—whether they are more efficient in the stopping of crime, particularly as regards young offenders?—I have a general impression that they are not; as regards the French police, I do not believe it is a good preventive police.

With the exception of the right of search, which you think might be extended, do you conceive the present powers sufficient, if it be expedient, for other reasons, to carry them into effect?—Yes, especially if there were modes of disposing of children after they have been convicted and suffered their punishment.

Do you find that, in practice, the metropolitan magistrates, upon a lad being brought before them for a trifling felony, are in the habit of committing under the Vagrant Act?—I believe in a great many cases they do.

Do you apprehend that it would be desirable, for the purpose of preventing offences by young persons, that power should be given them expressly of committing in execution for trifling larcenies under a certain age?—I think it would, if there were proper means of disposing of them; the whole question turns upon that.

Supposing that they could be subjected to the same system of prison discipline that the prisoners now in execution under sentence of the court receive, but appropriate to their age, do you think it would be desirable that the magistrates in the metropolitan districts should be vested with the discretion of hearing the cases in a summary manner, and disposing of them in that way?—That is a matter upon which I can hardly form an opinion; I think a distinction might very safely and usefully for society be made, after conviction, between the treatment of young offenders and those grown up; but I say that more from general consideration than from anything which comes within my experience with reference to the police.

If the magistrates had the power of convicting summarily juvenile offenders for trivial offences, would there be any practical difficulty in finding places of temporary custody for them when they are remanded for re-examination; for instance, if a young lad is taken before a magistrate to day, and he says that he has some witnesses to produce to-morrow, would there be any difficulty in finding a proper place of custody for him till the following day, or a longer time?—I should think none. The course in town is for the magistrates to commit all prisoners, in remanded cases, to the prisons; but in the country parts of the metropolitan police district, such prisoners are always recommitted to the custody of the police, there being no gaol at hand; as for instance, at Greenwich and Deptford, the county prison is at Maidstone. The magistrates, therefore, always recommit, in remanded cases, to the custody of the police, and the prisoners are kept in our Police Stations.

Then in country places, where your police is in existence, you find no practical difficulty now in that respect?—None whatever.

By whom is the expense of the maintenance of the prisoner paid?—At one time the magistrates ordered the expenses out of the county or parochial rate; but an objection was made to the payment, and the expense is now borne by the funds of the police establishment; but it is a very small sum, the cases in those places are not so many as to make it of any serious consequence.

Do you think that, in the rural districts, where there is no organized system of police, it would be objectionable that a juvenile offender upon being remanded for a re-hearing should remain in the custody of the constable?—I think it would be objectionable, unless proper places of confinement were provided.

Do you find that your men have sometimes a reluctance to take up a person when they cannot make an Old Bailey case of it, so as to get their expenses allowed?—I do not believe it.

Is it not an additional advantage to them if it does go to the Old Bailey?—I do not think they care much about it, for the allowance to our men is only 2*s.* a-day; it is less than to other witnesses, and they are at some expense, and a great deal of trouble; I have known instances in which they were very anxious to get to the assizes—to the county assizes—where they are allowed, I think, 7*s.* a-day.

Do you find any inconvenience from the distinction of felonies and misdemeanors?—Yes.

Do you think that the distinction between the two is mischievous, as far as concerns the police?—I think so. There is a class of misdemeanors in which the consequences of the present state of the law are most extraordinary; the class of violent assaults, for example, which are of continual occurrence in the streets, and in which the police have no authority to interfere, unless they happen to be present at the moment and witness the assault, so that if a policeman comes up immediately after an affray, where the parties have obviously been fighting, but he does not see the very blow struck, he has no authority to interfere; and I remember a case that occurred of a most curious sort, from this strange state of the law:—a fellow struck a gentleman in the street, and immediately after a policeman came up, the charge was made, and the police constable desired to take the man into custody for the assault; the constable explained why he could not do so, not having seen the assault committed; upon which the party assaulted said, "I will take the law into my own hands," and he struck the man who had assaulted him first; the policeman then said, "Now I must take you into custody, for you have committed an assault in my view;" and he took him into custody, and the other party went away. There is no subject upon which we have more complaints from the public than for the refusal of the police to interfere in such cases; the opinion of the law officers of the Crown was taken about three years ago, as to whether the police, under any circumstances, could interfere legally in such cases, and their opinion was, that the police could not, that the law did not authorize any interference, unless the police witnessed the misdemeanor.

Would it not be expedient to alter the law in that respect?—I should say, decidedly; I see nothing but the old distinction between the legal authority of a constable in cases of felony and misdemeanor against it.

Suppose there is an attempt to commit a felony, can the police apprehend the man?—He can take him into custody if he sees it, but not otherwise. With respect to assaults, the most unreasonable instance of the law is, where a person assaulted himself lays hold of the party assaulting him, and brings him to the Station House for safe custody, yet the police are not authorized to detain him there; so that, if a magistrate be not sitting at the moment, there is no way of detaining the person till the charge can be preferred.

With reference to these Returns, which show the frequency of the same person being committed, do you not think it would be expedient that a very much increased punishment should be applied to those who commit a second or third offence?—Yes.

In a very considerably ascending ratio?—Certainly.

Do you consider that you have now the power of getting at all the reputed thieves?—I think we have not. I think the present state of the law allows them to go on in defiance of the police.

Do not you think that, if the police could say to a magistrate, There is a youth who has no ostensible means of getting his bread, and who is seen about the streets, there ought to be some means of confining him or preventing him from going about to do mischief?—I should say certainly; the public are continually crying out for prevention; and the police have not authority to interfere for the purpose, not even where such persons are found in numbers together at night in public-houses. We have sometimes even gone so far as to keep a certain number of the police at the doors of such public-houses, watching the thieves, and, as they come out, making a constable follow each; but this employment of the police required so many men that we could not afford to continue it.

Do not you think the punishment for keeping those small theatres—the penny theatres—might be increased?—Certainly; I believe there is no power of punishing them now, unless by indictment; but before the indictment can be tried, the keeper of the theatre decamps. There was, I think, a power of dealing with them in a Vagrant Act, which has now expired; both with regard to them and gambling-houses, I think the police had the power of entering and taking all persons found there into custody.

Has any other suggestion occurred to you upon this subject?—There is a practical difficulty that we find from warrants not being granted to the constables of the metropolitan police. There are attached to each magistrate's office five or six constables; and whenever a warrant is applied for by any of the metropolitan police, the magistrate always gives it to his own officer. For instance, if an assault is committed on a police constable, and the party escapes at the time, when the police constable applies for a warrant the warrant is not given to him, but to the constable attached to the magistrate's office, and he frequently does not know the party, and takes no interest in the case, and the warrant remains unexecuted. Also where search-warrants are wanted, the police having been engaged in the case, they apply for a warrant, and the warrant is given by the magistrates to one of their own officers, who knows nothing about the case, and has no interest in successfully executing the warrant; he takes his own time, and very often cases are consequently mismanaged; but this might be altered by arrangement. There is no alteration of the law required for that.

Do not you think that the public, having now experienced the benefit of the Metropolitan Police, if their powers were more strictly exercised with regard to juvenile vagrants, the public would understand the benefits of it, and the probability would be that no complaints would be made?—I think the public would very gladly see that done, if there was a proper mode of disposing of them; but young boys and others idling about the streets, though without any honest mode

of earning their living, are not, according to the present law, vagrants; you may sometimes see a dozen men walking down the street singing, with women and children walking after them, and holding out their hands for money; but the magistrates decide they are not vagrants—that it is not begging.

With respect to the effect of the summary convictions for short periods, at present, do you think they do more harm than good?—My general impression is, that summary convictions for short periods are mischievous; their only effect is in restraining the parties for the time. They are altogether inefficient for reformation; the police are quite discouraged, finding the parties so soon at liberty again, and committing fresh crime.

The men at last become convinced of the inefficiency of the punishment, and cease to exert themselves?—Yes; there are also cases of this kind, where an attempt has been made to commit a felony of an aggravated description,—for instance, a burglary. The parties are caught by the police just before they have effected the felony, and they are then imprisoned only for a month, or a few months at the most. I remember a case which occurred in Harley-street, where two men were found in the passage under the door-way, breaking into the lower part of the house; they were armed, and, as the police came down into the area, one of the men fired a pistol at them. They were regular housebreakers; they had just commenced with their centre-bit at the door, but not so as to make it a case of burglary. They were, consequently, committed only as reputed thieves; and, if they had been allowed five minutes longer, before the police apprehended them, the burglary, a capital offence, would have been committed. But the principle the Commissioners have always laid down for the police is, not to allow parties to go on to commit a greater offence, but to lay hold of them the moment they have done anything that justifies interference. And so it is with respect to boys picking pockets in the street; if the police see a boy feeling pockets, which is the first attempt, they lay hold of him at once, but then the punishment is only confinement for a short time, whereas, if they had committed the felony, they might be transported; but the Commissioners always enforce upon the police, that they must not allow a greater offence to be committed for the sake of increasing the punishment.

Do not you think that it would be expedient for the better regulation of the decisions of magistrates in London and in England generally, that the laws relating to summary convictions and the power of magistrates should be more simply defined?—We find the varying decisions now a great evil; I think that the law should be made more clear and distinct in its application. There is a very numerous class of cases that the police in town have to deal with under the local Acts and the Metropolitan Street Acts, in which it would be very desirable to simplify the provisions, and make them similar for the whole town.

Do not you think it would be expedient that the whole of those laws should be accurately digested and defined?—Undoubtedly.

By that means magistrates and inferior persons would be better informed in the laws under which they were to act?—I think it would be very useful both for the police and for the public at large.

Do not you find a great inconvenience from the confliction of decisions at the various police offices?—We certainly do; the police, to act effectively, ought to be guided by a uniform, consistent course of decisions.

Does anything else occur to you upon this subject?—There is a part of the present system at the sessions and assizes which causes great trouble and loss of time to the police. A great deal of time is wasted by the constables and all the witnesses being kept generally for two or three days waiting to get their bills prepared by the clerk, to go before the grand jury. In November last, at the Central Criminal Court, 205 of the Metropolitan Police were concerned in the cases there, and each man, upon the average, was kept two days and a half there, merely in getting the bill prepared to go before the grand jury; sometimes, in consequence of so many being thus employed, we have found the greatest difficulty in carrying on the ordinary police duty of the town.

How many men have you altogether?—About 3,500. Now, the inconvenience I have just mentioned might be remedied by the bill being prepared at the time the parties are before the magistrates, that is to say, the notes for the bill taken then. At present, as soon as the sessions begin, every witness has to attend there, which, upon the average, costs each man two days, or two days and a half, merely to state again to the clerk of the indictments the particulars of the case, from which he draws the bill; and then, after that, they have to go before the grand jury: but, if there were competent persons appointed for the purpose at the magistrate's office, when the parties are all there assembled, the particulars might be taken down, from which the bill might be afterwards drawn, without obliging parties to go before the clerk of the indictments. This inconvenience is the more striking now, when sessions are held so frequently; the parties are often before the magistrate one day, and the next day, or very soon after, have to go to the clerk of the indictments, and repeat the same statement again to him.

In a great number of cases is not the policeman the prosecutor now?—In many cases the policeman is the prosecutor now, and he goes prepared with a note, which he hands to the clerk of the indictments. The present practice is a very serious evil, and a very serious expense, calculating the value of the time of the men; it would be a great saving to pay for an additional clerk or two at the magistrate's office, if their present establishment be not adequate for the purpose. There are still some misdemeanors in which costs cannot be allowed; and where the police are concerned, either as prosecutors or witnesses, I think it desirable that to them, if even not done to all persons, expenses should be granted, being engaged in the course of their public duty.

Whitehall Place, 9th March 1837.

The above evidence has been read by Colonel Rowan, the other Commissioner of the Metropolitan Police, who concurs with me in the statements and opinions in my evidence.—R. M.

Appendix No. 2.

Appendix No. II. Correspondence.

Letter from George Warry, Esq. to J. Lonsdale, Esq., Secretary to the Criminal Law Commission.

Sir, *Shapwick, Glastonbury, December* 24, 1836.

I beg to acknowledge the receipt of copies of the First and Second Criminal Law Reports, which you forwarded to me some weeks since, together with your letter, requesting me to furnish the Commissioners with any suggestions of mine on the subject of the administration of justice at sessions, or of the punishment of juvenile offenders, particularly as to the expediency and practicability of confining boys and girls in the strong room of workhouses previously to trial, and generally with any other observations connected with Criminal Law Reform.

These are all subjects which must necessarily claim the attention of every one engaged in the administration of the criminal law of this country, and the punishment of juvenile offenders in particular is of such vital importance to the best interests of society, that, I believe, there is now but one opinion as to the propriety and necessity of some legislative provision for it. In offering to the Commissioners my sentiments on these several points, I will first address myself to that of the punishment of juvenile offenders.

It is a very great defect in the legislative policy of this country, that no distinction is recognised between the first offence of a youthful depredator and that of an experienced thief. If the former, urged by sudden strong temptation, steals my property to gratify his appetite, the law awards the same punishment, and by the same processes, too, as in the case of the older trespasser who steals for profit. This is a most vicious system, because it is unjust in its award of punishment, unreasonable in operation, and baneful in its effect. True it is, with regard to the measure of punishment, a discretion in apportioning it rests with the court by which it is decreed; but it must be remembered, that in most cases part of the punishment has been undergone before the offender appears in court. The committing magistrate reluctantly inflicts it, when he sends the young offender to gaol for trial; here he remains for many weeks imbibing corruption from his association with worthless characters, and the slight punishment with which, in mercy for his age, the court visits his offence too frequently, I fear, tends to lower his estimate of the terrors of offended justice. When one considers the extensive machinery that is set in motion to deal with the number of trifling cases which are constantly brought before our criminal courts, the time that intervenes between the offence and the punishment, and the great expense and inconvenience resulting to the public therefrom, it does appear to me that a more summary and beneficial course of proceeding may be devised. The present system may be compared to the economy which works a steam-engine to crush a fly. A too common use of the processes of our criminal courts tends much to a prostitution of the dignity of the law. What benefit does society derive from it? The juvenile offender comes out of gaol much worse in character than when he entered it, and his suffering there has not the merit of an example apparent to his companions at home to prevent their offending. With respect therefore to the trifling offences of juvenile offenders and their punishment, I have no hesitation in expressing a strong and decided opinion on the defect of our criminal jurisprudence, and of further stating, that I think some improvement herein may, without much difficulty, be effected.

In our rural districts, where education prevails, children, as soon as they can labour, are withdrawn from its discipline long before any thing like a habit of virtuous sobriety is generated, and there remains to them no protection from error, except parental authority and chastisement. Solomon says, "He that loveth his son chasteneth him betimes." There is no want of affection for their children in the humbler classes of society, but there is a sad lack of discipline, which in my opinion too often originates in an over-fondness for them. Here then, as I think, is the main source of all succeeding evil, and it is in this stage of life, and under such circumstances, that the law may wisely be allowed to interpose its authority, and supply a wholesome care and correction to children where their parents fail to do so. In every village there are some unruly children, who are notoriously idle and disorderly, and prone to mischief, addicted to bad habits, and quite regardless of all the common decencies of social life; were such the children of respectable parents, or inmates of a school, they would receive correction for their misconduct. I hold that it would be sound policy to allow a public officer to administer similar correction, when the parent or the schoolmaster fails to do so. Examples of domestic public punishment are of rare occurrence; indeed the means of inflicting it have been suffered to decay, and the wreck of the parish stocks only serves to remind us of the wiser practice of former times. It would be highly advantageous to revive it. Lock-up houses or places of confinement in parishes or districts would be found most serviceable for the purposes of correcting juvenile offenders, and also for the detention and safe custody of more serious offenders previously to commitment, instead of lodging them at beer-houses, and affording them ample opportunity of escape. The necessity of some such provision will be apparent when the amendment of our constabulary arrangements is effected. The opinions which I entertain on this subject recommend themselves to me upon this ground. The pauperism of the country is an evil which the public are taxed to remedy; and the public have therefore a right to insist that all proper measures be adopted for its prevention. Nothing will tend so much towards this as the improving of the habits of that class of society in which the disease is engendered. The most certain and easy way of doing this is by an early attention to the moral conduct of the children of the labouring classes. Every day's experience proves how inestimable to a young family is the example of correct conduct in their parents, and a watchful control over their actions. Where, on the other hand, parents lead an idle, profligate, irregular life, pauperism surely awaits them; their children, uncontrolled, soon follow in their footsteps, and succeed to all the sad consequences of such a course. Here, then, I think we must begin, and, by legislative provision, insist on the liability of the parent for the misconduct as well as the maintenance of his children. There are many trifling offences committed by children of tender age, which go unpunished either because the redress which the law affords is ineffectual and most unsatisfactory, or because it does not descend to the notice of such trifles. This impunity hardens the child, and the reprobate parent profits by its agency. I will put the case of fence-breaking. What can be done with a child, nine or ten years old, caught so offending? No one thinks of seeking redress from the statute. In such a case, I think, if there were a lock-up house, a few hours' confinement for the child, and a pecuniary fine levied on the parent, would be a wholesome correction. Some such arrangement as this would soon convince parents that the virtuous habits of their children are their greatest gain. Again: take the case of profane swearing and sabbath-breaking. If children are not checked here, one can anticipate for them none but the most fearful consequences. If, therefore,

parents neglect the correction of this habit, authority may be properly intrusted to the clergyman and parish-officers to administer slight punishment through the operation of a lock-up house. In dealing with young offenders, the operation must be more *domestic* than at present.

It seems to me that they may be distinguished into two classes: the first to include those guilty of trifling offences against public decency and good order; and the second to include the more disorderly, such as those who have received previous punishment, or been guilty of petty trespasses and felonies. For the first I would suggest some domestic punishment; and, in some cases, visit it on the parent too, as above suggested. The second class, I think, may be left to be dealt with by a tribunal to be constituted in each union, and punished by confinement and labour in the workhouse.

I have no hesitation in stating that I think that, whatever alterations may be made with regard tc the punishment of juvenile offenders, care must be taken to keep the workhouse and the gaol distinct. I cannot recommend the strong room of the workhouse for confinement previously to trial, if the trial be in the usual criminal courts, because then the outcry against the execution of the Poor Law would have some ground for justification; but treat these juvenile offenders as incipient paupers, and then the workhouse will be the proper place, and the Board of Guardians the proper authority, for their management and control. I cannot help anticipating great advantage from the adoption of some such a system as I have above suggested. The punishment will follow close upon transgression; it will be administered on the spot, before the offender's companions, and operate as an example to them: wholesome and natural correction will have been applied, without subjecting the culprit to the contamination of a gaol; and, instead of returning home from an education in roguery, (too frequently the case at present,) the young offender will still retain all his magnified conceptions of the terrors of a gaol. In addition to all these advantages, the saving of the public money will be great.

With respect to the administration of justice at the sessions, I do not know that I can suggest any improvements. One grand point, I think, ought mainly to be kept in view; namely, the appointing of proper persons to the bench. I think, also, that in their attendance in the courts of quarter sessions, the magistrates ought to be more constant: I would enforce this. Many magistrates would learn much that belongs to their duty; and a little attention to legal practice would create a taste for legal study and acquirements. I think, previously to any violent alterations in the constitution of these courts, the feelings of the magistracy should be consulted. Their office now abounds in duties which, if attended to, draw largely upon their time and attention; and it will be unwise, without the prospect of positive good, to reject their services. The recent Act of Parliament, allowing counsel to prisoners, will probably assist in the administration of justice by preventing some mistakes; but, from my own experience, I should say that, in our criminal courts, an innocent man is seldom convicted.

In the wording of our Acts of Parliament there is often much cause for complaint. A case of attempted arson was stated to me some time since. The object sought to be destroyed was a stack of turves. Upon looking into the Act of Parliament, 7 & 8 Geo. IV. c. 30, s. 17, I found that there was no protection for such property. Were this defect in the law generally known, I fear the consequences would be very serious. The turf, in this neighbourhood, is the staple commodity of the country, and affords the means of living to hundreds of the people. The annexed paper affords another example of the loose language of the statutes:

At our last petty sessions at Bridgewater a lad was brought before the justices upon a summons, charging him with stealing apples. The complainant expressly stated that he saw the offender pick up the fruit from the ground under the tree, but he took none from the tree. It would have been straining language too freely to hold these apples so taken to be fruit "*growing*" in an orchard, in order to give magistrates the power of dealing summarily with the charge, under the 42nd sec. of the 7 & 8 Geo. IV. c. 29, and the case could therefore be considered only as a felony. The magistrates thought the offence too trifling to set the machinery of a criminal prosecution at work upon it, and they allowed the complainant to withdraw the summons, upon the offender promising to amend his conduct. Here certainly is great defect in the language and provision of the before-mentioned Act of Parliament. A person who takes my apples from the ground which have just fallen from the tree, and carries them away, in effect, both morally and legally, does no more than he who picks them off the tree for the same purpose; but, as the law stands, there is a wide difference in the consequences of these two offences. I believe that the trouble, delay, and inconvenience of prosecuting offenders, tend to incline persons to overlook many felonies and misdemeanors which would not escape unnoticed if a more summary mode of dealing with them were allowed. Among the latter I may mention that of pound-breach. This is an evil of frequent occurrence, but the offender goes unpunished, because the delay, trouble, and expense, deter the injured party from prosecuting.

In illustration of my observations on the neglect and mismanagement of children by their parents, I may state a case which lately came before us in petty sessions. Two boys (brothers) were brought before the court, on some complaint against them. They were both parish apprentices. It was fully shown that their masters were both excellent ones, but they had a foolish mother who indulged and received them whenever they misconducted themselves and ran home. The boys at last became incorrigible by their masters. It was stated, in addition, that two other boys of the same family had turned out as bad, under the same circumstances, and from the same cause. What prospect can there be for these children, when they come to years of maturity, beyond a workhouse or a gaol?

I have the honour to be, Sir, your obedient humble servant,

GEORGE WARRY.

Letter from the Chief Justice of Australia to Andrew Amos, Esq., &c. &c.

DEAR SIR, *Cambridge, 31st December* 1836.

In compliance with your request I now beg leave to submit a few suggestions upon the several points contained in your letter of the 15th instant; but, preparatory thereto, I think it will be more convenient to take a short view of the nature of transportation as a punishment of crime, as it exists at present, by law and in practice, in order to point out what appear to me to be defects in the system, and to suggest a few alterations which are calculated, as I conceive, to render it a more defined and effective punishment.

By law, transportation is the appointed punishment for most of the felonies relating to the property and person of individuals, as well as for many offences more immediately affecting the public; and it is usually substituted for capital punishment. In the range of crimes to which transportation is thus applied, there is great diversity in the nature of the offence, as well as in the degrees of criminality;

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but the law makes no difference in the punishment, except in the mere *time* of transporting. The judge in passing sentence adheres to the law, and orders the offender to be transported for the regulated time—neither the party sentenced, nor the public, learn any thing further of the consequences which are to follow. The Transportation Act then takes up the case where it was left by the court, and enables the Secretary of State to appoint the place to which the offender shall be conveyed, and directs that upon his arrival at such place he shall be delivered over to the Governor of the Colony, and that the Governor shall have a *property* in the *services* of the convict for the term of his transportation, with a power of transferring such property to the inhabitants of the Colony. This is a summary of the

5 Geo. 4, c. 84, s. 13.

whole law of transportation—the provisions of the Act of Parliament with respect to setting convicts to labour within the limits of certain ports or harbours being rather applicable to the hulks at home, and to the public works at Bermuda, than to the Australian Colonies. Under the power given to the Governor of transferring the services of the convicts, the greater proportion of them are assigned to the inhabitants, who undertake to provide them with a certain daily ration, and a yearly quantity of clothing, in consideration of their labour and earnings. In order to keep the convicts to their duty, they are subject to a code of laws framed for such purpose by the local legislature. These laws create a

See Act of Governor and Council New South Wales, 3 Wm. 4, No. 3.

class of offences peculiar to the condition of the convicts—such as "drunkenness, disobedience, neglect, absconding from servitude, abusive language, or other disorderly conduct"—the breach of which is liable to be visited with summary and, in some cases, severe punishment. The convicts are also liable to be tried in a summary manner by two magistrates for all offences not capital, and, upon conviction, to be set to labour in chains on the public works, or removed to a penal settlement for years, or for life, according to the nature of the offence. In case of good conduct for a certain period of probation, which is regulated by the original term of transportation, they are allowed to work for their own benefit, an indulgence which is held during good behaviour only, and the holder still continues subject to the same discipline and summary correction as other convicts. The system of assigning transported convicts to the settlers relieves the public from the great expense of maintaining them, and has, after long experience, been found the most efficacious mode of reforming them; but, at the same time, it causes great inequality in their condition, and in its consequences renders transportation an undefined and uncertain mode of punishment. Immediately after assignment, the situation of the convict depends upon his qualifications and capability of being useful, the temper and disposition of his master, the nature and place of his employment, and other accidental causes, which have no relation whatever to his offence, but which are very influential, in their consequences of good or ill, upon his present condition and future prospects. From this cause it frequently happens that lesser offenders against the law come to be punished with disproportionate severity, while greater criminals escape with comparative impunity. This inequality in the condition of transported convicts is, no doubt, founded partly on the nature of private servitude, but it is also in part and perhaps chiefly owing to the undefined and uncertain state of the law. For transportation itself, as a punishment, will admit of as great variety in the degrees, and is capable of being applied with as much precision as any other penal infliction, as the following short table will show:—

1. Transportation for seven years, and assignment to private service, with capability of indulgence.
2. Transportation for like term, without capability of receiving indulgence during whole or part of term.
3. Transportation for like term, without indulgence, and labour in irons for two or more years.

The same varieties in form may be applied to transportation for 14 years, or for life; or, in extreme cases, to a penal settlement. From this short table it will be seen that transportation may be applied to every variety and degree of crime, from simple larceny to offences only not capital, and will afford the means of punishment, from mere exile and temporary servitude to a state of endurance hardly short of death. Indeed the experience furnished by the penal settlements has proved, that transportation is capable of being carried to an extreme of suffering, such as to render death desirable, and to induce many prisoners to seek it under its most appalling aspects.

Should the foregoing observations be thought of any force, I would respectfully submit the following suggestions to the consideration of the Criminal Law Commissioners:—

First. To classify all the offences to which transportation is intended to be applied, according to their magnitude, under two or more general heads; and in crimes which will not admit of separate classification, but which depend in their degrees upon the circumstances attending their perpetration, to place a discretion in the court to apportion the punishment according to the extent of the criminality.

Secondly. To apply transportation to the crimes so classed, according to a fixed scale of time; for example, for embezzlement by servants, 10 years transportation; for receiving stolen goods, 15 years; for forgery, transportation for life.

Thirdly. To enable the court, in more aggravated cases of each class, to superadd to transportation for the appointed period, labour in irons on the public works of the Colony for any period of the term; or,

Fourthly. In less aggravated cases of each class, to enable the judge to deprive the offender of the capability of receiving any remission of his sentence during the whole or part of his transportation, as the degree of his offence may require.* With this view I would leave the royal prerogative of mercy

30 Geo. 3, c. 47.
5 Geo. 4, c. 84, s. 26.
9 Geo. 4, c. 83, s. 9.
2 & 3 Wm. 4, c. 62, s. 2.

undisturbed, and I would also leave the power, at present vested by several Acts of Parliament in the Governor, of remitting any part of the term of transported convicts, as it now is—only liable to be suspended by the court in passing sentence upon the prisoner. The system of granting temporary indulgences, called *tickets of leave*, has been found of the most beneficial use in the Colonies, in preventing the commission of crimes, protecting the property of the settlers, and working the reform of the convicts. The habits of honesty and industry acquired during the course of probation enter into the character of the individual, and most frequently continue with him for life. And, as this is a branch of the prerogative of mercy, it may be regulated in the exercise, by instructions from the Crown, so as to produce the least amount of ill in the United Kingdom, and the greatest amount of good in the Colonies. With reference to this subject, I would recommend that the second clause of the statute 2 & 3 Wm. IV. cap. 62, should be repealed. The provision, disabling the Governor from granting tickets of leave within given periods of time, was unnecessary, because the regulations approved by His

* The additional punishment of privations of indulgence, and hard labour in chains, render transportation, with such additions, for 10 years, more severe than simple transportation for 15 years; but embezzlement by servants may be accompanied with aggravated circumstances, rendering it more criminal than receiving stolen goods. All that can be done in the first instance by the Legislature will be to classify crimes according to their ordinary circumstances and effects upon society, and to leave a discretionary power to apply severer modes of punishment in aggravated cases of each class.

Majesty had already done the same thing; and the provision which prevents a transported felon from acquiring property, or suing in a court of justice, was only an affirmance of the common law. By a local enactment, persons holding tickets of leave were expressly enabled to sue for their earnings, or for personal injuries; and there seems some inconsistency in an Act of Parliament's sanctioning a ticket of leave, and, at the same time, preventing the holder from deriving any benefit from it. I have known cases in which the most fraudulent use has been made of this law, as a defence against a just demand.

Acts New South Wales, 3 Wm. 4, No. 3, c. 36.

Fifthly. To establish by law some uniform instrument, to be transmitted together with the transported convicts to the Colonies, and to be received by the local courts as proof of the respective sentences and personal identity of the parties therein described. There is no provision upon this important point in any English statute. The legislature of New South Wales made an enactment, admitting the instrument, called an "Indent," as proof to such effect, which was followed by the legislature of Van Diemen's Land. The instrument so called is a parchment or paper roll, with separate columns, setting forth the names of the whole of the transported prisoners in one ship, the several places at which they were tried, and the terms of their transportation. In the Irish indents the offence is stated, and is of use in correcting any error in the term; in the English indents the offence is omitted; and instances have occurred of inaccuracy in the time of transportation. I would venture to submit that an instrument, which is to take the place of a record or certificate of conviction and proof of identity, as required by law at home, should be uniform in all cases, and should be authenticated by responsible officers, and accredited by Act of Parliament.

Acts New South Wales, 3 Wm. 4, No. 3, c. 35.

I will now proceed to remark upon the several propositions in the order they are placed in your letter, and which are as follow:—

> "The expediency of transporting juvenile offenders, and of sending them to some Colony not penal."

As a general opinion I should say, that for a first offence below the degree of capital, and for a second offence of no higher degree than simple larceny, summary trial and punishment immediately by magistrates at petty sessions, would, upon every principle which should regulate legislation with respect to crimes, be preferable to transportation. The tender age of the offender, while it presumes less power of discriminating between good and evil, and less reason to restrain, also affords the greater prospect of reformation. The trial being summary, and the punishment proportionately moderate, would admit of being applied immediately, and made to appear to the mind of the young culprit and his associates as the speedy and necessary consequence of crime. In cases of a capital nature, or upon the repetition of crimes of a higher degree than simple larceny, transportation to a Colony, not penal, would be preferable to one that is penal. But, connected with this proposition, there are some minor points which require mature consideration, which I will state as they present themselves to my view. To effect any good by changing the place of exile, the juvenile offenders should not be congregated together, but should be dispersed throughout the Colony, and apprenticed to residents of the more respectable class. In New South Wales the attempt was made to keep the transported boys together in a school or place of discipline, called Carter's Barracks, where they were placed under the best superintendency and control which could be provided, and much care was taken of their morals, as well as in teaching them some useful art or occupation. But the establishment was not found to answer, and has been lately broken up, and the boys distributed among such respectable inhabitants as were disposed to receive them. The main cause of the failure, I have understood, was the association of a body of young criminals together, and the incorrigible effects of their example and communications upon each other. Should the system of apprenticing be adopted in a Colony not penal, it will be necessary to provide for cases where the offender should be found irreclaimable by his master, and returned to the care of Government. To meet such and similar cases there will be required a penal establishment, with a penal code, applicable to the condition of transported convicts. The statute 6 Geo. IV. c. 69, merely subjects transported persons to the criminal laws of England; the artificial system consequent upon transportation has no place in English law. To show what that system is in the Australian Colonies, I would beg leave to refer to a local ordinance of the Governor and Council of New South Wales. How far it may be practicable or expedient to introduce similar provisions into a Colony not penal, is a question which will of course receive due consideration. But, should the expense of penal establishments, or the inconvenience of a separate penal code, be found to weigh against transportation to other than penal Colonies, and should the juvenile offenders be transported to Australia as heretofore, I would recommend that in all cases they should be assigned, immediately upon their arrival, to persons residing in the country, who should be carefully selected by the local authorities, and should undertake to have the boys instructed in some useful employment. This will, of course, if adopted, be matter of instruction from the Government at home, and will not require the interposition of Parliament.

3 Wm. 4, No. 3.

> "The expediency of transporting women."

I am of opinion that it would be better for the moral welfare of the Colonies not to transport women; for, besides the particular offences for which females are transported, they almost always superadd those of intemperance and unchastity—two vices which, in women, corrupt the sources of domestic peace, and render them a great public nuisance. Since the appropriation of the land revenues of the Australian Colonies to the introduction of free and virtuous persons of both sexes, in equal proportions, there is no longer any occasion for convict women. And the little good which is done at home by relieving the public from this class of offenders, is more than overbalanced by the great amount of evil which they bring upon the Colonies.

> "The expediency of making the shortest period of transportation 10 years, and of classifying offences with regard to their punishment of transportation under two divisions; first, where there shall be a discretion to transport for life, or for not less than 15 years; and, secondly, where the discretion shall lie between 15 and 10 years."

With reference to the first part of this proposition, I have always thought seven years too short a time to render it expedient to incur the expense of transportation. In cases of simple larceny it is in the discretion of the court to transport for seven years, or to imprison for two years; this wide discretion was doubtless left to enable the judge to meet the great difference in the degrees of criminality, in the class of crimes falling within the general designation of larceny. But, while it is easy to imagine cases of simple larceny, in which transportation would be too severe a punishment, other cases may as readily

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be supposed of an aggravated nature, which would not be adequately punished by transportation for seven years, and a ticket of leave at the expiration of four years, according to the present law and practice. I am therefore of opinion that it will be a great improvement in the present system, to limit the shortest period of transportation to not less than 10 years. I have already submitted some remarks upon the second part of the proposition, with respect to the classification of transportable crimes. I would here add, that I think it will be at once simpler and more defined to classify transportable offences under three separate heads, and to appoint to each class a fixed time of banishment, namely, for 10 years, for 15 years, and for life; and to leave all degrees of criminality in each class to be punished at the discretion of the court, either by transportation and servitude, or by the deprivation of indulgence, ort he addition of labour in chains, according to the circumstances of each particular case.

"The expediency of abolishing transportation in all cases of larceny."

I must own that, of the whole catalogue of crimes made punishable by transportation, those of larceny seem to me to be most appropriately and effectually so punished. The great mass of crimes in this country are against property. In a state of society where commerce has created redundant wealth, and caused it to be widely and, at the same time, unequally distributed, the temptations to gain, in all its forms, may be said to surround the needy man every hour of his existence. In a country so circumstanced, the frequency of larcenies is the necessary effect of a predisposing cause. The principle of honesty, however, once broken through, is not to be restored by punishment. It is difficult to comprehend how the infliction of bodily suffering can effect the reform of a criminal mind—as a means it is not adapted to its end. After a convict has been punished for larceny, and is returned again upon society, ruined in fortune and degraded in character, with increased temptation and diminished restraint, there is every chance that he will resort to his former habits and associates—grown more wary by experience, but not more honest. Transportation to a distant land is precisely the punishment fitted for such an offender. Society is thereby relieved from an irreclaimable depredator, and the convict himself has some chance of being reformed. There is a wide difference between England and America as a field for the application of a penitentiary system of discipline. In the United States, after the convict is released from confinement, he may easily change his country—the high price of labour readily provides him employment, and the constant influx of strangers withdraws his former life from inquiry—the back settlements are to the elder states exactly what the Australian Colonies are to the mother country. For these reasons I am of opinion that it would be inexpedient to abolish transportation as a punishment for larceny altogether; but, at the same time, I would not transport any offender whose crime did not authorize transportation for at least 10 years. I am fully aware that simple larceny has sometimes been committed for the meditated purpose of being transported: but withholding all remission of sentence for 10 years, and in more aggravated cases of such kind, a slight addition of labour in chains would, I think, entirely put a stop to all speculations in transportation.

"The expediency of punishing juvenile offenders summarily by magistrates at petty sessions."

I have already expressed my opinion upon this point under the head of the first proposition, and I am not sufficiently acquainted with the state of crime among offenders of this class in the United Kingdom, to offer more than a general opinion upon the comparative efficacy of summary punishment and transportation, as they may be applied to juvenile offenders.

I had intended, before the conclusion of this paper, to avail myself of the general permission given me in your letter, to offer a few suggestions upon a point or two of criminal law, which appear to me to be unsettled, and to require some amendment; but perhaps it will be better to reserve them for a separate communication. I will therefore for the present beg you will excuse the length of this letter, and allow me to subscribe myself,

Yours very sincerely and respectfully,
FRANCIS FORBES.

Letter from the Guildford Bench of Magistrates to the Right Honourable Lord John Russell, &c. &c., submitted to the Commissioners by his Lordship.

MY LORD, *Guildford Bench, 14th January* 1837.

We the undersigned magistrates for Surrey beg to call the attention of your lordship to the state of the law respecting the offence of stealing faggots, which can only be dealt with as a felony. When persons are brought before us for stealing one faggot, we have no power of adjudging the case summarily, as with various other offences, and some of much greater magnitude, by the 7 and 8 Geo. IV. c. 29: the prosecutor, when informed that we must commit the prisoner for trial, often shrinks from going on with the case, desiring to avoid the trouble and expense of travelling thirty miles to the quarter sessions, and disliking to bear the onus of punishing a man more severely than appears to be called for by the offence; and, if there is no such backwardness on the part of the prosecutor, we submit that, to commit an offender to gaol, who, perhaps, would shrink from any other crime, contaminates and hardens his mind; reconciling him to be the associate and imitator of more abandoned characters. Juries (though certainly forgetting their province) hesitate to convict in cases of stealing faggots; in one such case, notwithstanding the confession of the prisoner, acquitting on the ground of his having been in gaol a fortnight before trial.

Unless some better means of rectifying what appears to us to be a defect in the existing law should occur to your lordship or to the law-officers of the Crown, we beg to suggest that a short Act should be passed in the ensuing Session, to amend and enlarge the 7 and 8 Geo. IV. c. 29, to give magistrates the power of dealing summarily with the offence of stealing faggots and wood, as they possess with respect to other offences by the 39th and two following sections of that Act; and, to prevent any jealousy of extending the power of justices of the peace, their jurisdiction might be limited to cases where the value of the faggots stolen does not exceed one or two shillings.

We have the honour to be, My Lord, &c. &c. &c.
(Signed) KING,
G. W. ONSLOW, (Chairman.)
G. H. SUMNER,
ARTHUR ONSLOW,
R. SUMNER.

Letter from Thomas D'Oyly, Esq., Serjeant-at-Law, to Thomas Starkie, Esq., K. C., &c. &c.

My Dear Sir, 4, *King's Bench Walks, February* 13, 1837.

With reference to the conversation which we had together a few days ago concerning the better administration of criminal justice in cases of trifling larceny, I cannot but feel persuaded, upon the best consideration I can give the question, and regard being had to the practical working of what I have witnessed in analogous cases, that great public benefit would be thereby attained, and that it would be following up, at the same time, the old common law principle of making a marked distinction (though in a manner better suited to the change of times and of habits) between grand and petty larceny. If the smaller offences of this class were to be disposed expeditiously and easily, no inconsiderable advantage would unquestionably be the result. It is to be remembered that crimes of this description occupy a very large proportion of the calendar at the quarter sessions; I should say nearly one half; that many of these are very young persons, and that they have been inmates of a gaol, for different periods, some of them for nearly three months; that all the same machinery, viz. of grand jury and of petty jury, is employed which is required for the trial of offences of the greatest enormity, whereas the punishment inflicted is usually light in cases where the property stolen is of trifling value.

Further, these petty offenders so standing committed for trial necessarily overload the prison more than is desirable for classification and discipline, and also much increase the charge upon the county rate.

If, for these and other considerations, it should be deemed expedient that a speedier and more simple mode of disposing of such cases be adopted, I would recommend that the improvement be attempted by following up the principle which the Legislature has already acted upon in three recent statutes, viz. 7 and 8 Geo. IV. c. 29, in regard to certain cases of stealing; 7 and 8 Geo. IV. c. 30, in certain cases of injury to property; and 9 Geo. IV. c. 31, in certain cases of injury to the person; so it might be provided that, in cases of simple unaggravated larceny where the value of the property stolen falls within a specified amount, the offender may be dealt with, as under those statutes, by two magistrates; the extent of punishment being also defined and limited.

It is worth consideration, whether it may not be advisable to require that such convictions should take place before two magistrates *at a petty session*, rather than before two magistrates generally: the proceeding would thus be at a fixed and known time, and would partake more of the character of publicity; and this will be yet more completely accomplished if the recommendation made in the last Report of the County Rate Commissioners (p. 32) be adopted, for establishing a regular court of petty sessions in each division, to be held at stated and frequent periods.

Having been in the habit of witnessing convictions before magistrates at the petty sessions under the three statutes above cited, I think I can venture to affirm that no spirit of jealousy or distrust has manifested itself in the mind of the public against the jurisdiction so exercised: the question may, however, fitly present itself, whether it would be expedient to give the defendant the election of being tried at the quarter sessions, if he wishes it; or (2dly) whether, at his election, he may have a small jury, say of from three to five, empanelled at the petty sessions; or (3dly) whether it would be better for a small jury to be always in attendance on, and attached to, the petty sessions, to give a verdict on the question of fact in all cases.

I cannot, however, but surmise that the culprit so brought before the magistrates would, in very many instances, at once admit his guilt, and make no defence.

I think it clearly ought to rest in the discretion of the magistrates to remit the case to the quarter sessions, if, from the nature of the circumstances, they should deem it fitting; and, in the case of a second offence, it perhaps ought always to be a matter for the quarter sessions.

In the opinion of many individuals this speedy cognizance of small offences should be allowed only where the offenders are very young; but I confess my sentiments are widely different: it strikes me that in *all* those cases of petty pilfering, which so frequently occur, it would be of great public utility, upon the grounds already stated, that the summary mode above proposed should take place, limiting it only as to the nature and amount of the offence, and as to the extent of the punishment. With respect, however, to *the sentence* a line of distinction might perhaps be advantageously drawn, and provision might be made for dealing differently, after conviction, with the juvenile offender than with the culprit of mature age.

It is obvious that the same form of judicature which is established for the thief ought to have jurisdiction also over the receiver of the stolen articles; still, however, always reserving to the magistrates the discretion of disposing of the thief, and sending the receiver to be tried at the quarter sessions, if they think the case requires it.

In regard to the process which is to be used, and the course to be observed, for bringing the offender to justice, and placing him before the tribunal which is to try him, I should be inclined to conform in a great measure to the mode chalked out in the three statutes already alluded to. There is no magic in the term "felony," and surely the offences of such petty pilfering may be allowed to range in that class of crime, and yet be subjected to the jurisdiction of the petty sessions.

I should propose that, if a man be brought before a magistrate charged with a larceny of the specified description, the magistrates should be required to bind over the offender and the witnesses to appear at the next petty sessions, giving the magistrate power to require bail, or to commit, if he sees occasion; and this latter provision I consider necessary, as the culprit may often be a tramp or vagabond who would otherwise abscond.

So, too, conformably to the provisions of 7 and 8 Geo. IV. c. 29. s. 65, of 7 and 8 Geo. IV. c. 30. s. 30, and 9 Geo. IV. c. 31. s. 33, I should allow complaint to be made to a magistrate, without bringing the prisoner before him, and that the magistrate might thereupon issue *his summons*, or *his warrant*, as therein is enacted, for procuring the appearance of the criminal before the petty sessions.

At the petty sessions the proceeding might be analogous to that which is now in the course of taking place under the statutes cited; the clerk of the magistrates fills up an information, which is of course simple and short; the prisoner is called upon to plead to it; the prosecutor and his witnesses give their evidence; the prisoner makes his defence, and calls any witnesses he may have; and the magistrates then decide.

The before-mentioned statutes award *a penalty*, and, in default of payment, award a power of commitment; in case of larceny, I conceive that the bare infliction of *a penalty* would be improper, and that the proper punishments would be a limited fine, a limited imprisonment, and perhaps a

Appendix No. II.

Correspondence.

whipping. The fair costs, such as the court thought proper to allow, would, I presume, be paid by the treasurer of the county.

It would perhaps be right also to provide that the very penal consequences which follow on a second conviction for felony under 7 and 8 Geo. IV. c. 28. s. 11, should not attach where one of the convictions has been a summary one before magistrates.

I feel a firm persuasion, that most of the hateful circumstances which we now daily witness in bringing to justice the pilferers of articles of trifling value, might be avoided by some such legislative measure as I have endeavoured to sketch out.

Most truly yours,

THOMAS D'OYLY.

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For His Majesty's Stationery Office.

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FOURTH REPORT

OF

HER MAJESTY'S COMMISSIONERS

ON

CRIMINAL LAW.

DATED THE 8TH DAY OF MARCH, 1839.

Presented to both Houses of Parliament by Command of Her Majesty.

LONDON:
PRINTED BY W. CLOWES AND SONS, STAMFORD STREET,
FOR HER MAJESTY'S STATIONERY OFFICE.

1839.

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COMMISSION.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To our trusty and well-beloved Thomas Starkie, Henry Bellenden Ker, William Wightman, Andrew Amos, and David Jardine, Esquires, greeting: Whereas his late Majesty King William the Fourth did, by his Letters Patent, bearing date the Twenty-first Day of October, in the Seventh Year of His Reign, appoint you, the said Thomas Starkie, Henry Bellenden Ker, William Wightman, Andrew Amos, and David Jardine, to be His Commissioners for the purpose of digesting the several Statutes relating to the Criminal and other Law. Now know ye, that We have revoked and determined, and by these presents do revoke and determine, the said recited Letters Patent, and every Clause, Article, and Thing therein contained. And further know ye, that We, reposing great trust and confidence in your zeal and ability, and being graciously pleased to renew the said Commission, and to continue you in such employment, have authorized and appointed, and do by these presents authorize and appoint, you, the said Thomas Starkie, Henry Bellenden Ker, William Wightman, Andrew Amos, and David Jardine, or any three or more of you, to be Our Commissioners, for the purpose of digesting into one Statute all the Statutes and Enactments touching Crimes, and the Trial and Punishment thereof, and also for digesting into one other Statute all the Provisions of the Common or Unwritten Law touching the same; and for Inquiring and Reporting how far it might be expedient to combine both those Statutes into one body of the Criminal Law, repealing all other Satutory Provisions, or how far it may be expedient to pass into a Law the first-mentioned only of the said Statutes, and generally for Inquiring and Reporting how far it might be expedient to consolidate the other branches of the existing Statute Law, or any of them. And for the better effecting the purposes of this Our Commission, We do by these presents give and grant to you, or any three or more of you, full power and authority to call before you, or any three or more of you, such Persons as you shall judge necessary, by whom you may be the better informed on the subject of this Our Commission, and every matter connected therewith; and also to call for, have access to, and examine all such Official Books, Documents, Papers, and Records, as may afford the fullest information on the subject; and to inquire of and concerning the premises by all other lawful ways and means whatsoever. And We do hereby give and grant to you, or any three or more of you, full Power and Authority, when the same shall appear to be requisite, to administer an Oath or Oaths to any Person or Persons whatsoever to be examined before you, or any three or more of you, touching or concerning the Premises. And Our further Will and Pleasure is, that you, or any three or more of you, do and shall, within the space of One Year after the date of this Our Commission, or sooner if the same can reasonably be, certify to Us in Our Court of Chancery, on parchment, under your hands and seals respectively, your several proceedings in this matter, as the same shall be respectively completed and perfected. And We will and command, and by these presents ordain, that this Our Commission shall continue in full force and virtue; and that you Our said

Commissioners, or any three or more of you, may, from time to time, proceed in the execution thereof, and of every matter and thing therein contained, although the same be not continued from time to time by adjournment. And We hereby command all and singular Our Justices of the Peace, Sheriffs, Mayors, Bailiffs, Constables, Officers, Ministers, and all other Our loving subjects whatsoever, as well within liberties as without, that they be assistant to you and each of you in the execution of these presents. And for your assistance in the due execution of this Our Commission, We have made choice of Our trusty and well-beloved James John Lonsdale, Esquire, Barrister at Law, to be Secretary to this Our Commission, and to attend you, whose service and assistance We require you to use from time to time, as occasion may require. In witness whereof We have caused these Our Letters to be made Patent.

Witness Ourself, at Westminster, the Twenty-sixth Day of October, in the First Year of Our Reign.

By Writ of Privy Seal.

EDMUNDS.

FOURTH REPORT.

TO THE QUEEN'S MOST EXCELLENT MAJESTY IN HER HIGH COURT OF CHANCERY.

We, Your Majesty's Commissioners, appointed by Your Majesty's Commission, bearing date the 26th day of October, in the First Year of Your Majesty's Reign, whose Hands are hereunto set, do humbly certify, That, in obedience to Your Majesty's commands, we have proceeded in the execution of the several matters included in Your Majesty's Commission.

In laying before Your Majesty a portion of the Digest of the Criminal Law of England, we think it proper to refer to the precise nature and extent of the several authorities under which we have acted. The original Commission, issued by His late Majesty, after authorizing the Commissioners to "digest into one statute all the statutes and enactments touching Crimes, and the trial and punishment thereof, and also to digest into one other statute all the provisions of the Common, or unwritten, Law touching the same," directed them further to "inquire and report how far it might be expedient to combine both those statutes into one body of the Criminal Law; and generally to inquire and report how far it might be expedient to consolidate the other branches of the existing Statute Law, or any of them." The Commissioners, having by their First Report submitted to His Majesty their opinion that it would be expedient to combine the two statutes into one body of the Criminal Law, received His Majesty's directions, contained in an Official Letter from Lord Viscount Melbourne, then one of His Majesty's Principal Secretaries of State, to "proceed to frame a detailed Report, containing the plan they proposed to adopt in the consolidation of the statutes; and also to proceed in forming a Digest of the Criminal Law, as well written as unwritten, into one statute, with such partial alterations as might be considered by them to be necessary or expedient, for more simply and completely defining crimes and punishments, and for the more effectual administration of criminal justice." The Commissioners, accordingly, presented a detailed Report to His Majesty on the Consolidation of the General Statute Law, containing the plan which they proposed to adopt; and having been subsequently desired by Lord John Russell, then one of His Majesty's Principal Secretaries of State, to communicate, at an early period, the result of their inquiries respecting the Defence of Prisoners by Counsel, and Capital Punishments, they also presented to His Majesty a special Report upon those subjects. With reference to the suggestions contained in the latter Report, the Commissioners were directed by Lord John Russell "to consider what ought to be the principal heads of a Bill on the subject of Capital Punishments; also, to consider whether it would be advisable to make any distinction in the mode of trial between adult and juvenile offenders, and, if not, whether any class of offenders could be made the subject of a more summary proceeding than trial by jury; and to furnish an early and separate Report thereon, to be laid before His Majesty." In pursuance of these directions, the Commissioners presented a Report upon the subject of Juvenile Offenders, and prepared the heads of a Bill for the mitigation of Capital Punishment, which formed the foundation of the several enactments relating to the Criminal Law, passed in the first year of Your Majesty's reign. The former Commission having expired upon the demise of the Crown, Your Majesty was graciously pleased to issue a new Commission in the same terms as that issued by His late Majesty; and we have now proceeded in the composition of a Digest of the written and unwritten Law of Crimes, under the authority of Your Majesty's Commission, and in conformity with the above Official Letter of Lord Viscount Melbourne.

From this statement of the authority under which we now act, it will be obvious that it does not extend to the construction of a new Criminal Code, but is limited to the reduction and consolidation of the existing Law of England, as well written

as unwritten, concerning Crimes; for, although we are authorized to make *partial* alterations, we apprehend that we should not be justified in making such changes in the essential features of the law as would alter its nature and character. We have therefore confined our attention chiefly to a reduction of the existing law, by more simply and completely defining Crimes and Punishments, and have only, in a few extreme cases, ventured to remove positive and apparent inconsistencies in principle. Where defects have occurred to us in the prosecution of our task, which involved more extensive changes, we have noticed them in the Prefatory Remarks to the several classes of crimes, or in the Notes to the Digest, in order that, if it be thought expedient to remove them, the attention of the legislature may be directed to that object. It will be readily understood that the declaration of an existing law, to which our authority is limited, is an undertaking of a very different nature and extent from the composition of a new system. In the formation of a new system the several rules and definitions might be expressed in uniform language, and the several classes of crimes might be so arranged as always to bear a just proportion to each other, and to ensure the complete harmony of the whole; but in the reduction of the common and statute law of England, we have been compelled, in order to preserve its identity and character, to retain much that a strict regard to principle and propriety of language would have induced us to reject.

We have selected for the present Report the Crimes of Homicide, Malicious Offences against the Person, Theft, Robbery, Extortion, False Pretences, Cheats, Embezzlement, and Malicious Offences against Property, from the portion of the Digest which we are preparing, because these embrace by far the most difficult and important subjects, and because they may, with the least inconvenience, be separated from the rest of the undertaking. At the same time, we are persuaded that it will be impossible, from this partial execution of our labours, to form any conclusive judgment respecting the practical utility of the Digest. The several parts of the system are so dependent upon each other, and the boundaries of different crimes approach so nearly, that however carefully the outline may be drawn, neither the completeness of particular sections, nor their entire coherence or relative bearings, can be satisfactorily asserted, until the details are filled up, and the whole scheme is accomplished.

We purpose, in the present Report, to observe the following order:—

To premise some general remarks on the subject of penal legislation and the difficulties by which it is attended.

To make some observations on the subject, as connected with the present state of the law of England.

To enter into some explanation as to the manner in which we have attempted to meet the difficulties which occur in the execution of Your Majesty's Commission.

And then to submit portions of the Digest, with such Prefatory Remarks and Notes as appear to be proper for the purpose of further explanation.

It would be foreign to our present purpose to enter into any discussion of the principles of penal legislation further than may be necessary for the purpose of stating our understanding of the duty assigned to us, the difficulties attending the performance of that duty, and the mode in which we have endeavoured to overcome them.

It is in the first place material to advert generally to the relation which the criminal branch of the law bears to the whole system. Every system of municipal law consists necessarily of two distinct parts, which may be distinguished as substantive and adjective laws. The former comprehends the definition of civil rights and obligations; while it is the office of the latter to prevent the occurrence of certain grave infractions of such rights and obligations. And one mode of prevention, namely, the infliction of punishment on those who offend, in order, by example, to deter others from offending, constitutes the great principle on which the law respecting crimes and punishments is founded. The legitimate objects, therefore, of penal legislation are the selection of those violations of right which are sufficiently dangerous to the good order of society to justify and require the infliction of punishment to repress them, and the adaptation of the degree of punishment to the purpose of repressing such violations.

This consideration is an important one, as it limits the subjects of penal legislation to violations of such rights and obligations as are presumed to be already defined in another department of the law. It may, for instance, be proper to punish one, who being under a legal obligation to repair a public bridge, by reason of his tenure of particular lands, has omitted to do so; but to define under what circumstances one

who holds lands shall be bound to repair a bridge does not properly fall within the province of penal legislation. It is a question of substantive obligation, to be decided by the laws which concern the tenure of land. Were any such obligation to be announced or enacted by means of a penal law, the latter would no longer be merely adjective, or accessory to the enforcement of the substantive law, but would form part of that law. The definition of crimes, therefore, does not in any case involve the necessity for defining *de novo* substantive rights; yet, as the existence of a substantive right or obligation is frequently assumed in the definition of a crime, and as in the course of judicial investigation, the incidents and extent of such right or obligation often become material, any imperfection in the law by which they are constituted, necessarily introduces a corresponding defect into the criminal definition or the administration of the penal law. For instance, on charges of homicide, or cutting and maiming in resistance to a lawful apprehension, the guilt of the offender may often depend entirely upon a nice and difficult question belonging to the civil branch of the law, such as the technical regularity of civil process, or the precise duty of a minister of justice in its execution. In like manner, in ascertaining the penal responsibility of the offender in crimes of omission, an inquiry into the nature of the duty or liability, the breach of which forms the substance of the crime, is obviously essential. Thus in cases of homicide, where death has been occasioned by the omission to discharge the legal obligation imposed by some civil relation existing between the deceased and some other person, such as the supply of sufficient food in the case of parent and child, or master and apprentice, or the application of due skill and caution in the case of surgeon and patient, the particulars of the civil rights and liabilities of parties so circumstanced become absolutely essential to the determination of the criminal responsibility of the accused.

It is clear, therefore, that a system of criminal law, into the administration of which nice distinctions belonging to any other branch of jurisprudence are sometimes necessarily imported, must partake of all the imperfections to which those distinctions themselves are liable; and consequently that if the law concerning civil rights and obligations be uncertain and indefinite, the criminal law (however accurately defined in general) must be uncertain and indefinite in its application in every case in which those distinctions become essential. From the absence of sufficient definitions of rights and obligations in our civil Law, the examination of such rights and obligations has not unfrequently become the subject of embarrassing discussion in courts of criminal judicature; but the remedy for this evil must be sought in the improvement of the civil branch of Law, and cannot be comprehended within any scheme for digesting and amending the Criminal Law alone.

Having thus pointed out the relation which the Criminal Law bears to the whole system, we proceed briefly to notice the important principles upon which classes of crimes are to be distinguished and punishments annexed.

These principles are expounded with great clearness and brevity by Beccaria. His general conclusion is—"That a punishment should be public, immediate, and necessary, the least possible in the case given, proportioned to the crime and determined by the laws."* As the means for attaining this end, he observes,† "A scale of crimes may be formed, of which the first degree should consist of those which immediately tend to the dissolution of society, and the last, of the smallest possible injustice done to a private member of that society. Between these extremes will be comprehended all actions contrary to the public good, which are called criminal, and which descend by insensible degrees, decreasing from the highest to the lowest. If mathematical calculation could be applied to the obscure and infinite combinations of human actions, there might be a corresponding scale of punishments, descending from the greatest to the least: but it will be sufficient that the wise legislator *mark the principal divisions*, without disturbing the order, lest to crimes of the first degree be assigned punishments of the last."

These remarks seem to comprise sound and conclusive principles of penal legislation. All that human wisdom can effect in applying gradations of punishment is to distinguish crimes into classes properly defined, and adapted as nearly as possible to the different degrees of guilt, with power to the judge, within certain limits, to adapt the punishment still more precisely to the guilt of the offender. It is obviously essential to the further purpose of giving effect to these principles that each class should be marked by plain and definite limits; and it is also

* Beccaria, chap. 47. † Chap. 6.

manifest that the making of such classes either too large or too small would constitute a defect. This is a subject to which we shall afterwards advert.*

The difficulties in the construction of a scale of punishments to which Beccaria alludes in the passage above cited, are to a great extent common to all undertakings of a nature similar to that which Your Majesty's Commission has imposed upon us; and they have been experienced by those who in other countries have been employed to reduce criminal laws into a code. It is not in the power of language to render any law so entirely perfect in all its parts as to comprehend within its definitions every possible variety or combination of circumstances which ought properly to be the subject of penal regulation. In the Code Pénal, which was the result of the thought and deliberations of the most acute and learned jurists of France, continually applied to the subject during several years, many deficiencies have been shown. Even the modern German codes, which are composed with characteristic industry and caution, and are submitted to an ordeal of juridical and practical criticism which no other country has equal opportunities of applying, are not absolutely perfect.†

There are, however, difficulties of a very embarrassing nature, which belong peculiarly to the formation of a Digest of the English criminal law. In our First Report we have fully noticed those which apply to a Digest of the common law respecting crimes and punishments; and all we now think it necessary to state on this part of the subject is, that the difficulties of which the Commissioners had only a partial experience at the date of that Report, and could form little more than a prospective judgment, have been fully realized as we have proceeded in the execution of the undertaking. The confusion of rules and principles in the definition of crimes and punishments by the common law, the inconsistencies and contradictions of its provisions, and their frequent inapplicability to the requirements of a civilized nation, can hardly be sufficiently understood or appreciated by those who have not considered them attentively with a view to their systematic reduction. These defects are indeed the natural result of the history of our common law, the several rules of which being of miscellaneous origin, partly Roman, partly Saxon, and partly Norman, have undergone repeated revolutions by the slow process of time and gradual change of manners and customs, without any positive institution, and consequently are not bound together by unity of design or any governing principle; and though the Legislature has frequently interfered to remedy

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* See *post*, p. 12.

† The history of the Penal Code for Bavaria which formed the commencement of a new era in criminal legislation in Germany, may be taken as a specimen of the care and industry applied to the improvement of the criminal law in that country. In the year 1800 Kleinschrod, a distinguished criminal jurist, and Professor of Law at the University of Würzburg, was directed by the Bavarian Government to compile a detailed scheme for a penal code. This scheme was completed in the following year, and having been submitted by the Government in manuscript to two high judicial authorities, was returned to the author with their suggestions and additions. When finally revised by him, the scheme was published and officially distributed among universities and other public bodies in Germany and elsewhere; considerable prizes were proposed to induce attention to particular sections of the code, and no pains or expence were spared to encourage philosophical and practical jurists throughout Europe to contribute their aid towards bringing the undertaking to as high a point of perfection as possible. By these means a valuable but multifarious mass of information was collected, which it became necessary to digest and examine, in order, that if desirable, the original scheme might be remodelled and improved. In 1804, therefore, this undertaking was imposed by the Government upon Feuerbach, whose writings upon penal jurisprudence and experience in the practical administration of criminal justice pointed him out as eminently qualified for the discharge of so laborious and responsible a duty. At the close of the year 1807 the First Part of a new scheme for a Code founded substantially upon the former scheme, but enriched by all the improvements which the subsequent discussions had produced, was completed and presented to the Government. This was referred to a commission of ten persons, selected from the highest judicial officers and theoretical and practical jurists of the first eminence, including the compiler; and in 1810 the First Part of the scheme, consisting of the definitions of crimes and punishments, having been in the mean time carefully examined by the commission, was published by authority, and circulated with invitations to criticism, addressed particularly to the juridical faculties of the universities, and the different colleges of justice. In the same year Feuerbach presented the Second Part of his scheme, consisting of criminal procedure, which was likewise referred to a commission similarly composed, by whom both parts of the code were revised, article by article, the First Part being considered with reference to the various suggestions and remarks which had resulted from its publication. Finally, in the year 1813, having been submitted to the revision of the King and Privy Council, by whom the particular provisions, as well as the general scheme, were once more laboriously examined, the two parts of the code were established as law in all the Bavarian dominions, and, with certain partial alterations, still continue in force. Since that time new schemes of criminal codes, founded substantially upon the Bavarian code, have been officially compiled for Saxony, Hanover, Würtemberg, Baden, and other German states, the respective merits of which have been zealously discussed by juridical writers; and at the present moment commissions are engaged in preparing new penal codes for the greater states of Austria and Prussia, upon the improved notions of criminal jurisprudence now prevalent in Germany.

partial defects, no attempt has hitherto been successfully made to improve the whole system. Indeed the amount of the evil has been sometimes increased by the mode of correction applied by the Legislature. Statutes affecting the criminal law, have, in all ages, from the Statute of Treasons down to our own times, been passed much more to meet present emergencies and transitory circumstances, than with a view to improve the laws in general; they have been made, to use the language of Lord Bacon, "on the spur of the times," and very frequently without much consideration whether the common law was not sufficient without them. The consequence has been an enormous accumulation of particular laws, without system or principle, and many of them at variance with each other and the common law;—a proceeding which the same author characterizes as "a continual heaping up of laws without digesting them, which maketh but a chaos and confusion, and turneth the laws many times to become but snares for the people."* In this censure, however, we do not of course mean to include the Acts introduced into Parliament by Sir Robert Peel in 1827, which not only effected several very valuable alterations in the law, but further improved it, by repealing useless and inconsistent statutes, consolidating scattered enactments, and rendering its language more precise; and also led the way to the extensive reformation of many other branches of the Criminal Law which has subsequently been effected.

Our experience has proved (as was anticipated in our First Report) that the most laborious part of the undertaking is the systematic reduction of those classes of crimes which rest on common law authority. The difficulties peculiar to the Digest of common law crimes, (arising principally from the vague, changing, and often conflicting authorities from which the law is to be extracted,) are far more formidable than those which attend the consolidation of the statute law. This remark particularly applies to the common law offences comprised under the general heads of Homicide and Criminal Violations of the Right of Property; including of course, in the latter, the crime of Theft. These classes of offences have not only varied in features of minor importance at different periods, but have in many respects wholly changed their nature and essential qualities; so that the Treatises and Reports from which our knowledge of common law crimes is derived, give in one age, a definition of an offence totally different from that which was given by corresponding authorities in the preceding age. In general, the modern authorities have been followed by us, as they no doubt constitute the law at the present day; but it is by no means to be taken as an invariable rule that the modern definitions of crimes are the most explicit and accurate. For instance, we apprehend that Bracton's definition of theft, derived from the Roman law, as "fraudulenta contrectatio rei alienæ," is a more correct description of the offence than those which have been propounded by high authority, in modern times, in which the incident of the "causâ lucri" is improperly introduced, and the words "take and carry away" are used in a sense totally different from the popular acceptation of the terms. The great difficulty in framing this part of the Digest has been to extract from the numerous volumes of authority, which have been the produce of several centuries, the true meaning of the law, separated from its accidental corruptions. And thus it happens that, although the consolidation of the statute law is an undertaking of greater magnitude, so far as the number and bulk of its provisions is concerned, it is in truth a much easier and more mechanical process than the task of reducing the unwritten law to a series of written rules.†

Having thus generally alluded to some of our principal difficulties we proceed to explain the general heads or classes of arrangement which we have adopted, the limited sense in which we intend to use them, and our reasons for retaining them in preference to any new terms of classification.

Crimes have been, from very early times, distributed by the law of England into three general classes or divisions, viz., Treasons, Felonies, and Misdemeanors. The

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* Speech on the Union of Laws. Mr. Justice Foster truly remarks respecting "many of our penal statutes, made upon special and pressing occasions, and savouring rankly of the times, that, if the outrages at which they were levelled had been prosecuted with due vigour and proper severity upon the foot of the common law, an end would soon have been put to them without encumbering our books with special Acts, and a variety of questions touching the true extent of them."—Foster's Crown Law, Discourse II., p. 299.

† With a view to the consolidation of the statutory branch of the criminal law, we have prepared a careful abstract of all offences indictable by existing statutes, arranged according to the degrees of punishment. This abstract forms a conspectus of the whole criminal statute law, which we have found of the greatest use in the progress we have already made; and we annex it to the present Report, as we apprehend that it will be found an useful instrument for estimating the accuracy of this part of the Digest.

arbitrary distinctions introduced by this mode of classification as it at present exists, and the anomalies and the inconvenience it exhibits in practice, have been already alluded to in our First Report; and it was there stated that a Digest of the Criminal Law of England must be defective unless some modification of these classifications were adopted. As we propose to retain these general divisions, with certain changes and modifications, it is necessary to explain our views and reasons.

TREASON.

The crime of Treason consisted formerly of two degrees, High Treason and Petit Treason. The latter offence was designated by Lord Coke as "murder and more;"* it was, however, merely murder, aggravated by the relation subsisting between the murderer and the deceased, such as that of servant and master, or wife and husband, which was supposed to give the crime the quality of a breach of domestic or moral allegiance. The line drawn between this crime and murder was determined by no rational principle; and as the distinction occasioned much embarrassment in procedure, it was abolished by the statute 9th of King Geo. IV., c. 31, s. 2. The prominent feature in the crime of High Treason was the violation of the allegiance due from a subject to the sovereign as the supreme magistrate of the State. Within this class, however, were included many offences, which, without a very forced construction, (formed upon the ancient doctrines respecting the royal prerogatives,) could not be brought within the general notion of treason. Counterfeiting the king's coin and bringing false money into the realm were High Treason at common law, and by the words of the statute of treasons; so also clipping, washing, filing, or impairing the coin of the realm was declared to be Treason by the statutes 5th of Queen Eliz., c. 11, and 18th of Queen Eliz., c. 1; all of which laws were founded, no doubt, upon the principle that the offence was an invasion of the royal prerogative of coining and legitimating money within the kingdom. The clauses of the Statute of Treasons and of the two statutes of Queen Elizabeth, which declared these offences to be Treason, were wisely repealed by the recent statute 2nd of King Wm. IV., c. 34; and those crimes were by that statute distinctly defined and made felonies not punishable with death.† Other clauses of the Statute of Treasons (25th of King Edw. III., c. 2), which were also founded upon artificial notions of the crime of Treason and doctrines of prerogative long since exploded, still remain unrepealed; though the criminal acts they describe, such as killing the lord chancellor or the judges, contain no quality of the crime of treason, according to modern and rational views of the nature of offences against the authority of the sovereign.

But the clauses of the Statute of Treasons, which declare it to be treason to "compass and imagine the death of the sovereign, to levy war against him, or to adhere to his enemies" (though, in the primary meaning of the words, they contain the legitimate notion of treason), have been, at various periods of our history, fruitful sources of accusations, founded upon a technical and figurative construction of the words, totally different from their plain and obvious signification, and inconsistent with the original design and application of the law. Thus a riotous assembly meeting and attempting by force to redress a public grievance, such as to pull down all inclosures, or to burn all meeting-houses, has been held to be treason in the article of levying war against the king, though there has been no direct intention or design whatever against the State or the person of the Sovereign. This construction is said to be founded upon the doctrine, that by reason of the universality of the design, such acts and conduct amount to what in ancient times was called an "accroachment of royal power," and constitute what Hawkins describes‡ as "an insolent invasion of the king's prerogative by attempting to do that by private authority which he by public justice ought to do." Nor is this doctrine antiquated or obsolete; it is contained in modern text-books of the best authority; and on the trials under the special commission at Bristol for the riots which occurred at that place in 1831, some of the prisoners indicted for a capital felony under the Riot Act urged a plausible objection to the charge, that inasmuch as the evidence showed an intention to destroy *all* gaols and *all* buildings of a particular class, the generality of the design constituted the crime of treason, and consequently that the felony was merged in the higher offence.

Just and powerful arguments have been raised against these constructions of the

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* Case of Pardons, 6 Co. 136.

† It is worthy of remark that Lord Coke (3 Inst. p. 16) and other writers of authority assert that counterfeiting the King's coin was treason at common law; if so, the offence still continues to be treason, notwithstanding the recent statute.

‡ Hawkins, P. C., b. i. c. 17, s. 2.

Statute of Treasons whenever they have been attempted to be enforced; it may be reasonably doubted whether they could or ought to be enforced at the present day; and it is, perhaps, only in consequence of the infrequency of crimes of this character in recent times that constructive treasons still remain a part of the English law.

Influenced by these views, we shall have to submit to Your Majesty, at a future period, some modifications of the Law of Treason; and we propose that, in the Digest, the division of Treason should be strictly conformable to that which has always been considered to be the real principle of the offence, namely, that the crime should consist of a direct attack upon the person or authority of the Sovereign as head of the State. In order, therefore, to render the law consistent in this respect, we propose to remove from the present list of treasons such offences as do not come within the principle we have noticed, and to insert them under the heads of felonies or misdemeanors, with appropriate punishments. Thus the offence of slaying the Lord Chancellor or a Judge may be placed under the head of felony as an aggravated murder; and cases of riotous and tumultuous meetings, which can be no longer considered to fall within the Statute of Treasons, might be denominated felonies or misdemeanors, according to the aggravations by which they are attended.

FELONY.

We propose to retain Felony as a general term of classification. Felony in our criminal law constitutes at present an intermediate class between treason and misdemeanor, and is distinguishable from both by many peculiarities, although, for technical reasons, treason has been held to include felony. The crime of felony had its origin in a very remote period of our history, and was founded upon feudal principles. Its incidents were not formerly, as they are now, of a merely arbitrary nature, peremptorily annexed to certain criminal acts without any apparent reference to rule or principle. It was, in its more prominent features, the natural effect of the feudal relations from which it sprung. Thus the main incident of felony in former times, the forfeiture of the tenant's land to the lord of the fee, was a necessary consequence of the dissolution of the mutual compact, which formed the essence of the tenure, by the misconduct or felony of the tenant. For a long time, and even after felony had ceased to signify merely a failure of the tenant's duty with reference to laws of feudal allegiance, the term was used as descriptive of a crime which subjected the offender to the punishment of death, and, if he evaded punishment by flight, deprived him of his property and of all civil rights. Many of the incidents to a charge of this offence were formerly of a most severe and oppressive character. The most unreasonable of these, such as the denial of a copy of the indictment to the accused, of the means of compelling the attendance of his witnesses, of the right to examine them on oath when they did attend, and of the benefit of full defence by counsel, have been removed in modern times by the wisdom and justice of the Legislature, and with the general concurrence of public opinion. Another remarkable characteristic of felony, which we have noticed in our First Report, is the distinction between accessories before the fact and principals,—a distinction not recognised in treason (although, as before stated, every treason is considered to include a felony), nor in misdemeanors. The penal liability of an accessory after the fact, in harbouring or comforting a known offender, is also peculiar to crimes of the degree of felony. We have already remarked generally upon the present state of the law with regard to this distinction, and a more particular account of the reasons by which we have been governed in our proposed alterations will be found in the parts of our Digest which relate to Accessories. We think it expedient, however, at once to intimate our opinion that the limitation of the criminal responsibility of an accessory after the fact, to offences of the degree of felony, does not rest upon any reasonable foundation. If a person, who is not party to the commission of an offence, afterwards aids the criminal in acquiring the fruits of his crime, or in withdrawing himself from punishment, he is guilty of an obstruction of public justice, and should be punished for that offence, whatever may have been the nature of the crime of the original offender. In the most complete of the modern codes of Germany* such an offence is carefully defined as a substantive crime, and the punishment is distributed into several degrees according to the quality of the principal crime and other circumstances; and it seems to us that this offence ought not to be limited as it is in our law, by the technical distinction between felonies and misdemeanors.

* See the Bavarian Code of 1813, art. 84, *et seq.*; Scheme of a Code for Saxony, 1836, art. 37; Scheme of a Code for Würtemberg, 1835, art. 83. The Code Pénal also defines particular instances of this offence, art. 61, 62.

A further incident to the crime of felony at the present day is that a conviction for any felony, however trifling,* *ipso facto*, induces a forfeiture of the property of the offender. A rule of law, involving the invariable annexation of this incident to so large a class of crimes, some of them of a trivial character, operates very unequally and oppressively, and it seems to be worthy of the serious attention of the Legislature whether it ought not to be wholly abolished, or at least so far modified as entirely to alter its present character.

For these reasons, we propose to abolish or modify the incidents by which Felony is distinguished under the present law, although we retain the use of the term to designate a large class of offences. As it is a well-known and familiar phrase, descriptive in popular acceptation of an offence of a more heinous character than misdemeanor, we have retained it as a general division of the Digest, for the purpose of describing, by general reference when necessary, an intermediate class of crimes between treason and misdemeanors, rather than invent a new term of classification.

MISDEMEANOR. The term "Misdemeanor" (which we also retain as descriptive of a class) will embrace all crimes of an inferior degree, which do not fall within either of the other divisions. A misdemeanor is, in truth, according to its usual acceptation, any offence lower in the scale of crime than felony, and the word is generally used in contradistinction to felony. According to the present arrangement of indictable offences by our law, the distinction between felonies and misdemeanors is entirely arbitrary, and affords by no means a just line of division between a higher and lower degree of criminality. In several instances misdemeanors by the present law are offences of greater enormity, and are productive of more mischief and danger to society than many felonies; as, for example, perjury, forgery at common law, riots and various kinds of cheats. At the same time, therefore, that we think it convenient to adopt the term to denote a general division of inferior crimes, we propose to introduce an alteration in the law by transferring several offences, which are now misdemeanors, into the list of felonies; and it may perhaps be found expedient to reduce some felonies to the degree of misdemeanors. The change made by these alterations will, however, be little more than nominal, except so far as may regard the measure of punishment; for the recent improvements in the criminal law, including the opportunity of full defence by counsel in felony, have already so far broken down the ancient divisions between felony and misdemeanor, both as to procedure and penal consequences, as to leave few distinguishing incidents remaining, with the exception of forfeiture.

The general divisions of the Digest, as regards indictable offences, will therefore be Treasons, Felonies, and Misdemeanors; and under some one of these heads the whole of the present law, both respecting the definitions of indictable offences and procedure, with such modifications and partial alterations as we are authorized to suggest, will be comprised. Besides these divisions we shall also have to consider a numerous class of statutory offences now subject to summary jurisdiction.

We next proceed to submit to Your Majesty a few general remarks explanatory of the course we have adopted, and the general rules and principles upon which we have acted in defining the various crimes which form the part of the Digest already completed, and upon which we are executing the remainder of our undertaking.

I. We have studiously endeavoured to express the definitions of crimes, and the rules connected with them, in the most simple and intelligible language. The terms used to define offences ought to be as nearly as possible in conformity to their obvious and popular sense, and should not be involved in any artificial meaning. Technical terms, on legal subjects, are the conventional dialect of the profession of the law. When the members of that profession alone are addressed, as in text-books or practical treatises on the law, the use of such phraseology is convenient and necessary. But its use is manifestly improper in declaring to all classes of society the rules which they are bound to obey at the peril of punishment. On the other hand, the employment of terms which have an ordinary and well-understood signification in a technical or constructive sense, differing from their popular meaning, is far more objectionable than the use of terms of art to which no popular meaning is attached; in the latter case, the law may be

* Formerly it was considered by high authority that a conviction for petit larciny, or stealing below the value of one shilling, did not cause a forfeiture (Co. Litt. 41); but by the second section of the Statute 7th & 8th of King Geo. IV. c. 29 (the Larciny Consolidation Act) abolishing the distinction between grand and petit larciny, and declaring that "every larciny shall be subject to the same incidents *in all respects* as grand larciny was before the commencement of that Act," the Legislature has increased the range of the law of forfeiture for felony.

a dead letter to all those who cannot understand its meaning; in the former, the law will probably be misunderstood. In the first case, the law will not guide or direct; but in the other, it will positively mislead. An instance of this occurs in the common definition of housebreaking, which consists in a "breaking and entering" of the dwelling-house of another person; yet this quality of the offence is completed by merely drawing a latch or opening a window and putting in a hand, without any breaking or entry whatever in the ordinary and popular acceptation of the words. When, therefore, the Statute of the 7th and 8th of King Geo. IV., c. 29 (the Larciny Consolidation Act), enacted "that if any person shall break and enter any dwelling-house and steal therein" he shall suffer death as a felon, it conveyed to the great majority of mankind a positively false notion of the acts of which the crime was composed, and to the commission of which the punishment of death was annexed; because no man, not a lawyer, could understand that if he crawled down the chimney, or fraudulently induced a domestic servant to admit him into the house, or procured admission by a fraudulent ejectment or a false pretence of taking lodgings, or by any of the numerous other acts which would in construction of law be a *breaking*, he would have subjected himself to capital punishment as effectually as if he had *broken* the house by force in the ordinary sense. Nor could he more readily understand that by the insertion of an instrument through a window or over the threshold he would be guilty of *entering* the house within the words of the law. Again, when the Statute, passed in the first year of Your Majesty's reign, enacts "that whosoever shall be convicted of the crime of burglary shall be liable to be transported for life," no man unacquainted with the technical constituents of burglary, the explanation of which occupies many pages of the Treatises on the Criminal Law, could understand what crime the law intended to denote and to punish. Another instance of uncertainty introduced into legal definitions by the use of language in a different sense from that which popularly belongs to it, occurs in the case of larciny, one indispensable requisite of which offence is described to be a "carrying away" of the property; and yet the offence being completed by the mere removal of a watch from one part of the same room to another, or even by lifting it in the pocket of the owner, with the intention of stealing it, persons are daily convicted of theft without any "carrying away" of the property according to the obvious meaning of the words. It has appeared to us, therefore, that simplicity of expression, and the rejection, as far as possible, of figurative or technical language, are of the greatest moment in the composition of a digest of the criminal law. Elegance of diction must be regarded as a matter of inferior importance in the declaration of abstract propositions and rules; and we have not hesitated to use plain and even homely language in our articles where a neater construction of the sentences and more refined expressions would not have contained so effectually the meaning of the law.*

In conformity with these views, we have carefully avoided the use of technical expressions where it was practicable to omit them; and in all cases where terms of art have been necessarily employed, and where the definition of the offence is not, in itself sufficiently explicit, we have added expository clauses, interpreting them into popular language, and giving them a precise meaning.

II. We have considered it to be the most useful and important part of our undertaking, as it has certainly been the most difficult and laborious, to define with as much accuracy as possible the various acts and intentions which, either separately or in various forms of combination, constitute crimes by the law of England.

A crime must usually consist of some act, or combination of acts, constituting a violation of some right, or an attempt to violate some right, aggravated by the use of violence, or a fraudulent or malicious intention. The mere act done is seldom in itself, sufficient to determine whether it constitutes a crime; and therefore the distinction between acts which are merely wrongful, and as such, may be the subject of civil controversy between individuals, and those which are properly the subject of animadversion by the criminal law, for the protection of the community, must usually depend upon the intention of the offender. A man who takes a horse from the owner's stable without his consent may intend to despoil him of it, and fraudulently appropriate it to his own use, in which case he is guilty of theft; or he may intend to use it for some temporary occasion of his own and then return it, in which case he commits a trespass only; or he may take it as a distress

* "In legibus, non tam stylus et descriptio, quam auctoritas, spectanda est. Alias videri possit hujusmodi opus, scholasticum potius quidam, et methodus, quam corpus legum imperantium."—Bacon, De Augmentis, lib. viii. c. 3. (De Novis Digestis Legum, Aph. 62.)

for rent due from the owner, in which case he is justified by the law. In each of these instances the act done is the same, and it is merely the intention of the offender which determines whether it shall be the subject of civil or criminal cognizance, or whether it be altogether an innocent action. The common definition of theft by writers on the criminal law of England, as "the felonious taking and carrying away of the personal goods of another," draws no line of distinction between these supposed cases, and the crime, the civil trespass, and the innocent and lawful action are alike comprehended within its terms, unless the distinction is contained in the word "felonious." But the word "felonious" is a merely technical phrase, and therefore requires definition; and the explanations of the term given by the best authorities present to the mind no distinct or discriminating features of the crime of theft.* No argument can be required to show that a description so vague and uncertain as to embrace the three predicaments which we have above supposed is, of no value as a legal definition; it can be of no use to the judge in enabling him to apply the law to a doubtful or complicated state of facts; nor can it be useful to those who are subject to the law as declaring a rule which they are required, on pain of punishment, to obey.†

Much uncertainty has arisen in the administration of our criminal law from the use of constructive extensions of common law definitions. Most of the definitions of offences in the English law are of great antiquity; and having been adapted to times when it was more necessary to guard against force than fraud, have been found insufficient to meet the exigencies of a more civilized state of society, in which the means and opportunities, as well as the temptations, to commit fraudulent crimes have increased with advancing civilization. Finding the existing law, according to its obvious meaning, inadequate to the growing demands of criminal justice, the courts have from time to time, by their own authority, extended the boundaries of legal definitions by forced constructions, and have thus brought within the scope of penal provisions predicaments to which they had never before been applied, and which had even been excluded in a former age by express decisions. Hence arose the doctrines of *constructive treasons*, of *constructive possession* in larciny, of *constructive breaking and entering* in burglary, of *constructive force* and *constructive fear* in robbery, with many other subtleties and refinements of a similar nature. The extension of the penal law, so as to comprehend those predicaments, was reasonable and politic, but the mode of effecting it was liable to much objection. The practice amounted in effect to an exercise of legislative functions by the judges; and every such new decision beyond the strict limit of the ancient law was not only objectionable in subjecting the offender to a degree of punishment adapted to forcible outrages, where he had neither used nor contemplated violence, but also because every such instance of judicial interpretation constituted an *ex post facto* law. Independently of these objections, such extensions operated injuriously upon the law itself, by rendering it indistinct and uncertain;—the ancient boundaries being overthrown for the purpose of reaching flagrant offences not comprehended by them, without substituting such exact limits to the extended crimes as a correction by legislative interference would have prescribed.

It has been the practice in English law, in civil as well as criminal cases, to make frequent use of general terms, such as *malice* and *intention*, in a variety of senses. *Malice* is used, on some occasions, in a popular sense, to signify mere hatred and ill-will towards another; at other times it is used in a legal sense to denote a general mischievous intention, or a design to transgress some particular law. In other cases, again, it is used to denote simply the commission of a prohibited act without lawful excuse. In the case of homicide it is sometimes used in the first and popular sense; but it is also used in a sense entirely technical where it is called malice in law, or implied malice, to distinguish it from malice in fact, or express malice in the ordinary sense of the word. Thus implied malice, (the nature of which is often left wholly undefined, and the existence of which is held to be matter of law for the consideration of the judges and not matter of fact for the jury,) will raise the quality of homicide from manslaughter to murder. But to declare that implied malice, as an essential to murder, is a mere question of law, without specifying what intention or disposition of mind, or what other facts and circumstances constitute implied malice, is in effect not to define the law, but to authorize a discretionary power of decision in the judge. In like manner the term *intention*

* See Digest of the Law of Theft, *post*, p. 62. Note to Art. 26.

† Some observations upon this subject will be found in the First Report of the Commissioners on Criminal Law, pp. 3 and 16.

is not sufficiently distinguished from the motive or object with which an act is done. The intention to do the act exists for all criminal purposes where it is wilfully done, although the act itself was merely intended as a means of obtaining some ulterior object.*

Where the actual perpetration of the wrong is essential to the crime, it is obviously of less importance to specify the means used than it is where the offence rests in intention. In the former case the actual perpetration of the wrong is usually conclusive both as to intention and as to the adequacy of the means used; but in cases of mere intention it is obviously desirable for penal purposes that a fact so difficult to be ascertained, as a mere disposition of the mind, should be manifested by some overt act in order to make it the proper subject for criminal charge and judicial investigation. Thus in respect to injuries to the person, where the crime amounts to homicide, it is immaterial what means are used to extinguish life, provided they occasion bodily injury; but where an intent to murder or do bodily harm is made the substance of an offence, it is expedient to limit the definition by specifying either the means used, such as fire arms, or the particular injury effected, as cutting, stabbing, or wounding. So in respect of fraudulent appropriations of property, where the offence comprises an actual embezzlement, the particular means need not be specified, because they do not constitute the essence of the offence, nor are they material in order to distinguish it from others; but where, as in the instance of theft or forgery, the offence is completed, although the fraudulent appropriation be never accomplished, specific acts done in prosecution of the fraudulent design are essential, as manifestations of the intent, and distinctive of the offence.

In distributing crimes within proper limits, and so defining their component parts as to promote the great ends of all penal laws, two opposite evils are to be avoided. If the predicaments of fact, which constitute crimes, are framed too largely, and if the same penal consequences are applied generally to an extensive class of criminal actions, a wide range of discretion in their application becomes necessary in order to avoid injustice in particular cases; and thus judicial discretion, the exercise of which within defined limits is not only salutary, but necessary, is too largely substituted for legal certainty. In this state of things the uncertainty of the penalty diminishes the fear of offending, and tends to confound the gradations of crime which ought always to be plainly marked by corresponding gradations of punishment. If, on the other hand, the penal predicaments are too narrow, one of two inconveniences results; it is necessary either to multiply legal distinctions, the certain effect of which is the partial obstruction of justice, or to enlarge the boundaries of offences beyond their prescribed limits by technical interpretations and forced constructions. It is, however, a material object in defining crimes, to enlarge the terms of the definition to as ample a range of subject matter as convenience and a due regard to the above consideration will permit, as by this means the multiplication of special provisions is avoided, and the law is rendered more simple, and, therefore, more easily applicable. For instance, the crime of theft embraces the removal of every species of property capable of being removed, and this generality as to the subject matter, supersedes the necessity of various express provisions for the protection of particular kinds of property from depredation.

We are fully aware, as we have already intimated, that the attempt to describe all the minute variations and combinations of facts which compose crimes with metaphysical exactness, is visionary and absurd; but we conceive it to be quite possible, by means of correct definitions and subsidiary rules, to give to written laws such an approximation to certainty as may facilitate the practical administration of justice, and at all events, introduce an improvement upon a system so vague and indefinite as the present common law of England respecting crimes and punishments. In order to remove the uncertainty introduced into our law by the various causes to which we have above alluded, we have carefully endeavoured to reconcile the definitions of common law crimes with the various modern decisions by which their nature and qualities have been ascertained; and by such definitions (including, of course, all suppletory rules) to ensure, as far as possible, the simple and concise expression of every thing essential to the constitution of each offence. Still, whatever pains may be taken to render a digest of the law perfect, much must necessarily be left to judicial interpretation. A digest or code does not undertake to decide

* See a further illustration of this subject in the Prefatory Remarks to the Law of Homicide, *post*, p. 15.

with certainty every supposable case; it establishes directory principles,—it defines much that was before indefinite,—it supplies imperfections and removes inconsistencies,—it effects upon system and simultaneously with respect to the whole law, that which a variety of statutes has at different periods attempted to effect with respect to particular parts of the law. But it can never supersede the necessity for judicial construction, which, rightly understood and applied within certain limits, is not only necessary but beneficial.*

We have not thought it expedient to illustrate the abstract rules and propositions in the Digest by particular cases or examples, excepting in the few instances where such illustrations were found already moulded into rules, and, therefore, forming part of the existing law. It appears to us, that if an example falls clearly within the terms of the rule, it is useless as an illustration, because the rule is explicit without it; if, on the other hand, the example borders upon the verge of the rule, or does not fall clearly within its terms, it either renders the rule doubtful, or the example itself constitutes the law, and the rule becomes dependent upon it. In another point of view, illustrations supplied by particular instances ought not, we think, to form part of the law. An illustration cannot, as is already observed, be of any use as a law, except to remove some doubt which would otherwise occur, as to the proper application of the law to the case proposed, or to that and others of a similar kind. But this very necessity proves the law to be imperfect, and shows the framer of the law to have been aware of an imperfection which ought to have been remedied by using terms which either plainly excluded or included the proposed predicament. Laws must frequently be ambiguous in their application, because it is impossible to foresee all the various combinations of circumstances to which it may be necessary to apply them; but it would argue great negligence not to use terms which should clearly comprehend a case not only within the knowledge of the law-maker, but even suggested by him.

We are anxious in making these observations to guard against any misapprehension of our meaning. We do not assert that illustrations are not useful as leading to a knowledge and understanding of the law, but that they ought not to form a part of the law, so as to supersede or vary it, or to be of concurrent authority. There is, perhaps, no abstract rule or position in any science to the understanding of which the mind may not conveniently be led by the aid of familiar examples; they are indeed frequently the very steps by which the rule was first discovered, and its truth or propriety tested, and in either case must necessarily be included within it. It is, however, to be remarked that none but plain and obvious examples are conducive even to the purposes of instruction; for predicaments to which the application of the proposed rule was doubtful, would serve to perplex rather than enlighten the mind.

III. It will appear from the list of statutory offences contained in the Appendix to this Report, that a large number of different variations of punishment is at present formally in force. Of these many may be considered as obsolete, having originated at an early period of our history, and being quite inapplicable to the modern habits of society. In other cases parts of the punishments have been repealed, and the residue has been rendered altogether disproportionate to the magnitude of the crime. For instance, a perjury, under the statute of the 5th of Queen Elizabeth, c. 9, was punishable with six months' imprisonment, a fine of £20, or to have both ears nailed to the pillory; but the pillory being wholly abolished by a recent statute, the amount of the punishment for perjury under this statute is reduced to imprisonment for six months or a fine of £20, a penalty wholly insufficient to repress the commission of the offence, or to mark its enormity. The consequence of this is, that the degrees of guilt have been confounded, and the relative proportions of punishment destroyed.

We propose to reduce all punishments in respect of indictable offences to those specified in the following or some other similar scale by which the classes shall be greatly reduced in number, so as not, at the furthest, to exceed twenty:—

1. Death on conviction of treason—on conviction of felony.
2. Transportation for life or some less term of years, or imprisonment not exceeding Five years.

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* The province and proper limits of judicial construction were clearly comprehended by Lord Bacon, when he propounded, on the one hand, the maxim, "Cum receditur a literâ judex transit in legislatorem;" and on the other, "pessima tyrannis est lex in equuleo." De Augmentis, lib. vi. c. 3. (Exempla Antithetorum, 46.)

3. Transportation for Fifteen years or some less term, or imprisonment for any term not exceeding Four years.
4. Transportation for the term of Ten years, or imprisonment for any term not exceeding Three years.
5. Imprisonment for any term not exceeding Five years.
6. Imprisonment for any term not exceeding Four years.
7. Imprisonment for any term not exceeding Three years.
8. Imprisonment for any term not exceeding Two years.
9. Imprisonment for any term not exceeding One year.
10. Fine at discretion, either simply, or in addition to some other punishment.
11. Fine not exceeding Five hundred pounds, either simply, or in addition to some other punishment.
12. Fine not exceeding Two hundred pounds, either simply, or in addition to some other punishment.
13. Fine not exceeding One hundred pounds, either simply, or in addition to some other punishment.
14. Fine not exceeding Fifty pounds, either simply, or in addition to some other punishment.
15. Fine not exceeding Twenty pounds, either simply, or in addition to some other punishment.

In suggesting this scale, in which the *maximum* of punishment only is mentioned in each class, we are desirous that it should be regarded merely as a specimen of the form into which we think it will be desirable to reduce the various penalties assigned to crimes. When the definitions of crimes are completed, it will be necessary to consider the classes of punishments with the most scrupulous care, in order to ensure the consistency of the whole system; but this must, for obvious reasons, be one of the last operations to be performed.

We conceive, moreover, that there are several points connected with the punishments above enumerated which are deserving of the serious consideration of the legislature, some of which have, indeed, already attracted the attention of Parliament. By the stat. 54 of King Geo. 3. c. 146, the sentence in all cases of high treason is, that the convict "shall be drawn on a hurdle to the place of execution, and there hanged till he is dead; that afterwards he shall be beheaded, and the body, divided into four quarters, is to be at the disposal of the Crown." It appears to us that this statute, though it unquestionably introduced a great improvement by abolishing the revolting cruelties of the ancient sentence in high treason, still retains too much of barbarism to be fitted for a punishment in an enlightened age and among a civilized people. In early periods of our history, and in a comparatively rude state of society, it is not surprising to find aggravations of capital punishment which were suitable to the manners of the times. Thus Bracton, in his catalogue of punishments, mentions "ultimum supplicium, *cum pœnâ graviore et tormentis;*"* and Fleta distinguishes the punishment of high treason from that of common felony, as requiring "*pœnas* cum morte, altera vero mortem *tantum*."† The statute above alluded to discontinues all mutilation of the body before death; but we think that the exhibition of the spectacle of beheading and quartering can produce no good effect with reference to the legitimate end of punishment, and that it would conduce to the honour and dignity of our law if all the additions to the simple punishment of death were expressly abolished.‡

It will be seen that we have placed transportation among the secondary punishments in the above scale. In so doing we merely deal with it as a punishment provided by the existing law, without intending to express any opinion as to its general efficiency as a punishment, or as to the propriety of its continuance. This subject is at present under the consideration of the legislature, and the recommendation contained in the recent Report of a Committee of the House of Commons may possibly lead to some extensive modifications of the practice. On this ground alone it would be impolitic to recommend a final scheme of punishments,

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* Lib. iii. cap. 5. † Lib. i. cap. 22.

‡ It is remarkable that, by the Code Pénal (art. 13, 86), cutting off the right hand before capital execution is assigned as an aggravated punishment in treason and parricide. In Germany, although, during the last century, breaking on the wheel was the common mode of execution, the modern codes have abolished all painful mutilations, in addition to capital punishment. Many of them admit of no aggravations whatever of the sentence of death, though a few prescribe the public exposure of the criminal before execution with a view to render the effect of punishment more exemplary.

founded upon the present state of the law, as the abolition of transportation would necessarily occasion a total change in the whole system of secondary punishments.

IV. As the Notes as well as the particular Introductions to the Digest occasionally refer to the laws of other countries, we think it right to explain the nature and extent of the assistance which we have derived from this source.

Writers on English law have seldom compared the provisions of foreign systems of criminal jurisprudence with our own; and it has been a commonly received opinion that the laws of England are founded upon principles so peculiar and characteristic, that no advantage could be derived from the comparison. Thus Lord Hale,* after alluding to certain subtle distinctions respecting homicide, contained in the laws of the civilians and canonists, says, "But as the laws of several nations, in relation to crimes and punishments, differ, and yet may be excellently fitted to the exigencies and conveniences of every several state, so the laws of England are excellently fitted, in this and most other matters, to the conveniences of the English Government, and full of excellent reason; and therefore I shall not trouble myself about other laws than those of England." In composing a mere treatise of English Law, intended for practical instruction, it would no doubt be impertinent and useless to allude to the laws of other countries and the opinions of foreign jurists; but where the existing laws of England are discussed, with a view to defining and improving them, their comparison with those of other nations will often be of material advantage. It is true, as Lord Hale observes, that the criminal laws of different nations vary; but at the same time, among many differences, many points of resemblance will always be found, because the object to which they are directed, being the prevention of crimes resulting from the common passions and tendencies of human nature, must be universally the same. The forms of procedure differ in different countries, but the characteristics of crimes are remarkably similar in all. Besides, the difficulties of definition and classification are, to a certain extent, common to all attempts to digest or codify criminal laws, though the laws themselves may vary; it must always therefore be useful to those engaged in undertakings of this kind to observe and consider the means used by others to overcome such difficulties. With this view we have thought it right to consult most of the numerous codes which have appeared in Europe and America in modern times, as well as the writings of foreign jurists, and we are bound to acknowledge that in some instances they have furnished us with useful suggestions for the improvement of our law, while in others they have illustrated and confirmed our own previously conceived opinions.

In concluding these Introductory Observations, we have humbly to submit to Your Majesty our opinion that, independently of any improvement of the criminal law to be directly effected by means of legislative enactment, the execution of such a work as a General Digest cannot fail to be attended incidentally with important advantage. Treatises upon the criminal law of England are usually composed with a view to practical use in courts of justice; they, therefore, only exhibit the law as they find it; and the particular provisions of the law are seldom discussed in them upon principle, or with a view to a reformation or improvement of the system. On the other hand, the systematic reduction of the criminal law involves not only an investigation of the reasons on which it rests, but a minute comparison of the several parts with each other, and with the rules of the law relating to civil injuries. By thus subjecting the whole law to the test of rigorous examination, errors and imperfections are discovered, and the means of remedying them are pointed out, before embarrassment or injury have actually arisen from them in practice. Whereas the history of our criminal law for several centuries shows, that improvements have been rarely adopted until the occurrence of some pressing inconvenience or emergency (usually affecting only particular sections of the law) forced them upon the attention of the Legislature. The consequence has been that the improvements hitherto introduced have been partial and incomplete.

We conceive that, with a view to the general amelioration of the law, a most important advantage is gained by precisely describing its existing state, by reducing its provisions to distinct rules, and thus exhibiting such a complete delineation of the whole system that an accurate judgment may be formed of its merits and deficiencies.

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* 1 Hale, P. C. 489.

OFFENCES AGAINST THE PERSON.

I. Homicide.

Prefatory Remarks.

The order we propose to observe, in treating of the law of homicide, is, first to take a brief survey of the characteristic incidents which belong to the subject, and by which it may be conveniently defined and limited; secondly, to consider the mode in which the class of offences, comprehended under the general denomination of homicide, is regulated by the existing law; and thirdly, to submit our general conclusions.

To every culpable homicide two circumstances are essential:—first, the fact of killing; secondly, an evil disposition of mind on the part of the offender.

In respect of the mere fact of killing, it is necessary, in order to bring the offence within the jurisdiction of any criminal tribunal, that death should have been occasioned by some external act or some criminal omission; for although *in foro conscientiæ* one who designedly kills another through the medium of mental excitement, as by working on the imagination, be just as guilty as one who effects his purpose by actual violence, the two cases are not equally the subject of legal animadversion. The law cannot satisfactorily judge of or punish intention except it be manifested by some act of physical violence or some criminal omission.

The essential distinctions between culpable homicide and such as is justifiable or excusable, as also between the different degrees of culpable homicide, necessarily depend upon the following considerations:—

First, the mind and intention of the party in doing the act which occasioned death;

Secondly, the particular occasion of the act and circumstances attending it;

Thirdly, collateral grounds of legal policy.

Intention.

I. So far as the intention of the author of the death is concerned, the case admits of the following distinctions:—

1st. He may directly intend to kill the deceased or some other person;

Or, without intending to kill, he may intend to do *bodily harm* to the deceased or some other person;

And the harm so intended may be great bodily harm, or merely slight harm;

And such bodily harm, whether greater or less, may either be the immediate or the collateral object of the offender;

2dly. Being regardless of the safety of human life, he may wilfully do an act attended with manifest peril to human life;

3dly. He may be guilty of negligence or want of due caution either in doing an act not under the circumstances attended with manifest peril to life; or in doing an act which in fact was attended with such peril, but without wilfully and consciously incurring that risk.

Lastly, the death may be purely accidental, resulting from circumstances which were beyond the scope of ordinary vigilance, and consequently where the mind is not in fault.

The offence is obviously of a higher and more aggravated character, where the offender either directly intends to kill, or to do great bodily harm to the deceased or some other person; or where, being regardless of the safety of human life, he occasions death by wilfully doing an act attended with manifest peril to life; on the other hand, an offender within the third predicament, who occasions death merely through a blameable want of caution, is properly amenable for an inferior degree of culpable homicide.

Where no particular circumstances render some legal qualification or peremptory rule expedient, the higher degree of the crime of homicide properly, if not necessarily, depends on the intention of the offender to kill or do great bodily harm, or his wilful intention to do an act likely to kill. All the rules and distinctions properly incident to culpable homicide, with the exception of such as are founded upon consideration of legal policy are immediately derivable from the *intent to kill*, as the great principle of the crime. If a malefactor act with that intent, his punishment should be the same whether the *particular* blow or hurt

which was fatal was intended to be so, or was merely accidental. If the offender, intending to cut another's throat, in order the better to effect his purpose, were to throw him down, and in so doing happened to effect by an accidental blow, or by the fall, that which he intended to accomplish by the knife, the penal quality of the offence would not be altered by the accidental removal of necessity for further violence to accomplish the offender's object. So, if intending to shoot or poison one man, the offender by accident shot or poisoned another, the criminal intention, as well as the injury to the deceased, and the loss to society, would be the same. He intended to kill and did kill; whether, therefore, the crime be estimated by the intention or the result, its magnitude cannot be affected by the consideration that the mischief did not light where it was intended. The case of accidental homicide, in the endeavour to perpetrate a crime of a different kind altogether, as where one, intending to commit a theft, accidentally shoots another, admits of a very different consideration.

This is a subject to which we shall afterwards revert. We think it proper, however, in this place to explain that whilst we think that, in the case supposed of an offender's missing his aim and by accident killing one man where he intended to kill another, his crime is deserving of the same amount of punishment as if he had succeeded in executing his intention, we do not mean that the magnitude of the crime ought in principle to depend upon a result merely accidental. We think, on the contrary, that a mere accidental result cannot upon any just principle be made to enhance the offender's guilt; and that if the principle of protecting life would not warrant capital punishment in the case of a direct attempt to murder another, where means are used affording conclusive evidence of a murderous intention, such punishment would not be warranted by the merely accidental homicide resulting from such an attempt. But it by no means follows that the accidental killing ought to make no difference on grounds of policy, although it make none *in foro conscientiæ;* for it is obvious that where a life has been sacrificed, though indirectly, in the attempt to murder another, a jury would be less disposed to give undue weight to scruples in the execution of their duty, than they would be where the attempt had proved wholly abortive. This, therefore, may be a sufficient reason for diminishing the punishment in cases where, although death was intended, no personal injury has resulted.

Again, it appears to us that it ought to make no difference in point of legal distinction whether death results from a direct intention to kill, or from wilfully doing an act of which death is the probable consequence. According to the well-established judicial rule, every one must be presumed to contemplate the probable consequence of his own act. Neither is there any difference between the direct intention to kill and the intention to do some great bodily harm short of death, such case being within the immediate operation of the principle just adverted to, as no one can wilfully do great bodily harm without placing life in jeopardy.

The same principle pervades the rules relating to self-defence and extenuation. Where an attack is made with intent to kill, and is so resisted that ultimately the assailant cannot save his life but by killing the party assailed, the act, though it be necessary at the moment in self defence, is still attributable to the original intention which induced that necessity. A danger voluntarily incurred in seeking to destroy the life of another, cannot justify that destruction though it occurs under circumstances not originally contemplated. It is in truth but a mode of effecting the criminal purpose.

The same principle must prevail where a quarrel is sought with intent to kill or do great bodily injury under colour of provocation offered; for although previously to any mortal blow, provocation be given which might otherwise have operated in extenuation, yet having been voluntarily incurred, the act must be referred to the intent with which it was so incurred—that is, to the intention to kill—the procuring provocation being but a mode devised for killing with less risk to the offender. The principle applies without exception where, previously to provocation given which excites passion and subdues the reason, a design to kill is formed and endeavoured to be executed; for then, although provocation and passion intervene, the fatal result must invariably be referred to the intention of the offender in doing that which caused provocation, and by that intention must the criminal quality of the homicide be determined.

Thus in the case supposed by Lord Hale,* where A. and B. having quarrelled, A. says he will not strike, but will give B. a pot of ale to touch him, on which B.

* 1 Hale's P. C. 457.

strikes and A. kills him: here the offence of A. was murder; for the provocation was sought for and induced by his own act, in order to afford him a pretence for wreaking his malice.

Occasion and Circumstances attending the Fact.

II. There are necessarily some occasions, which, upon general principles of criminal jurisprudence, and independently of the motive or state of mind of the party who causes the death control the generality of the abstract rules founded on mere intention, and which tend to justify or excuse, or to extenuate the act of homicide. Of the former class, that is, of those which serve to justify or excuse the act, the most prominent are those founded on a principle of necessity where the act is essential to the defence of a man's person or property. The rule as to the latter class, *i. e.*, where the occasion serves to extenuate criminality, is also founded on a mixed principle of necessity and policy. It is necessary, as well as politic, to make allowance for the passions and infirmities incident to human nature, and it is neither advisable nor practicable to punish those who have offended in a moment of transitory passion, or under circumstances of fear or surprise, which controlled the free exercise of the judgment, in an equal degree with those who are guilty of cool and deliberate homicide.

In cases of killing upon provocation, the motive and state of mind of the party become essential to indicate the nature and quality of the offence. Where death is occasioned without deliberation, and under circumstances of provocation and excitement which, for the time, subdue the judgment, or of alarm and surprise which partially deprive a man of the powers of self-possession, and occasion him to do an act which he would not have done had his judgment remained unimpaired, the act, though culpable, is yet extenuated by the absence of deliberate malice. The principle of extenuation, in such cases, applies universally where a man, without seeking the occasion, labours under a temporary and partial privation of judgment, but it is properly confined, for the better protection of life, within certain reasonable and definite limits; for it is impossible to say that every petty affront should be available to extenuate the wilful destruction of life.

It would offend against the principles of criminal jurisprudence either to disregard altogether the plea of extenuation on the ground of provocation, or to allow it to extend to the slightest degree of provocation. Policy requires an intermediate line to be drawn; and even where this has been done, the plea of provocation is, in principle, unavailable, unless it appear that, in truth, the act did not result from malice, but from uncontrollable passion. An obvious condition, essentially annexed to every plea of this kind, is the circumstance to which we have already adverted, viz., that the party claiming to avail himself of it did not seek the occasion to colour his real purpose and to serve as a screen from punishment.

These principles qualify the positions deducible from a mere consideration of the intention of the offender, in connection with the act of killing. Although, considering simply the intention of the actor and the result, the crime would constitute the higher degree of homicide, yet the occasion may, independently of the intention, furnish a defence, or may, in the absence of a malicious and deliberate design to kill, extenuate the offence.

Collateral grounds of legal Policy.

III. In the next place, there are some rules concerning the crime of homicide which are dependent on principles of legal policy, where the magnitude of the offence is not determined by the intention of the offender, simply as regards the destruction of life, but by some criminal motive or circumstance collateral to that intention. One class falling within this principle, which we shall hereafter more particularly consider, consists in homicide unintentionally occasioned in the endeavour to commit some other crime attended with danger to the person. Another relates to the killing of officers and others acting for the advancement of the law.

Policy, or rather necessity, peremptorily requires that every minister of justice should be protected, not only in his execution of any express sentence of the law, but also in doing every act which the law obliges him to do in the administration and advancement of justice. And this principle, which is essential to the very existence of the law as an imperative rule of conduct, extends also to the protection of all who either assist ministers of justice in executing the authority of the law, or who, being mere private persons and not known officers of the law, lawfully execute such powers as the law casts upon them for the advancement of justice and the prevention of wrong. As a general principle, it is obvious that all who act in the advancement of justice ought to be protected to this extent,—that so long as they do no more than the law authorizes them to do, they are entitled to exemption from all responsibility. And also, that when, under the like circumstances, a minister of justice is unlawfully resisted and killed by one cognizant of his authority, it is

essential, for vindicating the authority of the law, that the offence should rank as a homicide of the highest penal class.*

We may here observe that it is not any part of the business of defining crimes and punishments, to lay down any rules for regulating the mode in which any process, civil or criminal, is to be conducted, in respect of arrests of the person, or the breaking or entering of houses for execution of process, or even as to the extent to which private individuals are bound, or are permitted to act for the prevention or suppression of offences, or the securing the custody of offenders. Such regulations properly belong to those branches of the civil and criminal law respectively, which concern the execution of process, and the prevention or suppression of crimes by other modes than criminal prosecution.

The law of England in its principles and details corresponds with the great outlines already noticed.

It recognizes two degrees of culpable homicide, independently of self-murder—murder and manslaughter; the first comprehending the two great classes already adverted to as dependent on the intention of the offender to kill or do great bodily harm, or wilfully to place human life in peril, and also killing in the endeavour to commit some other crime, or in resistance to ministers of justice and others acting for the advancement of the law; the other comprehending all cases of culpable homicide not amounting to murder, where death is occasioned by want of due caution or circumspection; also all cases of homicide which do not amount to murder, because they are extenuated by circumstances; and lastly, all cases where a minister of justice or other such officer is killed, but where, in consequence of want of notice, defect of authority, or other circumstance essential to murder, the crime falls within the inferior denomination.

The law of England also recognizes the plea of justification in the necessary defence of person or property, the plea of extenuation founded on provocation, and also makes special provision for the protection of officers and ministers of justice, where the killing of any minister of justice, although culpable, does not under the circumstances amount to murder.

We shall now proceed to notice some peculiarities of the law of England concerning homicide, upon which we deem it to be necessary to offer some suggestions.

Implied Malice.

The crime of murder, the highest class of culpable homicide known to our law and the laws of most countries, is in the law of England characterised by its having been committed with premeditation, or what the English law terms malice prepense, or malice aforethought. But as this class comprehends not only those instances where the offender acts from a motive of ill-will against another, and an express intention to destroy or injure him, but also other cases where there is no express malice, but where it is necessary on grounds of policy to punish homicide with the highest degree of severity, the term "Malice aforethought" is often applied to a state of circumstances where malice does not exist in the ordinary sense of the term, but is only malice in a legal sense by construction of law.

If A shooting at B with intent to kill him, were to miss B and kill C without intending to kill him, he would be guilty of killing C of implied malice. Or if A were to throw a great stone from a house into a street in which he knew that numbers of people were continually passing and to kill B, a mere stranger, he would be guilty of implied malice in killing B.

If the various facts and circumstances which constitute implied malice were sufficiently defined, there would be no particular inconvenience in the use of the term as a descriptive ingredient in the crime of murder. But implied malice, according to the law of England, is loosely defined, or rather is not defined at all. It is stated by an eminent authority on the subject (Mr. Justice Foster) to be a pure question, or conclusion, of law, from all the circumstances of the case; and it is made to depend on a very abstruse and technical doctrine, by which a criminal intention, wholly unconnected with any personal injury, in connexion with a purely accidental killing, is in some instances made to constitute the distinction between the higher and lower species of culpable homicide, and in others, to bring an accidental killing within the scope of manslaughter.

Mr. Justice Foster says, "When the law maketh use of the term 'Malice aforethought,' as descriptive of the crime of murder, it is not to be understood in that narrow restrained sense to which the modern use of the term 'Malice' is apt to lead one, a principle of malevolence to particulars; for the law, by the term

* We have elsewhere stated our opinion of the imperfect state of the law of England on this subject.—See *post*, Digest of Homicide.

'Malice,' in this instance, meaneth, that the fact hath been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit." * Again he says, "the *malus animus* which is to be collected from all circumstances, and of which, as I before said, the court and not the jury is to judge, is what bringeth the offender within the denomination of wilful malicious murder." † Again, "And I believe most, if not all the cases which in our books are ranged under the head of *implied malice*, will, if carefully adverted to, be found to turn upon this single point, that the fact hath been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty and fatally bent upon mischief." ‡

It is scarcely necessary to observe, that the conclusion of Mr. Justice Foster supplies no certain boundary for distinguishing the crime of murder; all that is concluded is, that to constitute murder the fact must have been attended with such circumstances as in the opinion of the court, not of the jury, are "the ordinary symptoms of a wicked, depraved, malignant spirit;" of "a heart regardless of social duty and fatally bent upon mischief." It is a description of that which is rather matter of fact than of law; for whether in any particular instance an offender in doing what was perilous to human life, acted in wanton and wicked disregard of the probable consequences of his act, is to be decided by the consideration of a variety of circumstances which are properly matters of fact upon which a jury may be able to draw the conclusion; but where the court would not, by the aid of any mere technical rules, be able to deduce any legal results from the facts.

When an attempt to explain implied malice by so high an authority as Mr. Justice Foster, on a review of all the cases, ends in a description so vague and indistinct as is contained in the above terms, it may, without hesitation, be inferred that the common law afforded no certain test of that malice which was essential to the crime of murder: had the law furnished any more specific definitions on the subject, they would not have escaped the search of so diligent an inquirer.

We proceed to offer some observations and illustrations, with a view to show that in the ordinary case where death is occasioned by the doing an act attended with manifest peril to life, the conclusion is properly one not of law but of fact, and that it is for the jury to decide whether the offender wilfully exposed life to manifest peril. Upon their affirming or negativing this proposition, the question whether he be guilty or not of murder, ought, we think, to depend.

The "*mens mala*,"—the heart regardless of social duty,—are figurative expressions used to denote the criminal apathy or indifference with which an act is wilfully done which puts human life in peril. Whether such a peril be wilfully occasioned is a question not of law but of fact, depending on a consideration of the nature of the act done, the circumstances under which it was done, the probability that the act under those circumstances would be fatal to life, and the consciousness on the part of the offender that such peril would ensue.

If A, knowing that one of two pistols was loaded with ball, but without knowing which, took one, and applying the muzzle to the head of B, pulled the trigger and shot him, having by chance taken the loaded one, this would be murder; for A. wilfully placed B's life in peril by his act. Here it was an even chance whether B was killed or not,—but it is evident that the principle and the law founded upon it must be the same, even although the probability were less; as for instance, though the selection were made from three or four (one only being loaded) instead of two; although no doubt the degree of probability may be an important circumstance in ascertaining the *fact* of the intention of the offender to put life in danger.

Neither the nature nor the degree of peril can possibly be the subject of legal definition; as well the knowledge of the offender that such peril exists, as the wilfulness of his act in proceeding notwithstanding that knowledge, are necessarily matters of fact, the existence of which is for the consideration of the jury. It may no doubt frequently appear, from the particular facts found by the jury, that the offender did wilfully expose human life to manifest peril, but still, as in numerous instances the court may be unable to draw the conclusion from the mere facts, it seems to be clear, as a general position, that the question is one of fact for the jury. In particular, it may be noticed that the fact of knowledge on the part of the accused, of the peril he was about to occasion by his act, must very frequently depend upon mere circumstantial evidence, upon the effect of which it is the province of a jury to decide.

Malice, in the legal sense of the word, means, according to Mr. Justice Foster,

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* Discourse on Homicide, II. p. 256. † Id. p. 257.
‡ Id. p. 257.

the *mala mens*, the heart bent upon mischief, as evidenced by general symptoms and circumstances. When this definition is applied to an ordinary case of implied malice, as where a man throws a heavy stone over a wall into a street, through which many persons are likely to be passing, malice thus defined assumes a more precise meaning. The offender in such case does not intend the death or hurt of any one in particular,—the act may kill a stranger or may do no hurt at all: there is nothing, therefore, to make it criminal, and so to constitute implied malice, but the peril of destroying life wilfully occasioned. The "heart bent on mischief" must in this case, and it is apprehended in all others, in the absence of a special definite rule of law which defines what is meant by implied malice, consist simply in the disregard of life manifested by exposing life to peril, although no malice in the popular sense of the term exist against any individual.

It is the *wilful exposure* of life to peril that constitutes the crime. If one, knowing cakes to contain deadly poison, were to scatter them in a public street, and death were the consequence, the act would be murder, for the offender knew that what he did was likely to occasion loss of life; but if one did the same act without knowing or suspecting that the cakes contained poison he would be innocent in law as well as in morals, for, although the act be in truth equally dangerous whether knowledge exist or not, in the one case great peril to life is wilfully occasioned, and in the other not. And so in all cases it is essential to the criminality of the act, both in law and morals, not only that the act should in its own nature under the circumstances be attended with peril to life, but that the offender should be aware of such peril. Where the offender does an act attended with manifest danger to life wilfully, that is with knowledge of the consequences, he may properly be said to have the "*mens mala*, or heart bent upon mischief;" but if he does an act, however dangerous it be in its own nature, without any knowledge or suspicion of its tendency, that is, if he does not wilfully place life in peril, he cannot be said to show the *mens mala*, or heart bent on mischief. In such cases, therefore, it is plain that implied malice, or malice in law, according to Mr. Justice Foster's notion, means nothing more than the state or disposition of the offender's mind when he wilfully does an act likely to kill or wilfully intends to put life in peril; but this is a conclusion to be drawn from the facts, viz., the probability that death will result from the act under the particular circumstances of the case, and the intention of the offender to occasion the peril regardless of consequences. No facts or symptoms evidencing brutality or malignity of mind could possibly be material to the inquiry, except so far as they tended to show the wilful intention to occasion the risk; and when that was proved, the offence would be complete.

In so atrocious a case as that of scattering poison, above supposed, no doubt could well be entertained as to the guilt of the offender, dependent as it is on the circumstances of the act being in its own nature attended with manifest peril to life, and of the criminal intention on the part of the offender wilfully to place life in peril. In other instances, although the evidence be not so cogent, it will be found that the difficulties arise not from the necessity of calling in aid the operation of any new principle, or the applicability of those adverted to, but merely from doubt arising upon the matter of fact. The degree of probability that death will ensue from the act is susceptible of every variety from moral certainty to the remotest possibility;—the intention of the actor is also capable of degrees, closely indeed dependent on the greater or less degree of probability of mischief, from a direct intention to destroy life, to perfect innocence. And such varieties, it may be observed, are not merely in proportion to the risk, but depend also on the knowledge and consciousness of the risk to life. These elements are obviously matters of fact, to be decided as facts; they are beyond the reach of definition, and when probability of loss of life from doing the act, the knowledge of that probability on the part of the offender, and his criminal intention to occasion the risk have been determined in fact, the principle of law applies.

It is upon these principles that the different degrees of legal guilt, in the absence of a direct intention to kill, depend. If poison instead of being, as in the case above supposed, used in such a manner as to occasion manifest danger to life, and with consciousness and knowledge of such danger, were to be used for the destruction of rats by placing it in a closet locked for greater precaution, the loss of human life would still be a barely possible, although most improbable, result from the act; a thief might by possibility break open the closet, and mistaking the poison for food, eat it and die. Here the fatal result would occur without the least blame, legal or moral, on the part of him who thus laid the poison. But between these two extreme cases lie an infinity of others, in respect of which important legal distinc-

tions are requisite, although they may vary almost imperceptibly from each other, and particularly as to the degree of risk to human life which may be incurred.

If one were for a lawful purpose, as above suggested, to lay poison, but negligently and imprudently, and without taking necessary precaution to prevent danger to life, but without consciousness that it was attended with such danger, the want of caution in such a case would furnish a wide and clear distinction from the case of one to whom no want of caution is attributable. The act is therefore, to a certain extent, culpable, and the want of caution constitutes a plain test of criminality.

It is also clear that there exists a wide difference between such a case of negligence and want of caution, and that of an offender who, with the knowledge that death is likely to result from his act, wilfully incurs the risk. In the one case the want of consideration, the omission to exercise that degree of vigilance to acquire the knowledge of danger, and found upon it those measures of precaution which prudent men from reasonable regard to the safety of human life would exert and adopt, constitutes the offence; in the other the offender knows that loss of life is likely to result, and acts, in despite of that probability, in wanton disregard of life.

For these reasons we infer, in the absence of an express intention to kill or to do great bodily harm to another, and where the quality of the offence is to depend on the evil disposition of the mind of the offender, that whether it be designated as the *mens mala*, or heart bent on mischief, or be described in any other terms, the question must really turn upon the single point of malice involved in the particular transaction; and that, confining the inquiry to that transaction, it is reduced to the mere question whether the offender, being conscious of the risk, wilfully exposed life to danger. If there was no such danger or no such consciousness, there could be no such malignity of heart in the transaction as could constitute the crime of murder; and this being the test of guilt, the question is properly one of fact, as dependent on the existence of peril, and the design to expose to peril.

The distinctions between the higher and lower degrees of homicide, and that between culpable and merely accidental homicide, as well as what is meant by the figurative expression of "a heart regardless of social duty," are thus aptly illustrated by Mr. Justice Foster:—"A person driving a cart or carriage happeneth to kill. If he saw or had timely notice of the mischief likely to ensue and yet drives on, it will be murder, for it was wilfully and deliberately done. Here is the heart regardless of social duty, which I have already taken notice of. If he might have seen the danger, but did not look before him, it will be manslaughter, for want of due circumspection. But if the accident happened in such a manner that no want of care could be imputed to the driver, it will be accidental death, and the driver will be excused."*

Here it is observable that it is the case of a heart regardless of social duty, that is a case of malice in law, and consequently murder, because the act is wilfully and deliberately done; but whether it be in truth wilfully and deliberately done is a mere question of fact,—a conclusion to be deduced by the jury, but which the court could not sufficiently judge of from a mere finding of the minute particulars attending the transaction. And the same observation applies to the want of caution which may be sufficient to constitute the offence of manslaughter.

Provocation.

We think it proper to make some observations upon another and very important class of cases, in which the question whether the offence has amounted to murder, or merely to manslaughter, has been said to depend on implied malice, and as such to be a question of law, with a view to show that the question is in truth one of fact and not of law. We allude to the class of cases where, some degree of provocation having been offered, the question is whether under the circumstances of the return made by the offender his offence shall be accounted murder, or shall be regarded as extenuated by the provocation, and to amount to manslaughter only.

The law merely ordains that a ferocious excess of violence, far beyond what the occasion called for, and which, therefore, cannot be attributed to mere heat and passion excited by the occasion, shall not be justified, but shall be accounted murder; but the law cannot define or decide generally in what circumstances such excess shall be deemed to consist. This, we think ought to be treated as matter of fact under the circumstances of each particular case.

If upon a slight blow given, the party struck returned a moderate blow not likely to prove fatal, and death ensued, it might no doubt be decided as matter of law, on the particular facts proved, that it was not murder. If, in a similar case, the offended party were for a great length of time to continue his blows, and

* Discourse on Homicide, II. p. 263.

never to desist until he had ascertained that life was extinguished, here again it might be easy to pronounce that the death resulted not from any sudden heat or passion which the first blow could have occasioned, but that the excess was attributable only to a deliberate intention to kill; yet intermediate cases, lying between these extremes, could only be determined as questions of fact. A jury having all the circumstances before them might in every case be able to decide whether the limits due to excited passion had been transgressed so as to compel them to attribute the excess to deliberate malice; but they could seldom by their verdict give such a description of the magnitude of the provocation, the force of passion excited, the manner and continuance of the return made, the comparative strength of the parties, which, in a case at all doubtful, would enable a court to decide the question as a matter of law;—still less would it be possible, *à priori*, to define by any general rules what should constitute such a clearly malicious excess as would amount to murder.

The efforts which Mr. Justice Foster makes to reconcile the cases on this subject, and bring them within the scope of a general rule of law, show the difficulty of the undertaking; for although he may have succeeded in proving that in particular cases, correct reports being selected and the circumstances carefully examined, the conclusions were reasonable, this merely shows that they contravened no rule of law, but were such as a jury might reasonably attain to in point of fact; but no rule of law is deducible for judging in other cases which occur under different circumstances, and where inferior degrees of provocation are given, or a more offensive or mortal weapon used in making the return. The father is decided to have been guilty of manslaughter only, in killing another who had beaten the son, because he used only a small stick and not a cudgel, whence it may be inferred that if he had in fact used a cudgel with the same result, the crime would have amounted to murder; but this seems to afford no rule for judging of intermediate cases where a father, under the like provocation, uses a larger stick or a smaller cudgel. It is obviously impossible that the law should fix any certain boundary by means of such limits. The law may pronounce whether any extenuating occasion of provocation existed, but it is for the jury to decide whether the offender acted solely on that provocation, or was guilty of a malicious excess in respect of the instrument used or the manner of using it.

Where the provocation is apparently slight, and death be immediately inflicted in return with a deadly weapon, it may be said that antecedent malice may be inferred, or that the disproportion between the alleged insult and the return made is too great to allow such an effect to be attributed to so slight a cause. The question, however, cannot be one of mere presumption or inference independently of inquiry, and, therefore, cannot be a question of law, if it be possible that, in point of fact, the insult offered excited such a state of passion and want of self-control as occasioned the act. It would be impossible, we think, to prescribe any limits of disproportion beyond which the province of the jury should be excluded, and the question should be treated as a mere question of law. On the other hand, disproportion in such a case is always an important circumstance for the consideration of the jury, to guide them to the conclusion whether the offender really acted under the influence of passion excited by provocation.

The cases put by Mr. Justice Foster to illustrate his doctrine, that the question of extenuation is one of law, do not seem to support that position; they are merely extreme cases, in which no doubt can occur, except it be a doubt in point of fact; and the latter instances cited seem clearly to be cases of mere manslaughter, even independently of any provocation given. He says, "The rule will, I conceive, govern every case where the party killing, on such provocation, maketh use of a deadly weapon, or otherwise manifesteth an intention to kill, or to do some great bodily harm; but if he had given the other a box on the ear, or had struck him with a stick or other weapon not likely to kill, and had unluckily, against his intention, killed, it had been but manslaughter." The latter branch of this observation seems to be wholly independent of the question of provocation; for, supposing no provocation whatsoever to have been given, and that one unlawfully gives another a box on the ear, or strikes with a stick or weapon not likely to kill, and unluckily, and against his intention, kills, it is difficult, on any just principle, to make it wilful murder. The offender, in fact, neither intends to kill, nor to do great bodily harm, nor voluntarily puts life in peril by using means likely to kill. In such a case, therefore, there can be no malice express or implied.

Want of due Caution.

The question whether for want of due caution a party were to be considered guilty of manslaughter or the death was merely accidental, has also been regarded as a question of law under circumstances which seem to make it more properly a

question of fact. An instance of this kind, reported by Kelyng, is cited by Mr. Justice Foster,* with just disapprobation, as being a hard case and of very extensive influence. "A man found a pistol in the street which he had reason to believe was not loaded, *having tried it with the rammer;* he carried it home and showed it to his wife, and she standing before him he pulled up the cock and touched the trigger. The pistol went off and killed the woman. *This was ruled manslaughter.*" This, then, was decided as a matter of *law*, but in such a case the law seems plainly to depend on a question of fact, viz., whether that reasonable degree of caution was used which is usual and ordinary in like cases.

The law may well pronounce as to the consequences where death results from the want of due caution, but whether, in the particular instance, there was a want of due caution, is a mere question of fact to be decided on a consideration of the circumstances of each particular case.

In a case very similar to the above† the same learned judge states that he left it to the jury to say whether the prisoner had reasonable grounds for believing that the gun was not loaded, and upon that direction the prisoner was acquitted. Had the same course been taken in the case reported by Kelyng it is next to impossible but that the jury would have acquitted the prisoner, and then the learned and humane judge would have been spared the necessity of dealing with the decision as matter of law, and urging the necessity of tempering justice with a larger portion of mercy. His language upon this occasion is very remarkable, and conveys a reflection on the motives for executing the law with rigour, which reflects little credit on the administration of justice in former times, and at the same time tends to explain why such questions should have been dealt with as questions of law rather than of fact. "Manslaughter," he observes, "was formerly a capital offence, and even the forfeiture of goods and chattels upon the foot of the present law is an heavy stroke upon a man guilty, it is true, of an heedless, incautious conduct, but *in other respects perfectly innocent;* and when the rigour of the law bordereth upon injustice, mercy should, if possible, interpose in the administration. It is not the part of judges to be perpetually hunting after forfeitures, *where the heart was free from guilt.*"‡

Before we leave this subject, we may observe that the inconvenience resulting from considering questions of implied malice to be mere questions of law is by no means theoretical, as in several instances offenders have escaped punishment from inability on the part of the court to decide as questions of law what ought to have been decided by juries as matters of fact. In illustration of this position we may refer to the following case:—On words of provocation, a man threw a broomstick at a distance at a woman and killed her, and the judges not being unanimous a pardon was advised. The doubt there (observes Sir E. H. East), must have been on the ground that the instrument was not such as could probably, at that given distance, have occasioned death, or great bodily harm.§ Here a party who undoubtedly committed culpable homicide, escapes altogether on the sole ground that the question was a question of law, and not of fact, which, nevertheless, the judges, as a question of law, were unable to resolve. The real doubt is that which the learned author suggests, the probability of a fatal result under the circumstances; for if that probability was considerable, the prisoner wilfully placed life in peril. But of the degree of probability the jury alone could properly judge; that the judges could not, the result clearly proves.‖

It has been necessary to consider these doctrines of the law of England with the greater attention, because, if well founded, they necessarily exclude, in all cases to which the notion of implied malice is applicable, any precise and definite rules. After much consideration we have come to the conclusion that such cases depend in principle on questions of fact, and we have therefore so treated them in the Digest.

It is probable that formerly the crime of murder was confined principally to homicides perpetrated of express malice, and where the intention to kill constituted the great characteristic of the offence, distinguishing it from a killing through care-

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* Discourse on Homicide, II. p. 263. † Id. p. 265. ‡ Id. p. 264.

§ 1 East's P. C. p. 236.

‖ "A man was driving a cart with four horses in the highway at Whitechapel; he being in the cart, and the horses upon a trot, they threw down a woman who was going the same way, and killed her. Holt, C. J., and others, held this to be merely misadventure." This was treated as a matter of law;—but surely it was properly a question for a jury whether, under such circumstances, the conduct of the driver was free from blame; consequently, whether the case was one of manslaughter or of misadventure. 1 East's P. C. p. 263. See also Hazel's Case, 1 East's P. C. p. 236.

lessness or by accident or misadventure. The limits of the crime would naturally be extended in this as in other cases, by a constructive extension of its rules, and thus constructive or implied malice, or malice in law, became a test of murder; but as the question how far and to what cases the offence should be extended by construction was of course a question of law, implied malice as the supposed test of the extended crime was also a question of law; or in other words it was a question of law how far the offence should be extended under the pretext of implied malice.

Homicide in pursuit of an unlawful purpose.

We proceed to notice more particularly a feature of the law of England closely connected with the doctrine of implied malice, and founded, as it seems, on supposed grounds of legal policy; that is, that homicide which would otherwise be no more than death by misadventure, is to be deemed culpable by reason of its having happened in the prosecution of some illegal purpose wholly collateral to the event; and that, upon the same principle, homicide which would otherwise be no more than manslaughter shall be deemed to be murder.

It may be very questionable whether, in point of principle, an effect wholly unexpected and unconnected with the intention and act of the party, except by accident, can properly be made the foundation of criminal responsibility; for as the object of punishment is the prevention of crime, it ought properly to be annexed to such acts as are in themselves culpable by reason of their mischievous tendency, and the intention with which they are done, and not to such as are simply accidental and unintentional. By the law of England this doctrine is in many instances reversed, and the criminal intention incident to the act intended but not perpetrated, or not in question, is supposed to be transferred to the act which was the mere accidental consequence. Thus a party doing the same act in the same manner, but who by mere accident, and not through want of caution, kills another, may be, according to his intention in doing that act, though such intention be wholly unconnected with the accidental result, guilty either of murder where his intention was to commit a felony, or of manslaughter where his intention was to commit a bare misdemeanor or trespass, or an act *malum in se*,—or purely innocent, where the act, although unlawful, was merely *malum prohibitum*.

Mr. Justice Foster* says, "In order to bring the case within the description of homicide by misadventure, the act on which death ensueth must be lawful; for if the act be unlawful, I mean if it be *malum in se*, the case will amount to felony, either murder or manslaughter, as circumstances may vary the nature of it. If it be done in prosecution of a felonious intention, it will be murder; but if the intent went no further than to commit a bare trespass, manslaughter; though I confess Lord Coke seemeth to think otherwise." The instances cited by Mr. Justice Foster in illustration of this doctrine are not inapt to show the want of principle exhibited by such a rule. "A shooteth at the poultry of B, and by accident killeth a man; if his intention was to steal the poultry, which must be collected from circumstances, it will be murder by reason of that felonious intent; but if it was done wantonly, and without that intention, it will be barely manslaughter." But he adds, that if an unqualified person shoots at game, and the same accident happens, it is excusable; "for," he says, "the statutes prohibiting the destruction of game, *under certain penalties*, will not, in a question of this kind, enhance the accident beyond its intrinsic moment." This may be a very satisfactory reason in the latter case, but it is equally, if not more strongly, applicable in the former. There seems to be no good reason why a trespass relating to a man's fowl should be enhanced beyond its intrinsic moment, which is in law a liability on the part of the trespasser to pay the value, to be recovered in a civil action; whilst the shooting at game without a qualification is not merely a civil injury, but an offence punishable by a penalty to the amount of much more than the value of the fowl. If the distinction is to depend on the intrinsic illegality of the wrong done, it ought to be applied in favour of the mere trespasser.

The learned judge states, that he once held at the assizes that a man throwing at a cock at Shrovetide and killing a child by accident was guilty of manslaughter, because "it is a barbarous and unmanly custom, frequently productive of great disorders, dangerous to the bystanders, and ought to be discouraged."† These are good reasons for prohibiting such a practice, by a direct and substantive law for that purpose; but it cannot be proper to check it indirectly, by making a mere accidental killing amount to manslaughter. Such a course would be, in effect, to make an objectionable practice a crime by indirect means; but as

* Discourse on Homicide, II. p. 258.

† Id. p. 261.

prevention is the proper object of inflicting punishment, such punishment ought, we think, to be directly annexed to the offence to be prevented.

It is observable that in the above case the learned Judge does not appear to have relied entirely on the ground that the act from which death resulted was *malum in se*, he further observes, that the practice is "dangerous to by-standers."

The rule is also open to the charge of inconsistency, for whilst a mere immoral act, not *per se* illegal, is thus made, in connexion with an accidental killing, to constitute a culpable homicide, yet the act of shooting at game by an unqualified person, although an illegal act,* has no such consequence; so that in effect a merely immoral act is regarded as more criminal than one which is absolutely illegal. And thus the question of culpable or innocent homicide is made to depend on the very doubtful distinction between that which is *malum in se* and that which is merely *malum prohibitum*.

Again, according to this doctrine, accidental homicide is made an offence variable in point of guilt, according to the nature and degree of the collateral offence intended to be committed, and thus as the degree of the offence is by no means a correct measure of its magnitude and atrocity (many misdemeanors being more highly penal than some felonies), the crime of murder and the life of the offender is made to depend on distinctions purely technical and artificial.

The necessary consequence of such a defect is unfavourable to the administration of justice. Where the penalty bears a due proportion to the offence, a popular tribunal is willing to give the law its effect; but it is otherwise where a jury is called upon to pronounce a verdict in a capital case, and where the heinousness of the offence is to be judged of by mere technical rules. It would be hard to convince a jury, in the case put by Mr. Justice Foster, of the expediency of putting a man to death, because in attempting to shoot and steal a fowl, an offence in respect of which an imprisonment of six months would have been thought sufficiently severe, homicide resulted from pure accident.

For the above reasons we have thought it expedient to obviate this defect in the Digest by modifying the existing law. Whilst we think that a mere accidental killing in the endeavour to do an illegal or criminal act, wholly unconnected with any danger or mischief to the person, cannot on any just principle be brought within the scope of the law of murder, it appears to us that the same objections do not apply, or, at all events, do not apply with the same force, to the case where death is occasioned in the endeavour to commit a crime with violence to the person or habitation of another, and consequently is attended with some degree of risk to the person, although it may not be so great as to constitute murder without resorting to the consideration of the offender's intention. For here the result is not a matter of pure accident wholly unconnected with the criminal intent; and consequently the enhanced punishment is justified by one of the main principles of penal laws, namely, the prevention of crimes of violence attended with danger to the person. For these reasons, we do not think it necessary to do more than restrain the present generality of the law in this respect, by confining the rule to cases where death results from the endeavour to commit some crime with force against the person or habitation.

Limitation of the time of death.

The limitation of the time of the death to a year after a mortal hurt done, is a rule of so arbitrary a nature, as seems to require some notice. It originated, no doubt, in the difficulty which it was supposed would exist in evidence, in showing after a considerable lapse of time that death really resulted from the inquiry given. But although it cannot but be regarded as some sacrifice, in point of principle, to allow a murderer to escape, merely because the deceased, from natural strength of constitution, or from accidental circumstances connected with the injury, happened to linger for more than a year, we have not considered ourselves to be justified in suggesting any alteration of this ancient rule. We are not aware that any practical inconvenience has resulted from such a limitation, and considering the provisions which have been made by modern statutes, which embrace almost every mode of violence to the person, with intent to murder, we do not think that any considerable degree of inconvenience is likely to result from it.

Deodands.

We think we should not be justified on this occasion, if we omitted to recommend the abolition of deodands, one of the last relics of very severe and oppressive laws, which exacted considerable mulcts and forfeitures in many instances of death,

* Killing game without a qualification was, at that time, illegal.

accruing purely from accident or misadventure. The practice originated, as is notorious, in religious and benevolent motives, but the ancient mode of applying such forfeitures having long been disused, and the forfeitures being in themselves unjust as imposed on persons not in fault, and moreover being in practice frequently imposed in an arbitrary and capricious manner, and in the absence of the owner of the property, we cannot but recommend their abolition. In some instances they may be honestly imposed by way of fine, in respect of negligence or carelessness, which has conduced to the loss of life. This, however, too seldom happens to create any general or satisfactory inducement to greater caution, and in some instances such a practice might be attended with inconvenience in leading jurors on inquests to substitute a fine for negligence, in the place of a verdict of manslaughter. It should be remembered, also, that deodands are imposed by juries under the superintendence of the coroner, who is not necessarily a lawyer, and is frequently incompetent to give proper directions upon the law as applicable to this subject.

We subjoin the remarks made by Mr. Justice Foster respecting deodands, as coincident with our own views of the propriety of abolishing them. He observes, "Accidental death, which happeneth without the intervention of human means, induceth a forfeiture, which the ignorance and superstition of ancient times called a deodand. These forfeitures were part of the casual revenues of the Crown; and the value when found by the coroners inquest, was put in charge to the sheriff, in order to be levied on the ville where the accident happened, and was paid into the hands of the King's almoner to be applied to pious uses for the soul of the deceased. This forfeiture, which is not now applied to superstitious uses, is still part of the revenue of the Crown, unless where lords of franchises are entitled to it by grant; for no man can prescribe to it, or to the goods of felons of themselves or other felons or outlaws happening within his royalty. I have nothing to add to what other writers have said touching deodands more than to observe, that as this forfeiture seemeth to have been originally founded rather in the superstition of an age of extreme ignorance than in the principles of sound reason and true policy, it hath not of late years met with great countenance in Westminster Hall; and when juries have taken upon them to use a judgment of discretion not strictly within their province, for reducing the quantum of the forfeiture (I wish the temptation to it was taken out of their way), the Court of King's Bench hath refused to interpose in favour of the Crown or lord of the franchise."*

We make these observations on this subject incidentally, but the full discussion of it belongs to that part of the Digest which relates to procedure.

In making the comments which we have deemed to be necessary on the law of homicide, we have referred particularly to the doctrines expounded by Mr. Justice Foster. We have done so because we consider him to be one of the highest authorities upon the criminal law of England, more especially as regards the crime of homicide. He was remarkable for the acuteness and earnestness with which he prosecuted his extrajudicial inquiries; and he has treated the various subjects contained in his volume with much more attention to the fundamental principles of penal jurisprudence than any other writer on the Criminal Law of England. It was therefore incumbent upon us fully to explain the ground on which we presume to propose any deviation from the law, as laid down by so eminent an authority.

Mr. Justice Foster's Discourses were intended by him to expound and discuss the law as it stood, with a view to its improvement, by means purely *judicial*, as contradistinguished from any *legislative* aid. With that view he laboured strenuously and zealously to reduce conflicting decisions within rules as definite as circumstances permitted. In doing this without recourse to legislative aid, he merely followed the example which had been set by the learned judges of the realm from the earliest times. For it is matter of obvious remark upon the history of English jurisprudence, how seldom it has been that defects rendered apparent in the course of the administration of justice in this country, especially in former times, have been remedied by any effectual appeal to the Legislature for an amendment of the law. Had the attention of this acute and learned writer been directed to the subject of legislative amendment, it cannot be doubted that he would have recommended the alteration of some parts of the law, upon which he strongly animadverts.

* Discourse on Homicide, II. p. 265.

DIGEST

OF THE

LAW OF OFFENCES AGAINST THE PERSON.

I. HOMICIDE.

THE following analysis and summary will serve to explain the arrangement of the Digest of the law of homicide.

Criminal homicide is,

I. Murder;
II. Manslaughter; or,
III. Self-murder.

Homicide not criminal is justifiable, excusable, or by misadventure.

I. Murder is of three kinds:

1. Voluntary homicide not justifiable, excusable, or extenuated by circumstances;
2. Homicide in committing or attempting to commit specified crimes;
3. Homicide committed in unlawfully resisting officers or others acting in execution of the law.

Homicide is justifiable or excusable:

For the execution or advancement of the law;
For defence of person or property;
For self-preservation.

Homicide is extenuated where it is not deliberate but is committed—

Under the influence of provocation arising from a sufficient cause;
Or, is attributable to the influence of fear, or effect of surprise.

II. Manslaughter is either—

1. Voluntary but extenuated homicide;
2. Involuntary homicide, not merely by misadventure.

Involuntary homicide, not by misadventure, includes—

1. Homicide resulting from any act or omission done or omitted with intent to occasion bodily harm to any other person;
2. Homicide resulting from any wrong occasioned to the person of another;
3. Homicide in committing or attempting to commit offences attended with risk to the person;
4. Homicide resulting from any act or unlawful omission done or omitted without due caution.

III. Self-murder.

I. HOMICIDE.

[Several Rules connected with Homicide will form part of the general Introductory Rules to the Digest, and some of the following provisions may be hereafter superseded by more general Rules.]

SUMMARY OF CONTENTS.

[Of what homicide the law takes notice, Art. 1—9. Murder, Art. 10—19. Homicide justifiable of necessity for the execution or advancement of the law, Art. 20—30. Homicide justifiable for the prevention of crime, Art. 31—33. Homicide justifiable or excusable in self-defence, Art. 34—38. Homicide justifiable for self-preservation, Art. 39. Extenuated homicide, Art. 40—52. Murder in respect of killing in the commission of forcible felonies against the person or habitation, Art. 53. Murder in respect of killing ministers of justice, Art. 54—64. Manslaughter, Art. 65—71. Self-murder, Art. 72—73.]

Of what Homicide the Law takes cognizance.

Art. 1.

Of what Homicide the law takes cognizance.

The law takes no cognizance of homicide unless death result from bodily injury, occasioned by some act or unlawful omission, as contradistinguished from death occasioned by any influence on the mind, (*a*) or by any disease arising from such influence.

(*a*) "If any man either by working upon the fancy of another, or possibly by harsh or unkind usage, puts another into such a passion of grief or fear that the party either dies suddenly, or contracts some disease whereof he dies, though, as the circumstances of the case may be, this may be murder or manslaughter in the sight of God, yet *in foro humano* it cannot come under the judgment of felony, because no external act of violence was offered whereof the common law can take notice."—1 Hale's P. C. 429.

Art. 2.

Definition of the terms "Unlawful Omission."

The terms "unlawful omission" comprehend every case where any one being under any legal obligation to supply food, clothing, or other aid or support, or to do any other act or make any other provision for the sustentation of life, or prevention of injury to life, is guilty of any breach of such duty. (*b*)

(*b*) See Self's Case, 1 East's P. C. 226.

Art. 3.

When it is Homicide, where the party killed laboured under previous injury.

It is homicide, although the effect of the injury be merely to accelerate the death of one labouring under some previous injury or infirmity, or although, if timely remedies or skilful treatment had been applied, death might have been prevented.

Art. 4.

It is not homicide in the person doing an injury where death results not from the injury done, but from unskilful treatment, or other cause subsequent to the injury.

Art. 5.

How soon the party must die.

It is essential to homicide, of which the law takes cognizance, that the party die of the injury done within one year and a day thereafter.

Art. 6.

How the year and the day are to be computed.

In the computation of the year and the day from the time of the injury, the whole of the day on which the act was done, or of any day on which the cause of injury was continuing, is to be reckoned the first.

Art. 7.

When a child in the womb is a subject of Homicide.

A child in the womb is not a subject of homicide in respect of any injury inflicted in the womb, unless it afterwards be born alive.

Art. 8.

It is otherwise if a child die within a year and a day after birth of any bodily injury inflicted upon such child, whilst it was yet in the womb. (*c*)

(*c*) The law as here stated was considered doubtful by some of the older authorities; see Staundford's Pleas of the Crown, p. 21; Lambard's Eirenarcha, book II. c. 7; 1 Hale, 432. On the other hand

it is supported by the principles on which the crime is founded, as well as by the following authorities, 3 Inst. 50; 1 Hawk. P. C. c. 31, sect. 16; 1 East's P. C., p. 228; Senior's Case, 1 Moody's Crown Cases, 346. The difficulty of ascertaining the fact, which is assigned by Staundford and Hale as a reason for not including it under the head of homicide, merely affects the proof and not the definition; and the reason seems to be unsatisfactory, unless it could be shown that the fact can in no case be proved.

ART. 9.

The law of homicide applies to the killing not only of any subject of the realm, but also of any alien, with the exception of an alien enemy in the heat of war and in the actual exercise thereof. (*d*) Killing aliens.

(*d*) We have taken the expression of Lord Hale, 1 Hale's P. C. p. 433.

MURDER.

ART. 10.

Whosoever shall, of malice aforethought, (*e*) kill any other person, shall be guilty of murder, and shall suffer death. Definition of Murder.

(*e*) See Prefatory Remarks, p. 18, and the definitions of murder in 3 Inst. 37; Staundf. P. C. 18 b.; 1 Hale's P.C. 424, 449; 1 East's P.C. 214. We adopt the present mode of treating this crime in the text books, *i. e.* making malice aforethought essential to the crime, and afterwards defining what constitutes malice aforethought. We are not aware that any inconvenience can result from pursuing this course, and without general terms like malice aforethought, the offence could not possibly be included within any summary definition, but must be defined by a detail of its essential circumstances. It would have been easy to proceed by defining murder to consist in the voluntary killing of any other without justification, excuse, or extenuation from circumstances,—such voluntary killing consisting in killing with intent to kill, or do great bodily harm, or the wilfully endangering life by doing an act likely to kill, and which does kill. The circumstances essential to the offence would be precisely the same whichever mode of definition were adopted. The only difference would be this, that the class of homicide punishable capitally as murder on grounds of legal policy, and which consist in the endeavour to commit particular felonies, or in unlawfully resisting officers of justice and others, would not, as at present, be connected with the general notion of murder by means of the technical terms "of Malice aforethought." This, however, would be of little consequence, for the terms "of Malice aforethought," are of no essential use in defining these classes of homicide, which are made capital partly, at least, on collateral grounds of legal policy; these classes equally require definition whether those terms be used or not. We have deemed it proper to enter into this explanation, lest it should be supposed that we lay any undue stress on the technical terms at present used. We retain them because their retention is not purchased, as it seems to us, by any sacrifice in point of perspicuity, pointing out at the same time the mode of dispensing with these terms, without in the least affecting any matter of substance. Actual premeditation, or forethought, is the leading characteristic of murder in most of the modern systems of criminal law. See Code Pénal, Art. 296; Bavarian Code, Art. 146; Prussian Code, Art. 826.

ART. 11.

The killing is of malice aforethought whensoever it is voluntary and is not justified, excused, or extenuated as hereinafter mentioned. Malice aforethought.

ART. 12.

The killing of another is voluntary whensoever death results from any act or unlawful omission done or omitted with intent to kill or do great bodily harm to any other person, or whensoever any one wilfully endangers the life of another by any act or unlawful omission likely to kill, and which does kill any other person. Voluntary killing.

ART. 13.

In all other cases the killing of any other person is involuntary. Involuntary killing.

ART. 14.

The killing of another is of express malice where death results from a deliberate intention to kill or do great bodily harm (*f*) to the person killed. Express malice.

(*f*) 1 Hale's P. C. 451.

ART. 15.

Any other killing, hereby declared to be murder, is of implied malice. Implied malice.

ART. 16.

It is murder where means used with intent to kill one person through mistake or accident occasion the death of another person, and whether the offender be present or absent when such means occasion injury. (*g*) Killing a person not intended to be killed.

(*g*) A. gives a poisoned apple to B., intending to poison her; B., without having knowledge of the poison, gives the apple to a child, who eats it and dies; this is murder in A., although A. was present and endeavoured to dissuade B. from giving it to the child.—1 East's P. C. 230. The rule contained in this Article is accurately stated according to the existing law of England; and by the Roman law, a man who, intending to kill one, unintentionally killed another, was subject to the *pœna ordinaria*. Thus Julius Clarus, after noticing that a contrary opinion had been held by some writers, adds, "Sed certè ego, si casus contingeret, illi facerem caput amputari." Receptæ Sententiæ, lib. 5, s. 6.

ART. 17.

Killing, where no person in particular intended to be killed.

It is murder, whether the offender, wilfully putting life in peril, intend mischief to the deceased or any other person in particular, or wilfully do an act, or be guilty of an unlawful omission likely to occasion death, without intending the mischief to light on any person in particular.

ART. 18.

Persuading a person to kill himself.

Whosoever shall persuade another person to kill himself, and shall be present aiding and abetting such killing, shall be deemed to be guilty of murder. (*h*)

(*h*) 1 Hale's P. C. 431; 4 Rep. 81 b.; Dyson's Case, Russell and Ryan's Crown Cases, 523.

ART. 19.

Bearing false witness on a capital charge.

Bearing false witness on a capital charge, with intent to destroy the life of any person, by reason whereof such person suffers death by the sentence of the law, shall not be deemed to be murder. (*i*)

(*i*) The heinous crime here alluded to was punishable with death by the Roman law as a species of assassination. See Digest, lib. 48, tit. 8, *Lex Cornelia de sicariis*. Our earlier writers, adopting the doctrine of the civil and canon law, speak of it as capital homicide by the law of England; but Sir Edward Coke declares "that it was not holden for murder in his time," 3 Inst. 48; and Mr. J. Foster (Crown Cases, p. 132) says that "the practice of many ages backwards doth by no means countenance the opinion" expressed by the old authorities. See Blackstone's Commentaries, vol. iv. p. 196, and Mr. Christian's note. Lord Mansfield, however, and several of the judges in his time, appear to have entertained a contrary opinion. See 1 East's P. C. 333. From the great number of facts (some of them, such as the precise ground of the verdict, being very difficult of proof) which intervene between the act of the offender and the death of the object of his malice, it would be very difficult to prosecute such an offence effectually; and there are strong reasons of policy against admitting it to be murder, founded on the danger of deterring witnesses from giving evidence in capital cases, if it must be at the peril of their own lives. Besides, if causing sentence of death and execution by means of perjury be murder, the causing whipping or imprisonment by the same means would amount to the offence of assault and false imprisonment—a doctrine which it would be impossible to sustain. By the Bavarian Law, Art. 292, and also by the Prussian Law, Art. 1412, 1413, this crime, though punishable with death, is classed among fraudulent offences, and does not constitute homicide. The Code Pénal places it under the head of False Testimony.

HOMICIDE JUSTIFIABLE OF NECESSITY FOR THE EXECUTION OR ADVANCEMENT OF THE LAW.

ART. 20.

Homicide justifiable in execution of a lawful sentence.

Homicide is justifiable where the act is done in a lawful manner, in execution of a lawful sentence.

ART. 21.

What is essential to such justification.

It is essential to such justification that the sentence be that of a court which has jurisdiction over the offence in respect of which the sentence of death is pronounced;

Also, that it be executed by an officer or other person lawfully authorized to do execution;

Also, that, in doing execution, such officer or other person pursue his authority according to its legal exigency. (*k*)

(*k*) 1 Hale's P. C. 496—502; 2 Hale's P. C. 411; Foster 267; 1 Hawk. P. C. c. 28. s. 10. Doubts have been suggested by eminent writers on Crown law, whether an alteration in the execution of a capital sentence by the authority of the Crown, by which the mode of execution was changed from beheading to hanging, would subject those on whom the duty of executing the sentence was incumbent to the penalties of culpable homicide. It appears to us that such doubts argue, at the least, much laxity in a matter of great importance. In cases of treason the doubt has been removed by the stat. 54 of King George III., c. 146, sect. 2. This subject will be fully considered under the head of Procedure.

ART. 22.

Homicide justifiable for the apprehension of felons.

Homicide is also justifiable where an officer of justice or other person duly authorised by writ or warrant, or otherwise, to arrest, detain, or imprison any person for any felony (*l*) or for any dangerous wound given, and using lawful means for the purpose, cannot, otherwise than by killing, overtake such person in case of flight, or prevent his escape from justice; provided that the party flying or attempting to escape knew that he was pursued for such felony or wound given. (*m*)

(*l*) Such is the law at present, see Fost. Disc. II, c. 2, s. 4; but it is proposed (see *ante*, p. 7.) to annex to the term "felony" a more precise meaning than it bears at present, as comprehending particular classes of crimes.

(*m*) 2 Hale's P. C. 118; 1 Hale's P. C. 489, 490; Fost. Disc. II. c. 2, s. 4; 1 East's P. C. 298, 300.

ART. 23.

Homicide justifiable for the advancement of the law.

Also, where any officer of justice, or other person lawfully executing in a lawful manner any civil or criminal process, or other authority for the advancement of the

law, or lawfully interposing in a lawful manner for the prevention or suppression of any breach of the peace or other offence is unlawfully and forcibly resisted, and using no more force than is necessary to overcome such resistance, happens to kill the person so resisting; or being by reason of the violence opposed to him under reasonable fear of death if he proceed to execute his duty, and because he cannot otherwise execute his duty and preserve his life, kills him who so resists. (*n*)

(*n*) 1 Hale's P. C. 494; Fost. Disc. II., c. 2. 21, s. 4. Kelyng, 66, 115. An officer of justice is not, as in the case of common persons, bound to give way when assaulted in the execution of his duty, and if he kill his assailant, it is justifiable homicide.—1 Hale's P. C. 481.

ART. 24.

An officer or other person shall be deemed to act in the execution of lawful authority, not only whilst he is actually executing or endeavouring to execute that authority, but also whilst he is proceeding to execute it, or is retreating, having executed, or being unable, by reason of resistance, to execute it. (*o*)

When a person shall be deemed to act in execution of lawful authority.

(*o*) 1 East's P. C. 296; Foster, 308; 1 Hale's P. C. 464.

ART. 25.

It is essential to every justification of killing by an officer or other person acting under the authority of a writ, warrant, or other process, (*p*)

What is essential to a justification of killing by a person acting under the authority of process;

That such writ, warrant, or process should have been issued from a court or by a magistrate having competent jurisdiction; (*q*)

That, at the time of issuing, it expressed by whom and against whom it was to be executed, and was otherwise complete and legal in its frame; (*r*)

That it was executed, or attempted to be executed, by one authorized to execute the same, and who executed or attempted to execute the same lawfully, in respect of the time, place, and manner of the execution, and according to the exigency of such writ, warrant, or process; (*s*)

That at the time it was executed or attempted to be executed, the person resisting had notice that the officer or other person executing or attempting to execute the same, purposed (*t*) to act under the authority of such writ, warrant or other process.

(*p*) The rules which govern the due execution of process belong, as we have already stated, to another branch of the law.

(*q*) Fost. Disc. II., c. 8, s. 8.

(*r*) 1 Hale's P. C., 457; Fost. Disc. II., c. 8, ss. 8 and 9.

(*s*) Fost. Disc. II., c. 8, s. 18.

(*t*) Curtis's Case, Foster, p. 137.

ART. 26.

It is sufficient for such justification that the officer or other person gave notice of the authority under which he purposed to act, without showing the writ, warrant, or other process.

ART. 27.

It is essential to every justification of killing by any officer interposing by virtue of his mere official authority, and without writ, warrant, or other process, for the purpose of preventing or suppressing any breach of the peace, or other offence, that the person resisting had notice that such officer had such authority, and that he interposed for that purpose. (*u*)

By an officer interposing of his mere official authority;

(*u*) 1 East's P. C., 314; Foster, 310.

ART. 28.

It is not necessary that the notice mentioned in Articles 25 and 27 should have been given in express terms;—such notice may be collected as a matter of fact from the terms used by the officer or other person, or from other circumstances. (*v*)

(*v*) In the text-books some circumstances are stated from which it is said a legal presumption of notice of the officer's authority arises; it seems, however, to be safer to rely in such a case upon the fact than on any mere presumption.—See East's P. C., 319.

ART. 29.

It is essential to every justification of killing by any private person interposing for the purpose of preventing or suppressing any breach of the peace or other offence, that express notice (*w*) should have been given to the party resisting, that such private person interposed for that purpose.

By a private person.

(*w*) Foster, 311; 1 East's P. C., 304, 318.

ART. 30.

Where justification for the advancement of the law is excluded, the ordinary rules concerning Homicide apply.

Whensoever the plea of justification of homicide of necessity for the advancement of the law is excluded, the quality of the act of killing is to be determined by such other rules concerning homicide as are applicable to the particular circumstances. (*x*)

(*x*) Upon failure of the justification, the killing may either be by misadventure, manslaughter, or murder.

HOMICIDE JUSTIFIABLE FOR THE PREVENTION OF CRIME.

ART. 31.

Homicide justifiable for the prevention of forcible felonies.

Homicide is also justifiable whensoever it is necessary for preventing the perpetration of any felony (*y*) attempted to be committed by violence or surprise against the person, habitation, or property of the party killing, or of any other person. (*z*)

(*y*) The above rule is limited to homicide for the prevention of *felonies*. If one comes to beat another, or to take his goods as a trespasser, though the owner may justify a battery for the purpose of making him desist, yet if he kill him, it will be manslaughter.—1 Hale's P. C., 485, 486; 1 East's P. C., 272. But the rule, even in the case of a felony, is strictly confined to an interference for the sake of prevention. "If a man," says Lord Holt, "shall see another stealing his wood, he cannot justify beating him, unless it be to hinder him from stealing any more; that is, that notwithstanding he be forbid to take any, doth proceed to take more, and will not part with that which he had taken. But if he desists, and the owner or woodward pursues him to beat him, so as to kill him, it is murder." Mawgridge's Case, Kelyng, 132.

(*z*) A servant or any other person may interpose with a view to resist a felonious attack upon the person or property of another. Thus in the instances of robbery or murder, the servant of the party attacked or any other person may interpose in order to prevent the mischief intended, and if death ensue, the party so interposing will be justified.—1 Hale's P. C., 481, 484; Foster, Disc. II., c. 3, s. 1.

ART. 32.

Necessity for killing must be apparent.

It is essential that such necessity be apparent from the manner of the attack, the means used in the attack, or some other manifestation of the criminal purpose; (*a*)

(*a*) Ford's Case, Kelyng, 51; 1 East's P. C. 243; Mawgridge's Case, Kelyng, 128—9; Fost. Disc. II. c. 2, s. 1; 1 East's P. C. 276.

ART. 33.

And continue to the time of killing.

And that such necessity continue to the time of the act from which death results.

HOMICIDE JUSTIFIABLE OR EXCUSABLE IN SELF-DEFENCE.

ART. 34.

Homicide justifiable in self-defence.

Homicide is also justifiable whensoever, in defence of his person against unlawful violence, the party assaulted being, from the violence with which the assailant pursues his purpose, under reasonable apprehension of immediate death, and, because he cannot otherwise preserve his life, kills the assailant. (*b*) Provided, nevertheless, that where retreat is practicable with safety to life, the party assaulted shall retreat so far as is practicable with safety to his life. (*c*)

(*b*) Ford's Case, 1 East's P. C., 243; Mawgridge's Case, 1 East's P. C., 276.

(*c*) The law is thus laid down by Lord Hale (1 Hale's P. C., 479, 481, 482), upon the authority of a case in the Year Books, which certainly contains the doctrine asserted by him. It is also incidentally mentioned as being the rule of law in several parts of Mr. East's chapter on Homicide. Lord Hale gives as a reason for the rule that "the King and his laws are to be the *vindices injuriarum*, and private persons are not trusted to take capital revenge one of another." If, however, a man may justify returning force for force in defence of his *goods*, without retreating (as it seems from 1 Hale's P. C., 485, that he may do), it appears unreasonable that in order to justify himself, if death result from an attack upon his *person*, he should be required to show that he retreated as far as possible before he struck. In order to remove this inconsistency we should propose to insert a rule to the following effect:—"Homicide is justifiable whensoever, upon any unlawful attempt to injure a man's person, he repels force by force, and, using no greater degree of violence than is necessary for causing the assailant to desist, happens to kill him."

ART. 35.

Homicide justifiable in defence of moveable property.

Also, where one, in defence of moveable property in his lawful possession, repels force by force, and using no more violence than is necessary for the defence of such property against wrong, happens to kill the assailant; or being, from the violence with which the assailant pursues his purpose, under reasonable fear of

death if he persist in his defence, and, because he cannot otherwise defend his property and preserve his life, kills the assailant. (*d*)

(*d*) It is conceived that this rule is strictly in accordance with the present law. "If," says Lord Holt," a man goes violently to take another man's goods, he may beat him off to rescue his goods; but if a man hath done a trespass, and is not continuing in it, and he that hath received the injury shall thereupon beat him to a degree of killing, it is murder, for it is apparent malice; for, in that case, he ought not to strike him, but is a trespasser for so doing."—Mawgridge's Case, Kelyng, 132.

Art. 36.

Homicide justifiable in defence of house and land.

Also, where one in lawful possession of house or land, after requesting another who has no right to be there to depart, is resisted, and using no more violence than is necessary to remove such wrongdoer and retain his possession, happens to kill such wrongdoer; or being, from the violence with which such wrongdoer endeavours to deprive him of possession, under reasonable fear of death if he persist in his defence, and, because he cannot otherwise maintain possession and preserve his life, kills such wrongdoer. (*e*)

(*e*) 1 Hale's P. C. 485–6. In such a case as this, Lord Hale says, "It seems that a man, being in his own house, need not fly as far as he can, as in other cases of *se defendendo;* for he hath the protection of his house to excuse him from flying, for that would be to give up the possession of his house to his adversary by his flight."

Art. 37.

When Homicide justifiable in self-defence, although the party was guilty of an assault, &c.

Homicide, when necessary for self-defence, is justifiable, although the party using the plea was guilty of an assault, or was engaged in an unlawful conflict, which led to the fatal result.

This rule is subject to the following limitations :—

That the party who relies on the plea of self-defence did not either commence the attack, or seek to provoke an attack, with intent to kill or do great bodily harm, or during conflict and before such necessity arose, endeavour to kill or do great bodily harm;

That he declined further conflict, and quitted and retreated from it, so far as he could with safety;

That he killed the assailant from necessity in order to avoid immediate death. (*f*)

(*f*) This is called by the writers upon this subject "homicide excusable in self-defence upon chance-medley." Upon cases of this description forfeiture formerly occurred, but for several centuries it was the practice to remit the forfeiture, and in modern times the judges always directed an acquittal, where the killing did not amount to murder or manslaughter.—See 1 East's P. C. 279; 4 Blac. Com. 188; Foster, 288. The statute of the 9th of King George IV., c. 31, s. 10, expressly enacted that "no punishment or forfeiture should be incurred by any person who should kill another by misfortune or in self-defence, or in any other manner without felony." Where previous malice has existed between A. and B., who meet casually, and A. assaults B., and drives him to the wall, and B. kills A. in his own defence, Lord Hale says that the killing shall be accounted *se defendendo*, and shall not be heightened by the former malice into murder or manslaughter.—1 Hale's P. C., 479. This and all other similar cases are resolvable into mere questions of evidence, whether the killing is to be referred to necessity or to antecedent malice.

Art. 38.

Where Homicide would have been justifiable, the killing of another accidentally is excusable.

Where a party who would have been justified in self-defence, or otherwise, in killing a wrongdoer, happens by mere accident to kill another, it is excusable homicide.

Homicide justifiable for Self-preservation.

Art. 39.

Homicide justifiable for self-preservation.

Homicide is also justifiable whensoever a man is involuntarily placed in such a situation that he is under the necessity of killing another in order to save his own life. (*g*)

(*g*) The illustration commonly applied in the text books to this rule is the case supposed by Lord Bacon (Maxims of the Law, Reg. 5), where two persons being wrecked and getting on the same plank, which is insufficient to save them both, one thrusts the other from it, whereby he is drowned. This is one of the instances of homicide which have been termed *excusable*, in contradistinction to *justifiable*, though the difference, as Mr. East observes, is not worth examination.—1 East's P. C., 294; 4 Blac. Com., 180.

Extenuated Homicide.

Art. 40.

When Homicide is extenuated.

The guilt of the offender is extenuated where the act, being done under the influence of passion from sudden provocation, or of fear, or of alarm, which for the time suspends or weakens the ordinary powers of judgment and self-control, is attributable to transport of passion or defect of judgment so occasioned, and not to a deliberate intention to kill or do great bodily harm.

ART. 41.

Where passion is excited by any act done, or attempted or threatened to be done, of an injurious or insulting character to the person of the party killing, or of any other person, or by any other grave cause of provocation of the like character offered to the party killing, or any other person, (*h*) such cause shall be deemed to be sufficient to extenuate the guilt of killing; provided that, in fact, the killing be attributable to heat of blood so occasioned, and not to a deliberate intention to kill or do great bodily harm, regard being especially had to the kind and degree of violence used as compared with the cause of provocation.

(*h*) Tooley's Case, 2 Lord Raymond, 1296; 1 East's P. C. 325. Foster, 291; 1 Hale's P. C. 473; 1 Hawk. P. C. cap. 31. s. 34; Fray's Case, 1 East's P. C. 236.

ART. 42.

Homicide is not extenuated when cause of provocation so slight that the killing cannot be attributed to heat of blood.

It is otherwise where, in respect of a slight cause of provocation, a return is made so excessive and disproportionate to the cause of provocation that the killing cannot be attributed to mere heat of blood arising from the provocation given.

ART. 43.

The rule contained in the last preceding Article applies whensoever, upon provocation given by mere words, or gestures of reproach, contempt, or derision, the party provoked uses a deadly weapon or otherwise makes a return wholly disproportionate to the affront offered. (*i*)

(*i*) We have experienced great difficulty in framing these rules respecting provocation. It is not every trivial cause of provocation which ought to be considered as an extenuation of the crime, even although a violent and irascible person was, in fact, excited by that cause to a pitch of passion which, had it arisen from a just cause, might, by reason of the temporary suspension of the judgment, have properly extenuated the offence. To allow this in respect of very trivial causes of affront would, if it did not encourage sudden outbreaks of ungovernable passion, at least weaken a salutary check, and withhold a signal mark of disapprobation stamped by the authority of the law. In this respect the Bavarian and several other German codes, by admitting generally as an extenuation of homicide the existence of passion, however caused, have introduced a dangerous latitude into the law on this subject. On the other hand, as a necessary allowance for human infirmity, and the actual subjugation of the judgment to uncontrollable passion are the grounds of extenuation, it is manifest that to punish a man as a murderer by virtue of any peremptory rule limiting the cause of provocation, may be in effect to inflict punishment not so much in respect of the particular act of deliberate malice, as of a want of habitual control over a mind naturally impetuous and ready to break forth on slight occasions. We have framed the above Article as nearly as we could in conformity with the authorities, which, whilst they, in many instances, recognize very slight causes of extenuation, do not extend an express negative beyond the limits of our rule. It seems to us, however, to be very questionable whether this rule, large as it may seem, is strictly in accordance with principle, for words or gestures may often be infinitely more irritating and provoking than a personal injury of a trivial nature. It is extremely difficult, if not impossible, to define all the causes of provocation which ought to extenuate homicide, and we do not see any mode by which the object of the law can be satisfactorily accomplished, unless it be by making the existence of reasonable provocation, within certain limits, a matter of fact to be decided by a jury. In France, the difficulty has been in a great degree evaded by the law introduced in 1832, enabling juries to find "attenuating circumstances;" and though we think a general law of this kind is liable to serious objection, the occasional introduction of a similar principle, where precise definition is impracticable, might perhaps be desirable. The following remarks of a distinguished foreign jurist upon this subject appear to us to be just. "Le même fait ne produit pas toujours une provocation également intense, ni une excuse également légitime. Un fait negligé par la loi peut devenir, dans des circonstances données, une provocation violente, irrésistible, et légitimer l'atténuation plus encore qu'un fait matériellement plus grave. S'il y a des cas où la provocation doive exempter de toute peine, il peut être utile que ces cas soient déterminés par la loi, comme il est utile que la loi elle-même détermine quels sont les crimes que nulle provocation ne peut rendre excusables. Mais une fois le principe d'excuse par la provocation étant admis, c'est organiser une justice bien grossière et souvent bien embarrassante pour les juges que de tracer à l'avance le cercle où ils devront nécessairement se renfermer dans une matière sujette a tant de variations et de nuances diverses."—Rossi, Traité de Droit Pénal, liv. ii. chap. 21.

ART. 44.

When an interval occurs between the provocation and the killing, it is a question of fact if the killing is to be attributed to provocation.

If an interval occur between the provocation given and the act done, it is a question of fact whether the passion excited by such provocation had subsided or still continued, and if it continued, whether the act was attributable to transport of passion or defect of judgment so occasioned, and not to a deliberate intention to kill or do great bodily harm. (*k*)

(*k*) This seems to be properly a question of fact in any doubtful case; it is impossible to lay down any rules of law for determining whether the influence of passion has or not ceased to operate, —still less to prescribe any positive interval as "*a reasonable time for cooling.*" In Major Oneby's Case, 1 East's P. C. 253, after a quarrel and mutual violence between the prisoner and the deceased, somewhat more than an hour had elapsed. When the company separated, the parties fought with swords, and the deceased received his death wound. The judges were of opinion that under the circumstances there was reasonable time for cooling. It is remarkable that, in coming to this conclusion, some circumstances were relied on which seem rather to have tended to raise the opposite inference. It would be a vain attempt to ascertain the subsidence of passion by any technical rules. Time itself, one of the most important circumstances for judging, can be of little value as a rule, independently of the nature of the provocation; the intensity of passion which it was likely to occasion depending on a mul-

titude of circumstances which set any attempt at enumeration or definition at defiance. The following, which have been suggested by learned writers as some of the tests for deciding on the question as matter of law, are in truth nothing more than ordinary evidence, such as is proper to be offered to a jury to decide on matter of fact;—"If, between the provocation offered and stroke given, he (the prisoner) fall into other discourse or diversions, and continue so engaged a reasonable time for cooling, or if he take up and pursue any other business or design not connected with the immediate object of his passion nor subservient thereto, so that it may reasonably be *supposed* that his intention was once called from the subject of provocation."—1 East's P. C., 252. If upon a provocation received, one party deliberately and advisedly denounce vengeance against the other, as by declaring that he will "have his blood," or the like, and afterwards carry his design into execution, he will be guilty of murder, although the death happened so recently after the provocation, as that the law might, apart from such evidence of express malice, have imputed the act to unadvised passion. But where fresh provocation intervenes between preconceived malice and the death, it ought clearly to appear that the killing was upon the antecedent malice; which it may be difficult in some cases to show satisfactorily if the new provocation were a grievous one. In such cases, says Hawkins, it shall not be presumed that they fought on the old grudge, unless it appears by the whole circumstances of the fact.—1 Hawk. P. C., b. 1, cap. 31, s. 30.

ART. 45.

The plea of provocation is available, although the offender by accident kill not the party who offered the provocation, but some other person. (*l*)

The plea of provocation is available if a stranger be accidentally killed.

(*l*) Fost. Disc. II. c. 1. s. 3. For the intention of the offender is no more criminal than if he had killed the party guilty of provocation. See also 1 East's P. C. 231, 245.

ART. 46.

The plea of provocation is not available where the offender either seeks the provocation as a pretext for killing or doing great bodily harm, or endeavours to kill or do great bodily harm before provocation given. (*m*)

When not available.

(*m*) See the Prefatory Remarks, p. 16.

ART. 47.

Homicide is neither justified nor extenuated by reason of any consent given by the party killed.

Consent does not justify nor extenuate Homicide.

ART. 48.

Where, upon any sudden quarrel, parties fight in heat of blood and one be killed, the offence, if attributable to heat of blood, is extenuated.

ART. 49.

In such case it is immaterial which of the parties was guilty of the first affront or assault.

ART. 50.

If two persons deliberately agree to fight with deadly weapons, and one be killed, the offence of the other is not extenuated.

ART. 51.

If one seeks a quarrel or takes advantage of a quarrel with another person with intent to kill or do great bodily harm, and a contest ensues in which he kills such other person, the offence of the person so killing is not extenuated, although such provocation has intervened as might otherwise have extenuated the offence. (*n*)

(*n*) See Mason's Case, Foster, 132; 1 East's P. C. 239; 1 Hawk. P. C. cap. 31. s. 24; 1 Hale's P. C. 456.

ART. 52.

If one, upon a sudden quarrel with another person and before any provocation given, sufficient to extenuate the offence, endeavours to kill or do great bodily harm to such other person and afterwards, upon a combat ensuing, kills him, the offence of the person so killing is not extenuated. (*o*)

(*o*) The rules contained in Articles 48, 49, 50, 51, and 52, are but so many applications of the principles that no consent will justify or extenuate any homicide, and that no provocation will extenuate any homicide where the offender is actuated by malice in either seeking or taking advantage of the occasion to kill or do bodily harm. As, however, in the text books and other authorities, such applications are moulded into particular rules of law, we do not conceive that we should be justified in omitting them, although they are obviously nothing more than applications of general principles. In Mason's Case, 1 East's P. C., 239, and others of the same class, it was adjudged to be murder, because the prisoner sought blows with a deliberate intention to take a deadly revenge for a previous injury. In Mawgridge's Case, 1 East's P. C., 243, and others of the same class, the killing was adjudged to be murder, because the offender, at the commencement of the contest, showed an intention to do great bodily mischief. Mawgridge, on words of anger, threw a bottle with great force at the head of Mr. Cope, and immediately drew his sword. Mr. Cope returned a bottle at the head of Mawgridge in his own defence and wounded him, whereupon Mawgridge stabbed Cope, which was ruled to be murder. For Mawgridge, in throwing the bottle, showed an intention to do some great mischief, and his drawing immediately showed that he intended to follow up his blow. It was murder, therefore, because before provocation given it was evident that the prisoner intended to kill or do great bodily harm, and the killing was not attributable to the provocation but to the antecedent

criminal intent. Where, on the contrary, *previously* to an act of deadly violence the blood is heated by contest and blows are given not likely to kill or materially to injure, the offence is but manslaughter.—Rex *v.* Taylor, 1 East's P. C., 244; and see the Prefatory Remarks, p. 21.

Murder in respect of Killing in the commission of forcible Felonies against the Person or Habitation.

Art. 53.

It is Murder where a person is killed in the committing of a forcible felony.

The killing is also of malice aforethought whensoever one in committing or attempting to commit any felony with force or violence to the person or dwelling-house of any other, or in burning or attempting to burn such dwelling-house, or in committing or attempting to commit any felony from which danger may ensue to the life of any other person, shall happen to kill any other person. (*o*)

(*o*) As the law now stands where death ensues from the doing of an act *malum in se*, with a felonious intention, it is murder. Fost. 258, and 1 Russell on Crimes, 454. We propose to restrict this as in the above Article, for the reasons assigned in the Prefatory Remarks, p. 24.

Murder in respect of killing Ministers of Justice.

Art. 54.

The killing of persons acting for the advancement of the law is Murder.

The killing is also of malice aforethought, whensoever one unlawfully and forcibly resists any officer or other person lawfully executing in a lawful manner any civil or criminal process, or other authority for the advancement of the law, or lawfully interposing in a lawful manner, for the prevention or suppression of any breach of the peace or other offence, and in so resisting happens to kill such officer or other person. (*p*)

(*p*) The law upon this subject is collected in 1 East's P. C., 295. We state this rule as it is laid down by the authorities; though we are fully sensible of the imperfection of this part of the law of homicide. It is unquestionably necessary that officers of justice should be protected, by exonerating them from criminal responsibility when, in the discharge of their duty, they kill those who resist them; and it is entirely a question of policy whether the offence of killing officers by persons so resisting them should be punishable with death. But we conceive that it ought to be made a substantive crime (as it is in the laws of most other countries), and should not be drawn by presumption and implication into the general class of murder, of which offence it may in fact bear none of the distinguishing characteristics. The policy of the law in endeavouring to secure obedience and prevent resistance to ministers of justice would, probably, be better effected by making the punishment in case of resistance more severe than it now is, where death does not result from resistance, and relaxing its severity where death does accidentally result. The evil to be prevented is unlawful resistance to legal authority,—an object which cannot be fully attained by making punishment to depend on a mere accidental event, and upon that event inflicting a punishment frequently disproportioned to an offence which derives its quality from mere accident. Justice may thus suffer in two ways. Where death results, the severity of the punishment has a tendency to prevent conviction, whilst in other instances, the punishment may not be sufficient for the purpose of example.

Art. 55.

The rule contained in the last preceding Article comprehends all officers of justice acting by virtue of any valid writ or warrant, or other special authority, all public officers lawfully acting in the execution of their office, without special authority, and private persons lawfully acting in aid of any such officer, or otherwise lawfully acting for the advancement of the law.

Art. 56.

When a person shall be deemed to act in execution of lawful authority.

An officer or other person shall be deemed to act in the execution of lawful authority, not only whilst he is actually executing or endeavouring to execute that authority, but also whilst he is proceeding to execute it, or is retreating, having executed, or being unable by reason of resistance to execute it. (*q*)

(*q*) 1 East's P. C., 296; Foster, 308; 1 Hale's P. C., 464.

Art. 57.

What is essential to make the killing of a person, acting in execution of process, Murder;

It is essential to make the killing of an officer or other person acting under the authority of a writ, warrant, or other process, murder;

That such writ, warrant, or process should have been issued from a court, or by a magistrate of competent jurisdiction;

That, at the time of issuing, it expressed by whom and against whom it was to be executed, and was otherwise complete and legal in its frame;

That it was executed or attempted to be executed by one authorized to execute the same, and who executed or attempted to execute the same lawfully, in respect of the time, place, and manner of execution, and according to the exigency of such writ, warrant, or process;

That at the time it was executed, or attempted to be executed, the person resisting had notice that the officer or other person executing or attempting to execute the

same, purposed to act under the authority of such writ, warrant, or other process (*r*).

(*r*) These rules, and also those contained in the four articles immediately following, correspond with those which apply to the justification of officers and other persons who kill in the course of executing lawful authority. See Article 25 and notes.

ART. 58.

It is sufficient as regards the last preceding Article, that such officer or other person gave notice of the authority under which he purposed to act, without showing such writ, warrant or other process.

ART. 59.

Of an officer interposing by mere official authority;

It is also essential to the crime of murder, in the case of killing any officer interposing by virtue of his mere official authority, and without writ, warrant, or other process, for the purpose of preventing or suppressing any breach of the peace or other offence, that the person resisting had notice that such officer had such authority, and that he interposed for that purpose. (*s*)

(*s*) 1 East's P. C., 314; Foster, 310.

ART. 60.

It is not necessary that the notice mentioned in Articles 57 and 59 should have been given in express terms: such notice may be collected as a matter of fact from the terms used by the officer or other person, or from other circumstances (*t*).

(*t*) See the note to Article 28.

ART. 61.

Of a private person.

It is essential to the crime of murder under this law, in the case of killing any private person interposing for the purpose of preventing or suppressing any breach of the peace, or other offence, that express notice (*u*) should have been given to the party resisting, that such private person interposed for that purpose.

(*u*) Foster, 311; 1 East's P. C., 304, 318.

ART. 62.

When notice need not be given of his authority by the party killed.

The rules respecting notice to the party resisting contained in Articles 57, 59, and 61, shall not extend to one who, upon resistance unlawfully made to any officer or other person lawfully acting in executing of any lawful authority, unlawfully interposes, and taking part against such officer or other person, kills such officer or other person; and in every such case the party so interposing and killing such officer or other person shall be deemed to be guilty of murder, unless he interposed with the intention of preventing mischief, having reasonable cause for believing that such interposition was lawful. (*v*)

(*v*) See 1 East's P. C., 296.

ART. 63.

It is Murder where several join in a common design to resist all opposition.

Where several join in a common design to commit any breach of the peace, and to execute it in a violent, tumultuous, or riotous manner against all opposition, and, being assembled and acting in execution of that design, one of them, acting in prosecution of such design, kills any other person, all are guilty of murder. (*w*)

(*w*) See 1 Hale's P. C., pp. 439, 445. Fost., 353. 1 Russell, 455. "They must at their peril abide the event of their actions who wilfully engage in such bold disturbances of the public peace. In such cases the law adopts the presumption of fact, that they came with intent to oppose all who should hinder them in their design." 1 East's P. C., 257.

ART. 64.

Where the killing of a person acting for the advancement of the law does not amount to Murder, the ordinary rules apply.

Where the killing of one acting or assuming to act for the advancement of the law does not amount to murder for want of a valid warrant, notice of intention, or other cause, the quality of the act of killing is to be determined by such other rules concerning homicide as are applicable to the particular circumstances.

MANSLAUGHTER.

ART. 65.

Definition of Manslaughter.

Whosoever shall wrongfully, but without malice aforethought, kill any other person, shall be deemed to be guilty of manslaughter, and incur the penalties of the ( ) class.

ART. 66.

Manslaughter includes voluntary extenuated homicide, as before defined; also involuntary homicide, which is not merely by misadventure.

ART. 67.

Involuntary Homicide not merely by misadventure.

Involuntary homicide, which is not by misadventure, includes all cases where,

without any intention to kill or do great bodily harm, or wilfully to endanger life, death occurs in any of the following instances:—

Where death results from any act or unlawful omission done or omitted with intent to hurt the person of another, whether the mischief light on the person intended, or on any other person; (*t*)

Where death results from any wrong wilfully occasioned to the person of another; (*u*)

Where death results from any unlawful act or unlawful omission, attended with risk of hurt to the person of another; (*v*)

Where death results from want of due caution either in doing an act or neglecting to prevent mischief, which the offender is bound by law to prevent. (*w*)

(*t*) This rule includes all such as engage in any hostile conflict, although without deadly weapons.

(*u*) This rule applies where a father, master, or other person having authority to correct or impose any personal restraint upon a child, scholar, apprentice, or other person, not intending to kill or do great bodily harm, exceeds the bounds of moderation either in respect of the means used, or the extent to which they are used.—1 East's P. C. 261.

(*v*) 1 East's P. C., 259. 1 Hale's P. C., 39, 475. This rule makes the killing manslaughter where the act is unlawful without regard to the question whether due caution has or has not been used to prevent danger; for where the act from which death results is unlawful and is attended with risk to the person, it is no excuse to the offender to say that he used the utmost caution in doing an act which he ought not to have done at all. It is otherwise where the act, although unlawful, is in its own nature wholly unconnected with risk to the person. If a man were to throw a stone at a horse, and accidentally to hit and kill the rider, he would be guilty of manslaughter, although he used great caution not to hurt the rider, the act itself being unlawful and attended with some risk to the person.

Where several join in a common design to execute any unlawful act by force and against all opposition, and one of the party acting in prosecution of that purpose, kills another, all are equally included in his guilt. This, however, is a matter to be provided against by a general law concerning principals to an offence.

(*w*) This rule applies to cases where stones are thrown from a height into a street, or where one allows an ox which he knows to be mischievous to go at large.—1 East's P. C., 265.

Art. 68.

What degree of caution is necessary.

The law does not require the utmost caution that can be used, but only such a reasonable degree of caution as is appropriate to the nature of the act, and the probability of danger in the particular case.

(*x*) See 1 East's P. C. 265; Foster, 264.

Art. 69.

Homicide by misadventure.

Homicide is by misadventure where a person doing an act, without intention of bodily harm to any other person, and using proper caution to prevent danger, happens to kill another; provided the act done be either a lawful act or be not attended with risk of hurt to the person of another. (*y*)

(*y*) 1 East's P. C., 260.

Art. 70.

Killing in the practice of lawful sports.

Homicide does not amount to manslaughter, where it occurs in the practice of any lawful sport or exercise with weapons not of a deadly nature, and without intent on either side to do bodily harm, and where no unfair advantage is intended or taken.

Art. 71.

Killing where dangerous weapons are used, or any unfair advantage is taken.

It is manslaughter where weapons or instruments are used which cannot be used without probable danger;

Or where, in case of friendly contest, without the use of such weapons, death results from any unfair advantage taken, either as regards the nature of the instrument, the mode of using it, the want of due warning previously to violence used, or from any want of due caution.

Self-murder.

Art. 72.

Definition of Self-murder.

Whosoever shall voluntarily or by any malicious act, cause his own death, (*z*) shall be deemed to have committed of self-murder.

(*z*) See the definition of this offence in 1 Hale's P. C. p. 411. 1 East's P. C. 219. It has been said, that if A. kill B. at his own desire it is not *felo de se*, because his consent was merely void.—1 East's P. C. p. 229. This is not warranted by principle, because B. still causes his own death through the agency of A. If A. were a mere irresponsible agent, the act would be as much B's as if A. had been a mere machine; and it can make no difference in law or morals whether A. is a guilty or innocent agent.

Art. 73.

The act of killing is malicious, and the offender shall be deemed to have committed self-murder, although such act was not done with intent to destroy the party himself, whensoever, had any other person been killed, such killing would have been murder. (*a*)

It is Self-murder where had any other party been killed it would have been Murder.

(*a*) "If A. had stricken at B. with a knife, intending to kill him, and, missing B., had stricken himself, and killed himself, there he had been *felo de se*, because that act whereby he intended to murder B. shall have the same construction, if it kills himself or any other person, as it should have had if it had taken its effect upon B."—1 Hale's P. C. 413.

II. OTHER OFFENCES AGAINST THE PERSON.*

SUMMARY OF CONTENTS.

[Attempts to murder, Art. 74—75. Attempts to maim, &c., Art. 76. Sending explosive substances' Art. 77. Setting spring-guns, &c., Art. 78—79. Trying to procure abortion, Art. 80. Endeavouring to conceal the birth of children by secret burying, &c., Art. 81—83. Rape, Art. 84—86. Carnally abusing girls, Art. 87—88. Buggery, Art. 90. What sufficient proof of sexual offences, Art. 90—91. Abduction of heiresses, Art. 92. Child-stealing, Art. 93—94. Abduction of girls, Art. 95. Masters of ships deserting any of their crew, Art. 96—97. Arresting clergymen, Art. 98. Imprisoning British subjects beyond the seas, Art. 99. Furious driving, Art. 100—101. Causing bodily harm to another by any wrongful act or omission, Art. 102. Battery, Art. 103. Imprisonment, Art. 104. Assault, Art. 105. Assault with intent to commit felony, Art. 106.]

Art. 74.

Whosoever shall administer to, or cause to be taken by, any person any poison or other destructive thing, or shall stab, cut or wound any person, or shall by any means whatsoever cause to any person any bodily injury dangerous to life,(*a*) with intent in any of the cases aforesaid to commit murder, shall suffer death. (*b*)

Administering poison, or doing other bodily injury dangerous to life, with intent to commit murder.

(*a*) We think it proper here to observe, that in the draft of the statute 7 King Wm. IV., and 1 Queen Vic., c. 85, as originally prepared by the Commissioners, the punishment of death was to be inflicted in respect of the crimes of "administering poison; attempting to drown, suffocate, or strangle; stabbing, cutting, or wounding; or doing actual bodily harm by any means manifesting a design to kill;—with the intent in any of those cases to commit murder." According to this scheme the capital crime consisted in an attempt to murder, effected by any of the means above enumerated; the *corpus delicti* was complete so soon as any of the specified acts of violence was committed with the intent to murder, and did not depend upon the extent of injury effected by them, or the accidental fact of resulting danger to the life of the individual against whom they were employed. See Correspondence between the Secretary of State for Home Department and the Commissioners, pp. 11 and 20. The clause as it now stands in the statute, makes the capital offences as follows:—"Administering poison, stabbing, cutting, or wounding, or causing any bodily injury dangerous to life; with intent in any of such cases to commit murder." It appears to us to be objectionable to make the issue of a capital charge depend upon the opinion formed by a jury respecting so doubtful a question as danger to life; besides which, in the above Article, which merely contains the words of the recent statute, the application of the principle of danger to life is partial and inconsistent, inasmuch as it is confined to that member of the clause which contains the general words, "whosoever shall by any means whatsoever cause any bodily injury dangerous to life;" and does not extend to the administration of poison, or cutting, stabbing, or wounding. The practical inconsistency arising from this is, that the offence of a person who with a murderous intent strikes another with a bludgeon and fractures his arm (provided the fracture does not endanger his life) is not within the clause; whereas a person who inflicts the most insignificant "cut" or "wound" upon the arm, with intent to commit murder, is guilty of a capital crime within the terms of the law.

(*b*) 7 Wm. IV., and 1 Vic., c. 85, s. 2.

Art. 75.

Whosoever shall attempt to administer to any person any poison or other destructive thing, or shall shoot at any person, or shall by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall attempt to drown, suffocate, or strangle any person, with intent in any of the cases aforesaid to commit the crime of murder, shall, although no bodily injury shall be effected, incur the penalties of the ( ) class. (*c*)

Attempts to murder, although no bodily injury be effected.

(*c*) 7 Wm. IV., and 1 Vic., c. 85, s. 3.

Art. 76.

Whosoever shall unlawfully and maliciously shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of

Cutting, maiming, &c., with intent to disfigure, &c.

* Besides the offences digested under this head, there are several others which in strictness are offences against the person; but being of a special nature, relating to the Revenue, the advancement of justice, trade, and the dealing in slaves, will be included under their proper heads in the Digest.

loaded arms at any person, or shall stab, cut or wound any person, with intent in any of the cases aforesaid to maim, disfigure or disable such person, or to do some other grievous bodily harm to such person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall incur the penalties of the ( ) class. (*d*)

(*d*) 7 Wm. IV., and 1 Vic., c. 85, s. 4.

ART. 77.

Sending explosive substances with intent to do bodily harm.

Whosoever shall unlawfully and maliciously send or deliver to or cause to be taken into possession or received by any person any explosive substance, or any other dangerous or noxious thing, or shall cast or throw upon or otherwise apply to any person any corrosive fluid, or other destructive matter, with intent in any of the cases aforesaid to burn, maim, disfigure or disable any person, or to do some other grievous bodily harm to any person, and whereby in any of the cases aforesaid any person shall be burnt, maimed, disfigured or disabled, or receive some other grievous bodily harm, shall incur the penalties of the ( ) class. (*e*)

(*e*) 7 Wm. IV., and 1 Vic., c. 85, s. 5. This Article merely contains the enactment of the recent statute, the substance of which is taken from a previous Act of Parliament, making this offence punishable in Scotland, 6 King Geo. IV. c. 126, sec. 2. In order to complete the offence under this Article, some person must have actually received injury from the malicious means used. If it should be necessary to make a distinction in this respect with reference to punishment, we think that the mere malicious acts, even where no injury has followed, should be punishable as a substantive offence.

ART. 78.

Setting spring-guns, &c.

Whosoever shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily harm, upon a trespasser or other person coming in contact therewith; or shall knowingly and wilfully permit any such engine, which may have been set, fixed, or left in any place, to continue so set or fixed in such place, being in his or her possession or occupation, shall incur the penalties of the ( ) class. (*f*)

(*f*) 7 and 8 Geo. IV., c. 18, ss. 1 and 3.

ART. 79.

The law contained in the last preceding Article shall not extend to make it illegal to set any gin or trap, such as may have been or may be usually set, with the intent of destroying vermin; or to set, or cause to be continued set, from sunset to sunrise, any spring-gun, man-trap, or engine, which shall be set, or continued to be set, in a dwelling-house for the protection thereof. (*g*)

(*g*) 7 and 8 Geo. IV., c. 18, ss. 2 and 4.

ART. 80.

Trying to procure abortion.

Whosoever, with intent to procure the miscarriage of any woman, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall incur the penalties of the ( ) class. (*h*)

(*h*) 7 Wm. IV., and 1 Vic., c. 85, s. 6.

ART. 81.

A woman secreting the dead body of her child.

If any woman, having been delivered of a child, shall, by secret burying or otherwise disposing of the dead body of such child, endeavour to conceal the birth thereof, she shall incur the penalties of the ( ) class. (*i*)

(*i*) 9 Geo. IV., c. 31, s. 14.

ART. 82.

It shall not be necessary to prove whether the child died before, at, or after its birth.

ART. 83.

A woman on her trial for murder of her child may be convicted of secreting the dead body.

Provided that if a woman, tried for the murder of her child, shall be acquitted thereof, it shall be lawful for the jury by whose verdict she shall be acquitted, to find, in case it shall so appear in evidence, that she was delivered of a child, and that she did, by secret burying or otherwise disposing of the dead body of such child, endeavour to conceal the birth thereof, and thereupon the court may pass such sentence as if she had been convicted upon an indictment for the concealment of the birth. (*k*)

(*k*) As this law was lately discussed in Parliament, and is contained in a modern statute, we have not thought it proper to make any alteration in its terms. We think, however, that it is objectionable in principle to charge one crime by the indictment, and to allow the jury to convict and the court to pass sentence for another not stated upon the record.

ART. 84.

Whosoever shall unlawfully and carnally know any woman, by force and against her will, shall be guilty of rape, (*l*) and shall suffer death. (*m*) Rape.

(*l*) See the definition of this offence in Hawkins's P. C. b. i. c. 41, s. 2. It was decided by a considerable majority of the judges in Jackson's Case, Russell and Ryan's Crown Cases, 487, that having carnal knowledge of a married woman, under circumstances which induced her to suppose the offender to be her husband, did not amount to a rape. Some of the judges dissented from this opinion; and a suggestion was made that it might be proper, if a similar case arose, to make it the subject of a special verdict, in order that the point might be more solemnly discussed. We have considered the law as decided by the above Case; and unless fraud can, under such circumstances, amount by construction to force, it appears to us that the facts do not bring the offence within the terms of the definition. For this reason we have not thought it necessary to insert in the Digest any express rule declaring this offence not to amount to rape, though, as we cannot doubt that an offence of so heinous a description ought to be the subject of exemplary punishment, we propose to notice it in another part of the law. Another offence of a very grave character, nearly connected with the offence of rape, namely, administering drugs with the view of preventing resistance to sexual intercourse, will also be noticed by us hereafter.

(*m*) 9 Geo. IV., c. 31, s. 16. Rape and unnatural crimes have been already noticed in the Second Report of the Commissioners on Criminal Law, which treated of the punishment of death. We then stated that it was our intention to resume the consideration of the subject; but as, since that Report was made, the mitigation of capital punishments has been maturely considered by Parliament, without leading to any alteration of the law relating to these offences, we for the present think it unnecessary to make any remarks upon them, and merely present the law as it now stands.

ART. 85.

It is rape although the woman at last consent to carnal knowledge, if such consent is given through fear of death or by reason of duress. (*o*)

(*o*) 1 Hawk. P. C. c. 41, s. 6; 1 East's P. C. 444.

ART. 86.

It is also rape, although the woman were first taken by her consent, if she be afterwards forced against her will. (*p*)

(*p*) 1 East's P. C. 444.

ART. 87.

Whosoever shall unlawfully and carnally know and abuse any girl under the age of 10 years, shall suffer death. (*q*) Carnally abusing girls under ten years of age.

(*q*) 9 Geo. IV., c. 31, s. 17. A question has been raised whether murder could be committed by ravishing an infant. R. v. Ladd; 1 Leach, 96; 1 East's P. C. 226. This doubt seems to be remarkable, because the offence, if not otherwise murder, is within the principle that the death is occasioned in the endeavour to commit a capital felony: independently of this, the question seems to be merely whether great injury, dangerous to life, was not likely to ensue from the violence used.

ART. 88.

Whosoever shall unlawfully and carnally know and abuse any girl being above the age of 10 years and under the age of 12 years, shall incur the penalties of the ( ) class. (*r*) Ditto under twelve years of age.

(*r*) 9 Geo. IV. c. 31, s. 17. We have inserted the provisions of Articles 87 and 88 from the recent statute, not thinking it right to alter in the Digest a law which has been so lately introduced by the Legislature. It appears to us, however, that the distinction between the ages of 10 and 12 years is not warranted by any facts relating to the physical or mental puberty of a child, or its capacity to consent. One child of 10 years may frequently have attained to greater maturity both of body and mind than another of 12 years; and thus the commission of a capital crime would, under the above law, depend upon a variable and uncertain fact. Probably the objects of a law upon this subject would be best attained by a provision that carnal intercourse with a child under 12 years, with or without consent, should always be liable to one of the highest classes of punishment short of death; but that the precise extent of punishment, should vary according to the circumstances of the crime, such, for instance, as the communication of disease, the infliction of serious bodily injury, the relation of the offender to the child, and other aggravations.

ART. 89.

Whosoever shall commit the crime of buggery, either with mankind or with any animal, shall suffer death. (*s*) Buggery.

(*s*) 9 Geo. IV., c. 31, s. 15.

ART. 90.

Any the least degree of penetration shall be sufficient to constitute carnal knowledge in relation to the crimes of buggery, rape, or carnally knowing and abusing girls under the respective ages mentioned in Articles 87 and 88. (*t*)

(*t*) 1 East's P. C. 438, 439; Gammon's Case, 5 C. and P. 321.

ART. 91.

Emission of seed, provided penetration be effected, shall not be deemed essential to the crimes of buggery, rape, or carnally knowing and abusing girls under the respective ages mentioned in Articles 87 and 88. (*u*) What shall be sufficient proof of the commission of the four preceding offences.

(*u*) 9 Geo. IV., c. 31, s. 18.

ART. 92.

Forcible abduction of a woman on account of her fortune with intent to marry her, &c.

Whosoever shall, from motives of lucre, take away or detain against her will any woman in any wise entitled to any interest, legal or equitable, present or expectant, in any property whatsoever, or being presumptive heiress or a co-heiress, or presumptive next of kin, or one of the presumptive next of kin, to any one having any such interest in property, with intent to marry or defile her, or to cause her to be married or defiled by any other person, shall incur the penalties of the ( ) class. (*v*)

(*v*) 9 Geo. IV., c. 31, s. 19.

ART. 93.

Child-stealing.

Whosoever shall maliciously, either by force or fraud, lead or take away, or decoy or entice away, or detain any child under the age of 10 years, with intent to deprive the parent or parents, or any other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong; or shall, with any such intent as aforesaid, receive or harbour any such child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away, or detained as hereinbefore mentioned, shall incur the penalties of the ( ) class. (*w*)

(*w*) 9 Geo. IV., c. 31, s. 21.

ART. 94,

Proviso.

Provided that no person who shall have claimed to be the father of an illegitimate child, or to have any right to the possession of such child, shall be liable to be prosecuted by virtue of this law, on account of his getting possession of such child, or taking such child out of the possession of the mother, or any other person having the lawful charge thereof.

ART. 95.

Unlawful abduction of girls under sixteen years of age.

Whosoever shall unlawfully take any unmarried girl, being under the age of 16 years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall incur the penalties of the ( ) class. (*x*)

(*x*) 9 Geo. IV., c. 31, s. 20.

ART. 96.

Masters of ships forcing on shore, or leaving behind any person belonging to their crew.

Whosoever being master of any ship belonging to any subject of the United Kingdom shall, whilst abroad, force on shore and leave behind, or otherwise wilfully and wrongfully leave behind on shore, or at sea, in any place in or out of Her Majesty's dominions, any person belonging to his crew, before the return to or arrival of such ship in the United Kingdom, or before the completion of the voyage or voyages for which such person shall have been engaged, whether such person shall have formed part of the original crew or not, or shall refuse to bring home with him again all such of the men whom he carried out with him, as are in a condition to return when he shall be ready to proceed on his homeward-bound voyage, shall incur the penalties of the ( ) class. (*y*)

(*y*) The above article is compounded of the 30th section of the 9 Geo. IV. c. 31. which enacts, "That if any master of a merchant vessel shall, during his being abroad, force any man on shore or wilfully leave him behind in any of His Majesty's colonies or elsewhere, or shall refuse to bring home with him again all such of the men whom he carried out with him as are in a condition to return when he shall be ready to proceed on his homeward-bound voyage, every such master shall be guilty of a misdemeanor, and being lawfully convicted thereof shall be imprisoned for such term as the court shall award;" and of the 40th section of the 5 and 6 Wm. IV. c. 19, which enacts, "That if any master of a ship belonging to any subject of the United Kingdom shall force on shore and leave behind, or shall otherwise wilfully and wrongfully leave behind on shore or at sea, in any place in or out of His Majesty's dominions, any person belonging to his crew, before the return to or arrival of such ship in the United Kingdom, or before the completion of the voyage or voyages for which such person shall have been engaged, whether such person shall have formed part of the original crew or not, every person so offending shall be deemed guilty of a misdemeanor, and shall suffer such punishment by fine or imprisonment, or both, as to the court before which he shall be convicted shall seem meet."

ART. 97.

Definition of "master of a ship," "seamen," and "ship."

For the purposes of the last preceding Article, every person having the charge or command of any ship belonging to any subject of the United Kingdom shall be deemed and taken to be the master of such ship; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same, shall be deemed and taken to be a seaman: and the term "ship" shall be taken and understood to comprehend every description of vessel navigating on the sea. (*z*)

(*z*) 5 and 6 Wm. IV. c. 19, s. 52.

ART. 98.

Arresting clergymen during Divine Service.

Whosoever shall arrest any clergyman upon any civil process, while he shall be performing Divine Service, or shall, with the knowledge of the person so arresting, be going to perform the same, or returning from the performance thereof, shall incur the penalties of the ( ) class. (*a*)

(*a*) 9 Geo. IV. c. 31, s. 23.

ART. 99.

Sending or imprisoning British subjects beyond the seas.

Whosoever shall unlawfully and forcibly transport any subject of this realm into any parts beyond the seas, or shall wrongfully and forcibly detain or imprison any such subject in any such parts, shall incur the penalties of the ( ) class. (*b*)

(*b*) The 12th section of the stat. 31 Car. II. c. 2, (the Habeas Corpus Act), in order to prevent illegal imprisonments in prisons beyond the seas, enacts, "That no subject of this realm, that now is or hereafter shall be an inhabitant or resiant of this kingdom of England, &c., should be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into any parts, garrisons, islands, or places beyond the seas, within or without the dominions of His Majesty, his heirs or successors; and every such imprisonment was thereby enacted and adjudged to be illegal; and that the person or persons who should knowingly frame, contrive, write, seal, or countersign any warrant for the commitment, detainer, or transportation of any subject; or should so commit, detain, imprison, or transport any person or persons contrary to that Act, or be any ways advising, aiding, or assisting therein, being lawfully convicted thereof, should be disabled from thenceforth to bear any office of trust or profit within the said realm of England, dominion of Wales, or town of Berwick-upon-Tweed, or any of the islands, territories, or dominions thereunto belonging, and should incur and sustain the pains, penalties, and forfeitures limited, ordained, and provided in and by the Stat. of Provision and Præmunire, made in the 16th year of King Richard the Second, and be incapable of any pardon from the king, his heirs or successors, of the said forfeitures, losses, or disabilities, or any of them." We apprehend that it would be extremely difficult to frame an indictment upon the above clause at the present day; and its enactments appear to us to apply to a state of society quite different to that of modern times. We should, therefore, recommend that it should be wholly repealed, and that the more simple provision in the text should be substituted.

The forcible abduction or the stealing away of a man, woman, or child from their own country, and sending them into another, is a misdemeanor at common law. 4 Black. Comm. 219; 1 East's P. C. 429, 430.

ART. 100.

Furious driving.

If any person shall be maimed or otherwise injured by reason of the wanton and furious driving or racing, or wilful misconduct of any coachman or other person having the charge of any stage-coach or public carriage, every such coachman or other person having such charge as aforesaid shall incur the penalties of the ( ) class. (*c*)

(*c*) 1 Geo. IV. c. 4.

ART. 101.

Exception.

The law contained in the last preceding Article shall not extend to hackney-carriages drawn by two horses, or one horse only, and not plying for hire as stage-coaches.

ART. 102.

By any wrongful act or omission, causing bodily harm.

Whosoever shall wrongfully beat, imprison, or assault, or shall by any other wrongful act, or by any unlawful omission, cause bodily harm to any other person, shall incur the penalties of the ( ) class.

ART. 103.

Definition of Battery;

A battery consists in the actual infliction of any the least unlawful violence to the person of another, in an angry or revengeful, or rude or insolent manner. (*d*)

(*d*) 1 East's P. C. 406.

ART. 104.

Imprisonment;

An imprisonment consists in any unlawful restraint of the personal liberty of another. (*e*)

(*e*) 1 East's P. C. 428.

ART. 105.

Assault.

An assault (*f*) consists in any attempt or offer, with force and violence, to do bodily hurt to another, whether it be from malice or wantonness. (*g*)

(*f*) Besides the assaults here digested, there are a variety of offences which, in some respects, partake of the same incidents, though their principal characteristics determine their arrangement under other divisions. Thus assaults upon officers of justice and striking in the King's superior courts will be appropriately placed under the head of Offences against Public Justice; assaults committed in pursuance of conspiracies to raise the rate of wages, under the head of Offences against Trade; and assaults upon officers of Customs or Excise, under the head of Offences against the Revenue.

(*g*) 1 East's P. C. 406.

ART. 106.

Assaulting with intent to commit felony.

Whosoever shall assault any other, with intent to commit any felony, shall incur the penalties of the ( ) class. (*h*)

(*h*) 9 Geo. IV. c. 31, s. 25.

CRIMINAL VIOLATIONS OF THE RIGHT OF PROPERTY.

Prefatory Remarks.

PENAL laws against offences consisting of violations of the right of property are much more simple than those which define and regulate the civil right. Such offences consist, for the most part, in specific acts of spoliation or damage, characterized by violence, fraud, or malice, to the definition and investigation of which the nature and constitution of the civil right is seldom material.

Offences against personal and moveable property are distinguishable, in the first instance, into two classes :—

1. Such as consist in the fraudulent appropriation by the offender, to his own use, of the property of another.

2. Such as consist in the malicious destruction of, or injury to, the property of another.

Each of these classes comprises offences which must be prohibited by the Criminal Law, but these need not, and ought not, to be punished in equal degree, or to the same extent. Here consequently arises a necessity for legal distinction; for laws against fraudulent appropriations are capable of a more general application than those which regard malicious injuries to property. Thus, although the fraudulent taking of another man's goods must usually constitute the same offence *in specie*, whatsoever kind of chattel be taken, policy may require a very different rule in respect of malicious destruction of or damage to property. Whilst the stealing of many kinds of property is necessarily punishable as a crime, the malicious destruction of the same property is an injury in respect of which a civil remedy to the proprietor may be deemed sufficient, without treating the act as a crime.

Offences of the former class, that is, those which consist in fraudulent appropriations, are also distinguishable for legal purposes into two classes :—First, those where a mere wrong-doer fraudulently takes and appropriates, or takes with intent to appropriate, that which belongs to another, and by so doing commits a wrong in the first instance; secondly, those where one having possession of property without wrong, by consent of the owner, or other lawful means, fraudulently converts such property. In the first case, the original taking or obtaining possession of the property is wrongful, and may properly be made penal; in the latter, it is not the taking, but the fraudulent appropriation of the property which is criminal. This distinction is important as serving to establish a boundary between the two offences of theft and embezzlement: to the former an original *wrongful taking* is essential, whilst the latter is committed by a *wrongful appropriation* consequent upon a possession originally lawful. In the one case as well as the other the prevention of fraudulent appropriation is the object of the law; but it is useful to distinguish them, because the offence of embezzlement is for the most part limited by the necessity of proving some *actual fraudulent appropriation*, but the offence of theft is capable of a much more extensive application.

Although, according to received notions of penal jurisprudence, a mere criminal intent, not manifested by any overt act, is not properly punishable, it is otherwise where such an overt act, coupled with a criminal intention, can be distinctly defined. Where the original taking is unlawful, the very acts of taking possession of and removing the property are manifestations of the wrongdoer's criminal intention, sufficient in conjunction with that intention, to constitute the specific crime of theft, although the thief be never, in fact, able actually to appropriate the property taken; and, therefore, for the protection of property, those overt acts, coupled with the criminal intent to appropriate, are properly punishable as a substantive offence. When, on the other hand, one is intrusted with the possession of property by the act, and with the consent of the owner, or by any other legal authority, the overt acts of taking and removing cease to be overt acts manifesting the fraudulent intention of the doer, and it is difficult to define any specific overt acts, *short of actual*

appropriation, which shall sufficiently manifest the intent fraudulently to appropriate the goods of another; and it would be a lax and inconvenient rule to constitute generally *any overt act*, without further definition, a substantive offence when coupled with the fraudulent intention to misappropriate.

The distinction, therefore, between a *wrongful* taking and a conversion consequent on a *lawful possession*, constitutes the line of separation between the offences of theft and embezzlement, the former of which embraces acts of unlawful taking and removing, though no complete appropriation be effected, whilst to the latter some kind of actual misappropriation is essential.

A wrongful taking into possession may either be without the consent of the proprietor, as where a chattel is taken clandestinely or by force, or with his consent induced by fraud or extorted by intimidation. As the distinction between the want of consent and a consent so obtained would not be available on any grounds of natural justice, civil policy, or legal analogy, it is, we conceive, useless as a legal distinction for penal purposes. We think that it would not only be objectionable as a useless and therefore impolitic distinction, but that it would be highly inconvenient in practice. For although the fraudulent intent were manifest from the offender's conduct, doubts would still occur whether, at the time of taking, any consent had been given by the owner, and whether that consent extended to the parting with the possession, or was confined to some act to be done, subject to the continuing possession of the owner. For instance, A. intending to deprive B. of his horse, obtains leave to make trial of the animal, with a view to the purchase; and having thus obtained possession, rides to a distance, sells the horse, and absconds. It is manifest that in such a case the question whether B. had consented to part with the temporary possession might be one of considerable difficulty, under the particular circumstances. If in such a case the consent were that A. should have a week's trial, or that he should merely try the horse in B.'s presence, there would be no doubt that in the one case he had, and in the other that he had not, consented to part with the possession; but it is obvious that innumerable intermediate cases might arise in which it would be difficult to decide whether A. had or had not possession by the owner's consent.

Again, were such a distinction to prevail, it would be necessary to consider such an offence (when possession was taken on a consent induced by fraud) as an obtaining by fraud; and this would induce the necessity, as will presently be more fully observed upon, of establishing two distinct classes of offences, consisting in the obtaining property by fraudulent pretences or misrepresentations; one of such classes being applicable to the case of obtaining the mere possession of property for some temporary purpose only, and the other extending to the case of fraudulently obtaining a transfer of property. It will presently be seen that these cannot be included within one general law; and that whilst the taking of property under a consent, fraudulently obtained, to part with *the mere possession*, is properly punishable without any limitation as to the fraudulent means used; the taking property under a consent fraudulently obtained to transfer the *entire right*, must, on grounds of policy, be limited to the obtaining by defined and specific means, and cannot be extended, without distinction, to every kind of false pretences and misrepresentations.

We now proceed to consider more particularly a material and important distinction in respect of these fraudulent appropriations, where the original taking or obtaining is wrongful, the consent having been procured by fraud.

The obtaining and taking are equally wrongful, whether the property be taken secretly, without the knowledge or consent of the owner, or, with his knowledge, by force or fraud; and, therefore, the taking or obtaining possession by any of those means may equally be regarded as a sufficient overt act to constitute the offence of theft. When, however, possession is obtained by fraud, there is a material distinction between the consent to part merely with the temporary possession of property and the consent to part with the entire interest. The distinction is important on grounds of extrinsic policy, rather than by reason of any intrinsic considerations in respect of the act itself, or its consequences. There is little reason, so far as either the immorality or the mischief of the act is concerned, for distinguishing between the case of an owner defrauded of his money under a false pretence, and an engagement for repayment in a month, or that of a horse obtained under the pretence of hiring it and returning it at the end of the month. The fraudulent intent may be the same, and the loss the same, and for many, even legal purposes, the contract may be equally void by reason of fraud. In point, however, of legal policy, there exists a wide difference between the case where the owner parts with the

temporary possession of a chattel to be returned in specie, and of one who parts with his entire interest in the specific money or chattel.*

To constitute any obtaining of money or goods a theft, where the owner meant, even although he were induced by fraudulent means to part with his entire interest, would be inconvenient and dangerous. Every loan of money or sale of goods, where the borrower or buyer made default in payment or repayment, might be made the subject of a prosecution by the disappointed creditor, and the guilt of the accused would be made to depend on the mere secret intent of his mind without such aid from circumstances as his conduct respecting property, in which he had but a temporary interest, would usually afford.

This objection applies only to a law which would generally constitute a taking of property penal whenever the owner was, with a fraudulent intention on the part of a wrongdoer, induced to part with his entire interest in such property; it does not apply where the fraudulent means can be specifically defined, and are such as of *themselves constitute overt acts of fraud*, sufficiently demonstrative of intention to constitute, in conjunction with such intention, a substantive offence, in conformity with the general principle to which we have above alluded. For, as the want of an overt act plainly manifesting the intention to defraud constitutes the principle of exception, it ought not to operate where the very means themselves indicate such intention.

The obtaining of money or goods by *false pretences* is, conformably with these principles, a mode so clearly indicative of fraud as properly to constitute an offence, notwithstanding the intention of the owner to transfer his right of property; and the same principles govern the class of cases usually denominated cheats, where false and deceptive cards, dice, and other such instruments, are used to defraud a person of his property. Consistently with these principles, it may be questionable whether the offence of obtaining moveable property by false pretences ought not rather to constitute a branch of the law of theft than a substantive and distinct offence. By the existing law, however, the two offences are regarded as distinct, and, although they agree in one material and characteristic circumstance, viz., that the original taking is *by wrong*, yet they differ in one other essential circumstance, that a taking by consent of the owner to part with his entire interest, however fraudulently obtained, cannot amount to theft, although it may constitute an offence of a different kind. We think it, therefore, more convenient that the offence of obtaining property by false pretences, and the kindred offences of defrauding by means of false weights and measures, and other such practices, should be effected by defined fraudulent devices, should constitute separate classes of offences.

These necessary distinctions between fraudulent appropriations of, and malicious damage to property; between appropriations where the first taking is wrongful, and those which are consequent on a rightful possession; and between those where consent is fraudulently obtained to part with the temporary possession only, and others where consent is fraudulently obtained to part with the right of property,—form the characteristic distinctions of several classes of offences which seem to be as direct and simple as conflicting principles and the necessity for distinct limits will permit.

The first class, being the most simple and comprehensive, consists of a wrongful *removal* of what belongs to another in prosecution of a fraudulent intent to appropriate the article taken. This offence constitutes theft or larciny, according to the English law, and it is characterized by a wrongful removal (taking and carrying away) of the property of another, whether it be effected without consent, or by consent obtained by intimidation or fraud, so as the owner consent not, in the latter case, to part with his entire right of property, but with the temporary possession only.

With this large class of offences that in the French code partially corresponds, which is denominated "Vols," and is summarily defined thus;

"Quiconque a soustrait frauduleusement une chose qui ne lui appartient pas est coupable de vol."

The second class, calculated in part to supply the defect of the former class, consists of cases where the property is obtained by means of some specific false pretence;—a predicament agreeing with the former, in this respect, that the original

* When the temporary possession only is parted with, property remains in the owner, notwithstanding the transfer of possession; the offender therefore in this case, in appropriating the goods fraudulently, appropriates the property of another;—which is impossible, where the entire property is transferred. We do not, however, regard this as sufficient to warrant the distinction; for if fraud be sufficient to defeat the transfer of *possession*, it is *à fortiori* sufficient to defeat the transfer of *property*.

taking must be wrongful, but differing from it in two others, viz., that a wrongful removal is not essential, (the false pretence being an overt act sufficiently indicative of fraud,) and that it includes cases where the owner means to part not merely with the possession but with the right of property.

The third and fourth classes consist of cases where the obtaining is wrongful, being effected by some defined act of fraud or extortion, by which the owner is defrauded of or made to surrender his property; in neither of which cases is it essential to the offence either that the property should be removed, or that the owner should consent to part with the temporary possession only.

A fifth class consists of fraudulent appropriations committed by persons embezzling property in their possession. This offence partially corresponds with that which in the French code is denominated "Abus de confiance."

As incidental to these several classes of offences, (which are all comprehended under the general head of Fraudulent Appropriation,) are to be enumerated, aggravations of those offences, attempts to commit those offences, and the offence of receiving property fraudulently appropriated.

Within one or other of these classes of offences seem to be comprised all which fall within the general notion of fraudulent appropriation. Every offence of this nature must originate either in a wrongful or rightful possession obtained by the offender,—if wrongful, it falls within the predicament of theft, save when the owner is induced by fraud or force to part with the entire interest, and, even then, it may fall within the narrower limits of the offence of obtaining property by false pretences, or extortion by intimidation, or the wider boundary of cheats.

It is here to be observed that an obtaining by a false pretence or by specific modes of cheating does not and cannot embrace all cases where one man defrauds another of his money or goods. Where one by a mere lie, but without any specific pretence or other defined criminal means, fraudulently induces another to part with his property, the act, although mischievous and immoral, is not properly the subject of penal animadversion. The extension of the criminal law to such acts would be to attempt to make the bounds of criminal liability commensurate with those of moral delinquency,—it would be to make such liability depend on previous indications of a dishonest intention not vouched for by any specific overt acts manifesting such intention. The interposition of penal laws to such an extent for the protection of property is unattainable. Whilst it is essential to guard the rights of property against frauds effected by means calculated to prevail over that degree of prudence and circumspection which every man is bound to exert for his own protection, it is sufficient to leave such as are not reasonably vigilant to remedies of a civil nature. Where, however, the original possession by the offender is rightful, but subject to some duty or obligation, the fraudulent appropriation is met by the laws against embezzlement. These laws seem therefore to include all predicaments of fraudulent appropriation which are properly the subject of penal legislation. Other offences, which are peculiar to particular subjects, require separate consideration.

Having thus briefly noticed the general principles by which the various classes of offences against property, unaccompanied with violence, are governed, we proceed to make some particular observations on each class; and in so doing, we propose to pursue the following course, which we have already adopted in respect of homicide, viz.:—to point out in each case those characteristic distinctions which belong to it, and by which it may conveniently be limited and defined; next, to consider the mode in which each offence is regulated by the existing law; and thirdly, to make such remarks as those considerations may upon comparison suggest.

THEFT.

Prefatory Remarks.

The most simple form of offence against the right of property might seem to consist in a man's fraudulently taking and having as his own that which does not belong to him. But the frequency of the offence and its endless variety, the consequent necessity for a multitude of decisions, the partial retention and partial abandonment of many antiquated rules, and, above all, the want of sufficient legislative alterations to meet the more complicated relations of modern society, and the frequent attempts made to supply the defect by judicial construction, have tended to burthen this branch of the law with much obscurity and complexity. The characteristics of the offence are a wrongful taking, by which it is distinguished from all offences, in the nature of embezzlement consequent upon a lawful possession; a removal or carrying away, which is the overt act by which the offence is consummated, without any further appropriation, and by which it is distinguished from an obtaining by false pretences,* cheat, or extortion; and the fraudulent intention to deprive the owner of his property, and to have as the offender's own another man's goods, by which the offence is distinguished from a mere trespass.

Previously to making some remarks on the present law of England as to theft, a few observations may be properly premised.

Theft of things attached to the realty.

It is observable, in the first place, that the offence of theft extends in principle to all property which is capable of being removed, although it be severed from the freehold for the purpose of removal. It is not moveable property in its strict and technical sense, with reference to the well-known distinctions in the civil branch of the law, which ought to be the subject of theft, but property which is moveable with reference to its physical condition and situation. It can make no difference in reason, whether an offender unscrews a looking-glass from a wainscot and then steals it, or steals one not attached. And it is as contrary to legal analogy as it is to reason to make such a distinction. It may, indeed, be here objected, that the effect of bringing the severance and stealing of a thing annexed to the realty within the scope of the law of theft would be, if not to abolish several petty offences of summary jurisdiction dependent on this distinction, at least to create two concurrent jurisdictions in respect of such offences. To a certain extent this inconvenience, if it be one, already exists, since many of the provisions against stealing shrubs, plants, &c., apply to cases already criminal as thefts. This, practically speaking, is productive of advantage, for although in the great majority of instances it is desirable that petty offences should be disposed of in a summary manner by the inferior magistrates, yet as the amount of the depredation or damage which can be proved is a very inadequate test of the difficulty of the inquiry which it involves, or the guilt of the offender, it is often expedient that an offender, whose offence comes within the scope of summary jurisdiction, should be brought to answer before a higher tribunal. It seems, however, to be desirable that a summary jurisdiction should, under certain restrictions, be provided for inquiry in the case of all kinds of petty thefts,—provision being made for excepting cases of difficulty or importance for the cognizance of a higher court.

Property and possession of things stolen.

It is further observable, that the intent essential to the offence must extend to the fraudulent appropriation of the whole property, and that the mere intent to deprive the owner of the temporary possession only is not sufficient to constitute the offence. For although, under particular circumstances, a fraudulent privation of possession may justly be made penal; such an offence cannot, without great inconvenience, be included within so general a predicament as that of theft. A law designed for the protection of the right of property would be far too general in its operation, were it to be extended to mere temporary privations of possession. In practice this would be to injure, if not to destroy, the important boundary between the crime of theft and a mere civil trespass.

It is also to be remarked that, in principle, possession by the proprietor of the article stolen is not essential to the offence. For the essence of the offence is the fraudulent appropriation of or attempt to appropriate that which belongs

* It has been seen that the offence is distinguishable from that of an obtaining by false pretences by an exception founded on a principle of policy, viz. when the owner is induced by fraud to transfer not merely the possession, but the right of property.

to another; and if the offender fraudulently take what belongs to another, it is immaterial, except for mere technical purposes, who had, or whether any one had actual possession of the property at the time of the taking, so as the offender himself had not possession. If A. and B., the joint owners of a horse, let it to D. on hire, who again lets it to E. on hire for a shorter term, who sends F. his servant with it on a journey, from whose possession it is fraudulently taken by M., an injury is done by M. to the right of each of the others. A. and B. are deprived of their reversionary right of property upon the expiration of the term of letting to D., the latter of his reversionary right to the use for the remainder of his term of hiring after the expiration of his letting to E., and F. of the right of possession which he had against all but E. his employer. M. therefore, by his fraudulent taking and conversion of the horse, in respect of which he has neither the right of property nor of possession, violates at once the rights of all who have either the right of property or of possession, present or future. The offence then consisting in the fraudulent usurpation of all rights, whether of property or the mere possession, it is obviously immaterial to the offence in whom or in what manner those rights reside;—the thief is a wrongdoer against each, and against all, and also against society by having committed a fraudulent violation of the right of property. It is only for the mere purpose of technical description that it is necessary in a prosecution for such an offence, to state whose property was stolen; even this cannot be invariably required, inasmuch as it may frequently happen that, although the guilt of the offender can clearly be proved, the owner cannot be discovered, and it would be absurd, that an offender should derive impunity from a circumstance not essential to the offence. Such a description of the property is to be given where circumstances admit of it, as serves to particularize the offence, and afterwards identify it, if need be; but it is obvious that for this purpose the naming the person from whose actual possession the property was taken, though he were not the owner, would as well, or even better, serve the purpose intended, than if the owner himself were to be named.

We now propose to make some observations on the law of England concerning theft, confining them principally to such of its provisions as appear to be defective.

Things attached to the Realty.

We have already had occasion to observe upon the distinction which the law makes between mere moveables and adherents to the realty. This gives rise to the rule that one who severs property from the realty and forthwith carries it away, is not guilty of theft, but of a trespass only. This rule is, in many respects, opposed to reason and convenience, the more especially as it has been extended by means of a very fanciful doctrine to mere moveables, not because they are adherents to, but because they "savour of the realty." The effect of the rule has been to leave a considerable class of property without adequate protection from the criminal law, and to induce the necessity of making many supplementary laws for partially remedying the defect. The rule itself is one of vague and indefinite operation, leaving it wholly uncertain what length of time must intervene between the severance and the taking to constitute the guilt of theft. In its application to the stealing of boxes, containing title-deeds to real property, which, in some instances, are not the subject of theft, because they savour of the realty, the distinction is occasionally so nice and subtle, as to depend on the circumstance of the box being open or shut. The statutory provisions to which a rule so defective has given rise leave anomalies almost as great as those which existed before those provisions were made. To cut down and carry away a tree of less than £5. value, not growing in a park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to a dwelling-house, is punishable merely by a pecuniary fine; but to steal a single apple casually severed from such a tree, is punishable by transportation for seven years, and the forfeiture of the offender's whole personal estate. Most of those suppletory provisions exhibit in their operation unreasonable disproportions as to punishment between offences committed in stealing that which does and that which does not adhere to the realty. It is observable also that the tearing property from the realty is usually an aggravation of the theft, as increasing the loss to the proprietor. The remedy obviously consists in the abolition of the distinction, provision being made for summary punishment in case of petty thefts, and which ought not, we think, to be confined to property attached to the realty.

We have endeavoured to make the description of property which forms the subject of theft, and also of other offences, more brief and distinct, by some general definitions, and more particularly by defining what animals are, under specified circumstances, to be regarded as property within the protection of the penal law.

Possession of Property stolen.

We proceed to notice the doctrine of the law of England in respect of the *possession* of property the subject of theft. The law differs from the general principles which we have lately adverted to in two important particulars, 1st, in making possession by the proprietor essential to the offence; 2dly, in making a constructive possession by the proprietor sufficient to satisfy the rule, though it be contrary to the fact, and even although the offender had the actual possession by delivery from the proprietor.

With respect to the first point, we have already offered some observations, to show that such a rule is useless, and therefore objectionable. Indeed, the law does not always consider an actual possession by the proprietor or his agent to be essential; on the contrary, theft may be committed by the taking of property lost from the owner's possession. This, perhaps, is not irreconcilable with the rule which makes possession by the owner necessary, as it may be said, that although he has no longer the actual, yet he has the constructive possession, or possession in law. If this could always be said, the rule would be inoperative, and though it did no good, would work no inconvenience; the result would be the same, whether possession by the proprietor were to be regarded as immaterial, or whether by construction of law he were still to be deemed to have possession in law, although he no longer had the possession in fact.

The second distinction is of greater importance. In accordance with the common law notion that possession by the owner was essential to the theft, it followed, *à fortiori*, that the offence could not be committed by one who was himself in possession of the property; so far was this doctrine carried, that it seemed at one time to have been doubted whether a servant, having the bare charge of his master's goods, was guilty of theft in taking them. So again, where the master or principal had no possession but by his servant or clerk who had received money or goods for him, it was doubted whether such servant or clerk was guilty of theft in taking and embezzling the property. Conformably with the same principle, no bailee, or other person intrusted with the possession of goods for conveyance or other purpose, was liable, in case of fraudulent appropriation, to the penalty of theft.

A law so narrow, and so limited by technicalities, was wholly inadequate to the growing exigencies of a nation, the wealth and commerce of which were rapidly increasing, and which required more efficient and extensive laws for the protection of the great mass of property necessarily confided to the possession of various agents. Notwithstanding, however, the urgent necessity of the case, the Legislature interfered but sparingly, whilst the courts of Criminal Law, by forced and subtle constructions, endeavoured to enlarge the boundaries of the law of theft, in order to reach offenders guilty of fraudulently appropriating goods entrusted to their possession.

Clerks and servants embezzling property received for their masters or principals, were, by the statute 39th of King George III., c. 85, declared to be guilty of stealing the same; and by the statutes 52nd of King George III., c. 63, and 6th of King George IV. c. 94, bankers, brokers, and some other agents, were punishable for fraudulent embezzlements of the property of their principals. Saving these exceptions, and some others of a more limited nature, the courts of criminal judicature have been left to struggle with the common law restrictions on the crime of theft, and to enlarge its boundaries, partly by constructive adherence to, but virtual departure from the common law doctrine, and partly by overruling former precedents. With a view to avoid the effect of the common law doctrine, a constructive possession is in some instances deemed to *continue* in the owner, although actual possession has been given to the offender, whilst in others, where the offender has clearly once had legal possession, the possession is deemed constructively to re-vest in the proprietor, although the actual possession of the offender still remains. The doctrine of constructive possession is objectionable, as well because it is indistinct and uncertain as a rule, as also because it affords after all but an inadequate remedy for the inconvenience felt.

The position that actual possession of property by the owner is necessary in order to make the taking of it by another theft, is best illustrated by example. If property be delivered to a carrier to be carried, the constructive as well as the actual possession of the proprietor ceases, and the carrier is not guilty of theft, although he fraudulently sell the property; but if he do any wrong inconsistent with the contract, as by breaking open the box or package containing the property, he puts an end to the contract, and then, although he continues to be in the actual possession of the property, yet in construction of law the possession re-vests in the proprietor: being so re-vested, the carrier is deemed to be as guilty of theft in taking any part of such property, as if he had, independently of any contract, frau-

dulently taken it from the possession of that proprietor. But though this be the law in the case of an ordinary carrier, yet if the owner of a horse deliver him to another, upon a bargain made that the latter shall take the horse to a distant place and there leave him, the possession is deemed constructively to remain in the owner, and the agent would be guilty of theft in taking and selling the horse contrary to the contract.

It is difficult to discover any certain principle which would reconcile such decisions, or prescribe any certain rules for determining, among the almost infinite variety of circumstances under which the possession of property is parted with, whether the constructive possession is to be considered as still continuing. The doctrine of re-vesting possession seems to be of too complicated and indefinite a nature to serve as a practical test of criminality; what particular wrongful acts shall operate to re-vest the constructive possession, and under what circumstances the bailment or contract shall be considered as determined by effluxion of time, performance, or otherwise, are questions frequently of a doubtful nature as matters of civil right, and the rules on which they depend are little calculated to define the boundaries of criminal liability.

In another and most important point, the law, even extended by the doctrine of re-vesting possession, is greatly defective. Its application depends altogether upon the fortuitous existence of circumstances which are by no means essential to the justice of the case, or the effectuating of any general principle. For although it be certain that the carrier or other agent has, contrary to his duty and the trust reposed in him, been guilty of a fraudulent appropriation, yet can he not be convicted, unless it can be proved that, previously to that offence, he committed a wrong, by which the possession was constructively revested.

Suggestions for altering the Law of Embezzlement.

The obvious remedies are, to make possession by the owner in all cases immaterial to the offence of theft, and to embrace at once, by a direct substantive law, offenders who, having lawful possession of property, are guilty of fraudulent embezzlements. Should this suggestion be sanctioned by the Legislature, it is hoped that all the anomalies and difficulties which have arisen from strained and ineffectual attempts to bring embezzlements within the limits of the law of theft, by resorting to the fiction of a constructive revesting of possession will be swept away, and that embezzlements will be adequately punished as frauds committed upon owners by offenders having the actual possession.

Such an alteration cannot, we conceive, be regarded as introducing any new principle, or as constituting an undue extension of any existing principle or rule of law. Clerks, servants, bankers, brokers, factors, and other such agents, are by special enactments already liable criminally in respect of fraudulent embezzlements of the property of their principals; the principle extends with equal force to carriers and other bailees entrusted with the possession of property. The proposed law would, though more direct and effectual in its operation, include few offenders who are not punishable by the present law of theft, as enlarged by construction; and although such offenders can and may now be reached occasionally by such means, it would, we think, be much better that they should be brought within the scope of a law of a more certain and direct operation.

It may be said that the distinction thus made between the offences of theft and embezzlement, to the former of which a wrongful taking is essential whilst the latter consists in a fraudulent appropriation of property not unlawfully in the possession of the offender, will not dispense with the necessity of rules for deciding, in doubtful cases, where the possession of the owner continues, so as to make the taking a theft, and where the offender, by reason of possession, is guilty, not of theft, but of embezzling. This is true; but the difficulty, we apprehend, will be of no practical importance. According to the present law, the question of guilt or innocence on a charge of theft frequently depends upon the mere question of possession; but, according to the proposed alteration, the question of possession will be not otherwise material than as deciding whether the offender be guilty of one or other of two offences,—of theft, if he had not lawful possession;—of embezzlement, if he had. And, as in cases of real doubt, the offender would be charged in the alternative, no practical inconvenience would result; and thus a question, which is often one of some difficulty and which cannot be conclusively defined by any general or certain rule, would be to a great extent avoided.

Where the legality of the original possession is doubtful, but property has been fraudulently appropriated, no difficulty can arise; it ought, in such a case, to be no defence against a charge of embezzlement, that the offender was originally a wrong-doer in stealing the goods;—that is, where there has been simply a removal sufficient to constitute a theft, but without any actual appropriation. It is

scarcely possible to suppose a case where a delivery by consent was doubtful in the absence of fraud;—and in the case of fraud, no delivery, even by consent, would be available.

It is difficult to define what shall constitute a distinct possession by any precise legal scale. The use or possession of property on the premises of the owner, or in the presence and under the superintendence of the owner or his agent, or where he or his agent are sufficiently near to exercise a control and superintendence over the property, may, without difficulty in point of law, be considered to constitute a continuing possession by the proprietor. Whether, under the circumstances of any particular case, property is subjected to the mere occupation of another, and no further, is a question of fact rather than of law, and it is one which, in whatever way it be decided, can rarely, if ever, be material when the indictment is properly framed.

Suggestions for altering the Law respecting Theft of Possession.

We may here notice another doctrine of the law of England, in respect of which some alteration, for the sake of consistency, seems to be desirable.

Theft, according to the existing law, may be committed by one who steals his own goods, with intent to defraud some other. The intent, in such case, must either be to commit some collateral fraud, or, in fraud of another's right, to enjoy the temporary possession of the property. Instances of the first class are put in the books of a master's robbing his own servant of his (the master's) own goods with intent to charge and so to defraud the hundred, and of the owner's stealing his own property from the custody of a carrier, with intent to charge him in respect of the loss. These it is evident, although justly punishable as mal-practices,—as incipient acts done with the intent to perpetrate a fraud *in futuro*,—are still wide of the general characteristic of the offence on which the law of theft is founded, viz., the fraudulent appropriation of the property of another. And although the intent be not to commit a collateral fraud, but to enjoy the temporary possession in fraud of another's right of possession, the offence cannot properly constitute a theft; for this is an offence, as we have already observed, against the right of property, as distinguished from the mere right of possession, and the law of England does not, as the Roman law did, notice the *furtum possessionis* as constituting a branch of the law of theft. The offence properly consists in the unlawful appropriation of that which belongs to another, which cannot be where another has not the property, but only the right of temporary possession. A law might, no doubt, be made to comprehend mere wrongs to the temporary right of possession; but the same principles of policy and convenience, which occasion the distribution of offences into defined classes, must also regulate the limits of each separate class of offences, and we have already observed that to extend the class of thefts to mere injuries to the possession, would be to extend its boundaries too widely, and render the limits between theft and a mere trespass indistinct. Were the common law doctrine, above adverted to, to be recognised, the law would extend not merely to an unlawful taking by the owner of his own property, being in the lawful possession of another, subject to a lien or on a contract of hiring, but would extend to every case of a fraudulent taking of another's property with intent to deprive the owner of the use for a time, and to convert it for the same period to the offender's own use; for no distinction could, in principle, be made between the case of an owner's fraudulently depriving one of the use of a chattel to whom he had let it for a term, and a stranger's stealing the same chattel from the hirer, with intent to defraud such hirer of his use of the chattel during the term. And again, if a stranger would be guilty of theft in stealing from the possession of a hirer of a chattel for a limited term, he must be equally guilty in principle in stealing it from the owner for the same term; and then, as the length of time during which the owner of the property was intended to be deprived of the possession, could not be of the essence of the offence, it would follow that the intent to deprive another of the use of his property for any time, however short, would be sufficient to constitute the crime of theft. This, however, is a result as little consistent with the proper limitation of so general a law as that of theft, as it is with the actual decisions according to the English law; for it has been decided that a taking, with intent to deprive the owner of the mere possession and use of a chattel for a time only, and not to deprive him of the property altogether, does not amount to the crime of theft.

Consistently with these observations, it has appeared to us that the offence committed by an owner in fraudulently subtracting his own property from the possession of another with intent to commit a fraud, might properly be classed as a criminal attempt to defraud.*

* It is worthy of remark, that the necessity of abandoning this principle of the Roman

Suggestions for altering the Law respecting Thefts the Husband's Pr perty by delivery the Wife.

Little comment is necessary in respect of an alteration which we propose in respect of thefts of the property of the husband, by delivery or consent of the wife. The taking, by the present law, does not amount to theft, unless the offender commit adultery with the wife. Although the wife, by virtue of the endowment incident to marriage, has such an interest in the goods of the husband that she cannot be guilty of theft in taking them, yet as she has no power, merely as wife, to divest the husband's right either of property or of possession, her consent appears to be wholly immaterial where the offender, in fact, intends to defraud the husband

Asportation.

A taking and carrying away are, according to all the modern authorities, part of the definition of the offence :* it is, therefore, incumbent upon us to explain our reasons for departing from the ordinary course. We do so because, after much consideration, it has appeared to us to be impossible, on any satisfactory principle, to adhere to the ancient language of the law, inasmuch as it has a tendency to mislead by using words of a known and popular sense in a different and merely technical sense. Whilst, therefore, we propose to make the Criminal Law more accessible and intelligible, we should, we think, be guilty of some inconsistency in retaining these words as descriptive of the offence, with the necessity of presently explaining that by a "carrying away" was merely meant a removal to *any* distance, however small. At one time, probably, a complete *taking away* of the article stolen beyond the reach of the owner was essential to complete the offence. The necessity for some abridgment or limitation would soon become apparent, and where property had been removed to a distance, although not beyond the reach of recaption, the policy of punishing a criminal intention manifested by so plain an overt act would be indisputable. And as the principle could not be limited by the consideration whether the property were carried to a greater or less distance, the only natural limit was a removal to *some distance*, however small. A conclusion thus probably resulting from experience of the convenience of establishing a crime within narrower limits, and which included offenders who would otherwise have escaped the penalties of theft, was well supported by sound principles of criminal jurisprudence. For although the mere intent to commit a crime not manifested by any overt act cannot properly be the subject of criminal animadversion, yet the intent fraudulently to appropriate another's goods manifested by an overt act of removal with that intent, if not an actual appropriation, may well be considered to be a substantive offence sufficiently defined. The rule, however, being once established that any removal to ever so short a distance is sufficient, where coupled with the criminal intent, to constitute the crime, it seems to be far more simple and proper so to describe the offence, than to make a "carrying away" essential after it has long ceased to be so.

To the law of theft, as governed by these principles, the following circumstances are essential :—

A wrongful taking and removal of the property of another.

That such taking and removal be without the consent of the owner or other person authorised to give consent to transfer the right of property (unless the taking and removal be such as to constitute the crime of robbery).

Such removal must be with intent to despoil the owner, and fraudulently to appropriate the thing taken to the use of the offender.

Neither the means used for obtaining possession, nor the motive of the offender, nor the purpose to which he intends to apply the property, are essential to the offence, otherwise than is above stated.

The offence is distinguishable from a mere trespass by the intent to despoil and fraudulently appropriate another man's goods.

It is distinguishable from the offences of obtaining by false pretences, extortion by threat, deceit, and embezzlement, by the circumstance, that a taking and wrongful removal in the first instance are essential to the offence.

It is also distinguishable from the offence of obtaining by false pretences, deceit, and extortion by threat, by the circumstance, that (except in cases of robbery) the taking does not constitute theft where the owner intends to transfer the right of property.

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law has been felt in nations whose systems depend more immediately upon that law than our own, inasmuch as the doctrine of the *furtum possessionis*, as well as the *furtum usûs*, has no place in any of the modern German Codes. See the Austrian Code of 1803, part I., p. 151; Bavarian Code of 1813, art. 209; Würtemberg Code, 1835, art. 297.

* The terms were probably derived from the ordinary form of indictment.

DIGEST

OF THE

LAWS RELATING TO CRIMINAL VIOLATIONS OF THE RIGHT OF PROPERTY.

PREFATORY ARTICLES.

Art. 1.

Definition of "Writing."

The term "*writing*" shall be deemed to signify any material, on which any words or figures, at length or abridged, are written, printed, or otherwise expressed, or any map or plan is described.

Art. 2.

"Valuable Security."

The terms "*valuable security*" shall be deemed to signify any unsatisfied debenture, deed, bond, bill, note, warrant, order, or other security for money, or for the payment of money, of this or any other state, any instrument for the delivery or transfer of any chattel personal whatsoever, any tally, order, or other security entitling or evidencing title to any share or interest in any public stock or fund of any state or country, or in any fund of any body corporate, company, or society, or to any deposit in any savings' bank, and any other writing which secures or evidences title to or interest in any chattel personal; and every such valuable security, shall, where value is material, be deemed to be of value equal to that of such unsatisfied money, chattel personal, share, interest, or deposit, for the securing or payment of which, or delivery or transfer or sale of which, or for the entitling to or evidencing title to which, such valuable security shall be applicable.

Art. 3.

"Muniment of Title."

The terms "*muniment of title*," shall be deemed to signify any writing, as before defined in Article 1, which shall evidence title to any real property or chattel real, or any interest therein; and it shall not in any proceeding in respect of any offence relating to any muniment of title be necessary to allege any such muniment to be of any value, otherwise than by stating the property or interest, or some part of the property or interest, the title to which it evidences.

Art. 4.

"Written Instrument of Justice."

The terms "*written instrument of justice*" shall be deemed to signify any commission, record, judgment, decree, sentence, probate, letters of administration, conviction, writ, return, panel, penal or civil process, bill, answer, interrogatory, deposition, affidavit, rule, order, warrant of attorney, or other original document whatsoever, relating to any cause or matter begun, depending, or terminated in any court of justice, or any proceeding taken or made by virtue of any commission or inquisition whatsoever.

Art. 5.

"Testamentary Instrument."

The terms "*testamentary instrument*" shall be deemed to signify any will, codicil, or other testamentary writing or appointment, as well during the life of the testator whose testamentary disposition it purports to be, as after his death, whether the same shall relate to real or personal property, or to both.

Art. 6.

It shall not in any proceeding in respect of any offence relating to any written instrument of justice or testamentary instrument, be necessary to allege any such instrument to be of any value.

Art. 7.

"Moveable Property."

The terms "*moveable property*" shall be deemed to include money, valuable securities, muniments of title, written instruments of justice, testamentary instruments; and all animals, although they be usually termed wild animals, or animals

feræ naturæ, which, at the time of any offence committed in respect thereof, are deprived of their natural liberty, and so confined in buildings, stalls, parks, paddocks, cages, nets, ponds, or other enclosures, or are in any other manner so reduced into possession, that they may be taken and used or disposed of at the will of the proprietor;*

Also all domestic animals, and all tame and reclaimed animals, known to be such, although they go abroad and return at pleasure, and also the eggs and produce of such animals so reduced into possession or so tamed and reclaimed;

Also the bodies, and all parts of the bodies, of dead animals;

And all other personal moveable chattels.

ART. 8.

The term "*cattle*" shall be deemed to signify any horse, mule, ass, sheep, pig, or goat, whatsoever be the age or sex of the animal; and also every bull, cow, calf, and ox. "Cattle."

The term "cow" shall be deemed to include a heifer.

ART. 9.

Where the term "cattle" shall be used, or any particular animal shall be mentioned by name, the term shall, unless otherwise provided, be deemed to signify living cattle or a living animal so named.

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* It has been held that theft cannot be committed by the taking of animals *feræ naturæ*, although reclaimed, unless they be "of a generous nature and courage, serving *ob vitæ solatium* of princes and noble persons, to make them fitter for great employment." 1 Hawk. P. C. c. 33, s. 36. 37 Edw. III. c. 19. 3 Inst. 96, *et seq.*; and in Searing's Case, *cor.* Wood, B. Hertford Lent Assizes, 1818, cited 2 Russell, 153, it was held that the stealing of five live tame ferrets confined in a certain hutch, &c., was not theft, although it was proved that ferrets were valuable animals, and that the ferrets so stolen were sold by the prisoner for the sum of nine shillings. It is difficult to conceive why animals so reduced into possession and of saleable value should not be under equal protection with any other property. To leave such property unprotected would not only constitute a strange anomaly, but tends to collateral evil consequences. If the possessor of such animals, after having laboured for their acquisition, cannot be protected in his enjoyment by the same laws which protect the valuable produce of labour in other instances, it cannot be doubted, on the one hand, that he will, in case of any attempt to deprive him of the benefit of his labour, supply the defect of the law by violence, and on the other, that impunity will hold out a strong temptation to wrongdoers to violate the laws of natural justice when they are unrestrained by the municipal law.

FRAUDULENT APPROPRIATIONS, AND ACTS DONE WITH THE INTENT FRAUDULENTLY TO APPROPRIATE.

ART. 1.*

A fraudulent intention to appropriate (*a*) that which belongs to another is an ingredient common to the offences of—

Theft (including Robbery);
Extortion by Threats;
Obtaining by False Pretences;
Cheating;
Embezzlement.

(*a*) See, as to the principle, the Prefatory Remarks relating to violations of the right of personal property.

ART. 2.

It is by such intent that this class of offences is distinguished from trespass to moveable property or other wrongs remediable merely as civil injuries. (*b*)

(*b*) See, as to the principle, the Prefatory Remarks, p. 45.

ART. 3.

Theft, extortion by threats, obtaining by false pretences, and cheating, are distinguishable from embezzlement by two circumstances. To the former, but not to

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* We have inserted these five Articles to show the relations to each other of the offences which are comprised within the above general class. They are not an essential part of the Digest, and it may be a question for further consideration whether they ought to form part of it.

the latter, a taking or obtaining by wrong is essential; to the former, defined acts of fraud with intent to appropriate are essential;—an' actual appropriation is the essence of the latter.

ART. 4.

The offences of theft, robbery, extortion by threats, obtaining by false pretences, and cheating, are distinguishable from each other; 1st, by the several defined overt acts of force or fraud peculiar to each (*c*); 2dly, in respect of the consent or absence of consent by the owner to part with his property. Where the owner consents to part with the absolute property, the taking does not amount to theft, unless it is by robbery, as hereinafter defined.

A taking by robbery may either be by violence or with consent extorted by fear of bodily harm. (*d*) It is essential to the offences of extortion by threats, obtaining by false pretences and cheating that the owner be induced to part with his property by means of some defined threat or fraud. (*e*)

(*c*) See, as to the principles of these distinctions, the Prefatory Remarks.
(*d*) See the Prefatory Remarks on Robbery.
(*e*) See, as to the principles of these distinctions, the Prefatory Remarks on Extortion by Threats, False Pretences, and Cheats.

ART. 5.

Theft is distinguished from all others comprehended within the general class by the essential overt act of taking and removing the property of another.

THEFT.

SUMMARY OF CONTENTS.

[Definition of theft, Art. 1. Effect of consent, Art. 2—5. Means of taking immaterial, Art. 6. Effect of permitting offender to take, Art. 7. What constitutes a wrongful taking and removal, Art. 8—16. What property the subject of theft, Art. 17—18. Ownership of property, Art. 19—25. Fraudulent intent, Art. 26—29. Right of property not altered by theft, Art. 30. Restitution no excuse, Art. 31. Definition of stealing, Art. 32.]

ART. 1.

Definition of theft.

WHOSOEVER shall, without such consent (*a*) as is hereinafter specified, wrongfully (*b*) take and remove (*c*) anything, being of the property of any other person, and, unless where it shall be otherwise provided, of some value, with intent to despoil the owner, (*d*) and fraudulently appropriate (*e*) the same, shall be guilty of theft, and incur the penalties of the ( ) class. (*f*)

(*a*) Exceptions in respect of consent are, it has been seen, (*ante*, p. 45,) essentially necessary to theft, as an offence constituted by the law of England, and any definition which either made no exception in case of consent, or which entirely excepted a taking by consent, would be objectionable.

(*b*) Every theft includes a taking *by wrong;* this is the great distinction between theft and embezzlement.—See Prefatory Remarks, p. 51.

(*c*) We have already explained our reasons for adopting the word "remove" instead of the phrase "carry away." See *ante*, p. 53.

(*d*) The intent must consist not in any temporary dispossession, but in the total privation of enjoyment of the thing taken.

(*e*) An entire appropriation must be contemplated, but the mode or object is not material.

(*f*) See the different and conflicting descriptions of this offence. Bracton, lib. iii. c. 38, p. 150. Glanville, lib. x. c. 18. Britton, c. 15, p. 22. Fleta, lib. i. c. 38, p. 54. Mirror. 3 Institute, 107. 1 Hale's P. C., 508. Hawkins's P. C., book i. c. 33. 4 Blac. Com., 229. By Eyre, B., in Pear's case, 2 East's P. C., 553. By Grose, J., in Hammon's Case, 2 Leach, 1089. First Report of the Criminal Law Commissioners, p. 9. The above definition differs from some of those referred to in not describing the intent in taking to be *causâ lucri*. It is conceived that this variation is justified not only by many authorities, particularly that of the twelve Judges in Hammon's case, 2 Leach, 1089, but also by the late case of Rex v. Morfit, Russell and Ryan's Crown Cases, 307, in which the *lucri causa* could not without a very forced construction be regarded as forming any ingredient in the crime of theft; and, in fine, that it is fully justified in reason and principle, inasmuch as a law, destined for the protection of property against spoilers, ought not to depend on the mere motive which prompted the offender to do the wrong, but that, on the contrary, the offence, so far as regards moral guilt or penal consequences, ought to be deemed complete when a wilful spoliation has been accomplished by an asportation of property, without regard to the particular object of the offender in doing the act, or afterwards applying the property.

ART. 2.

Effect of consent t transfer the right o property.

A taking upon consent given by the owner, or any other person authorized to consent, (*g*) such consent being given with intent to transfer the right of property in the thing taken, is not theft, (*h*) unless such consent be yielded to violence or threat of violence to the person of the party consenting, or of some other person. (*i*)

(*g*) See First Report of Criminal Law Commissioners, p. 23, Art. 11.

(*h*) 2 East's P. C., 668, 669, 693. Harvey's Case, 1 Leach, 467. 2 East's P. C. 669. Parkes's Case, 2 Leach, 614. 2 East's P. C., 671. Nicholson, Jones and Chappell (Case of) 2 Leach, 610. 2 East's P. C., 669.—Adams's Case, Russell on Crimes, 1060. Walsh's Case, 2 Leach, 1054, 1082. 4 Taunt. 258—284.

(*i*) The effect of making the consent to transfer the right of property a general exception in respect of theft, with a saving of such consent as is within the above rule, is to make the crime of robbery (as afterwards defined) a species of theft. There are, as we have already observed, other predicaments where, notwithstanding consent to transfer the right of property, the obtaining of the property is made penal, viz., in the case of obtaining by false pretences, extortions, and cheats. It may there fore be proper to state our reasons for not including these offences, as well as that of robbery, within the general predicament of theft. One reason is, that as the law now stands the crime of robbery includes theft, whilst the others adverted to do not; and much practical inconvenience might arise from disconnecting robbery from theft, which would not apply in such other cases. Another reason is, that in the case of robbery effected by threat of bodily violence, consent yielded to apprehension of violence, usually differs widely from the consent given in the other instances alluded to; in the latter the consent may be properly regarded as void in law, but a consent yielded to force, or threat of force cannot properly be considered as a consent even in fact.

ART. 3.

The rule contained in the last preceding Article, applies, although consent be obtained by a false pretence or other fraud, whensoever the owner or other person

authorized to consent intends and consents to part with the right of property, whether he intend and consent to transfer such right to the wrong doer or to any other person. (*k*)

(*k*) Atkinson's Case, 2 East's P. C., 673. Also see the Cases in First Report of Criminal Law Commissioners, p. 24, Art. 13.

ART. 4.

Effect of consent to part with the temporary possession only.

It is not theft where the owner consents to part with the temporary possession of the thing taken, provided such taking be not with intent to despoil the owner, and fraudulently to appropriate the thing taken.

ART. 5.

It is theft where the offender fraudulently procures or avails himself of such consent, with intent to despoil the owner, and fraudulently to appropriate the thing taken. (*l*)

(*l*) In confirmation of the opinion before given (See Prefatory Remarks, *ante*, p. 50), and now embodied in the form of a rule, that the fraudulent taking of any article of property where the owner consents to part with the temporary possession only, is properly classed as a theft, we subjoin the following illustration:—Let it be supposed that one offender clandestinely mounts a horse on the owner's premises, rides off and sells it; that a second, under colour of treating for the purchase of a horse, and under pretence of trying its paces, in the presence of the owner, fraudulently rides off and sells the horse; that a third, under colour of *hiring the horse for a month*, but fraudulently intending forthwith to sell him, obtains possession with the owner's consent, and rides off and sells the horse; that a fourth, under the specific false pretence that he is employed as the agent of a person of credit, known to the owner, to purchase a horse for such pretended employer, under colour of such purchase obtains possession, rides off and sells the horse; that a fifth, being utterly destitute of the means of payment, fraudulently purchases a horse, engaging to pay for it the next day, and that he forthwith sells the horse and absconds. While the first predicament clearly constitutes theft, the last must as clearly be excluded. To make it theft, would be to throw down the distinction between civil and criminal liability, and to make guilt depend on the state of a man's circumstances, his knowledge of them, and his opinion of his ability and willingness to pay a debt. In the fourth, the offender would be properly punishable without incurring any such objection, by reason of the specific *false pretence* of which he was guilty. How then is the third to be dealt with? it must either be regarded as a theft, or, as in the last case, constitute no crime, or must be dealt with as an obtaining by a false pretence, or as an embezzlement, or as a substantive offence characteristically distinguished from all these. Such an offence ought clearly to be cognizable by the criminal law under one description or another. It cannot constitute a false pretence, because the falsity consists merely in entering into a prospective engagement which the offender never meant to perform; and were the law against obtaining by false pretences to be extended so widely as to comprehend such a case, it would be far too wide in its operation, and would, in effect, include all cases of the last class. When property is fraudulently obtained under a prospective promise of payment which the offender never intended to perform, it cannot properly constitute an embezzlement; for the very taking and removing is wrongful, and ought to be punishable, independently of any subsequent act of unlawful appropriation. Neither ought it to be regarded as a substantive offence. It possesses the characteristics of theft in being a taking by wrong with intent to defraud the owner of his right of property; it differs from the second predicament only in the circumstance of a consent by the owner to part with the temporary possession, and this distinction cannot be regarded as decisive, when it is considered that even the case where the owner is induced to part with his whole right of property, is excepted merely on grounds of extrinsic policy, which do not materially affect the present case.

ART. 6.

The means by which the offender is enabled to take, &c., immaterial.

Where possession is fraudulently obtained under pretence of hiring or other agreement for the temporary possession of moveable property, it is not material that the agreement should be for any definite time; nor is an actual appropriation by the offender of the thing taken essential. (*m*)

(*m*) See First Report of the Criminal Law Commissioners, p. 23, art. 12.

ART. 7.

Effect of owner's *suffering*, without *inducing*, the offender to take.

It is theft, although the owner, knowing that a theft is meditated, suffers it to be accomplished, provided he do not procure or induce it to be committed. (*n*)

(*n*) Eggington's Case, 2 East's P. C., 666. 2 Leach, 913.

ART. 8.

Taking not wrongful by reason of distinct possession.

No taking or fraudulent appropriation by one who has lawful possession of any property, such possession being distinct from that of the owner, amounts to theft. (*o*)

(*o*) For one who has lawful possession does not *wrongfully* take; the great characteristic of theft, by which it is distinguishable from embezzlement, is this, that the *first taking* is unlawful; whereas embezzlement consists in a fraudulent conversion during the offender's possession, though it were lawful in its inception. Theft is conveniently and justly made a substantive offence, although it consists, or may consist, merely in an overt act done with the intention to despoil, and manifesting that intention. As essential, then, to theft, the distinction is necessary between the case of possession *in fact* lawfully given, which excludes theft, and a taking by one who has but a bare charge or use, the pos-

session *in fact* still continuing in the owner; as where a guest, having the mere temporary use of a silver spoon, in the presence of the owner, takes it by stealth; in such case the possession of the owner still continuing, the taking is as unequivocally wrongful in its inception, and as strongly manifests the fraudulent intention to despoil as if the offender took it from the sideboard or plate-box of the owner. But although in ordinary cases the distinction between one who has a bare charge or the temporary use, as in the case of a domestic servant or guest and one who has a distinct possession, as in the case of a bailee or hirer of a chattel personal, be sufficiently distinct; yet, in others, it may be doubtful whether, under the circumstances, the owner has parted with the possession, and another has obtained a distinct possession.

The difficulty under the existing law upon this subject has been increased, and a considerable degree of obscurity introduced, by the inclination to extend the continuance of the owner's possession beyond due limits, for the purpose of bringing offenders within the scope of the law of theft, who would otherwise have escaped for want of a law sufficiently extensive to punish for embezzlement an offender who has fraudulently converted property in his possession; and, with the like intention, subtle reasons were resorted to for getting rid of the effect of the delivery of possession, by considering the possession *in fact* to be determined by some tortious act, and either by that means or by some other determination of the bailment or contract, to deem the possession to have revested in the owner, although the offender still have the actual possession.

An express provision for the punishment of such offenders as embezzle property entrusted to their possession, or of which they have possession without wrong, will not only be advantageous, as including spoliations in numerous instances where the offenders cannot now be reached at all, but also in simplifying the law, by getting rid of technical niceties and refinements, no longer necessary for bringing offenders to justice. Such provision being made, it will become unnecessary to strain the law *by supposing the owner's possession to continue* where it has, in truth, *ceased;* and difficulties, to a certain extent inherent in the subject matter, will be greatly diminished, if not wholly avoided. When the offender, by reason of possession delivered to him, is not guilty of theft in taking and removing the goods, he will be still liable for having, whilst they were in his possession, fraudulently embezzled them. The charging the offence both ways, in case of doubt, will prevent the escape of the offender on mere technical objections. The numerous distinctions and authorities on the question, whether a bailment has been determined by the wrong of the bailee, or whether, previously to the actual redelivery of the property, he could be guilty of theft, in taking and converting it, will be rendered useless by the proposed provisions, the offender being in cases where, by reason of actual possession lawfully acquired, he is innocent of theft, still liable to be punished for any embezzlement committed whilst his possession continues.

ART. 9.

The rule contained in the last preceding Article comprehends all cases of possession by carriers intrusted with goods to be carried, millers with corn to be ground, artificers or workmen with materials to be wrought, hirers of goods, pawnbrokers, and all others who, by virtue of any express or implied consent, or by authority of law, or by any finding or other casualty or means whatsoever, have a lawful possession of any property distinct from that of the owner.

ART. 10.

A taking and fraudulent appropriation by one who has the bare charge or use of any property, but has no lawful possession distinct from that of the owner, amounts to theft.

Distinction between a distinct possession and a bare charge.

ART. 11.

The rule contained in the last preceding Article applies whensoever servants or others have the lawful custody or charge of their master's property to be exercised upon his premises, or elsewhere under his superintendence or control, or guests, or inmates, have the temporary use of plate or other property, or artificers or workmen have the charge of materials to be wrought in the house or on the land of the employer, and, generally, whensoever any owner employing, permitting, or authorizing another to deal with his property in his house or on his land, or elsewhere, for any purpose, subject to his own continuing possession and control, does not intrust him with any possession of the property distinct from his own.

ART. 12.

The rule contained in Article 10 applies whensoever one has the temporary possession of any property, subject to the continuing possession of the owner or his agent, with a view to a sale or transfer, or other special purpose. (*p*)

(*p*) This rule comprehends all cases where an offender, under pretence of buying goods, runs away with them, or, on pretence of trying a horse, rides away with it. Chisser's Case, T. Raymond, 275. 2 East's P. C., 683, 684. It is to be observed that such cases may also be thefts within another principle, viz., that of a precedent criminal intention to steal; for then, independently of any continuing possession in the owner or his agent, and even supposing the owner to have parted with the temporary possession of it by reason of fraud, the taking would amount to theft. See First Report of the Criminal Law Commissioners, p. 22, Art. 5.

ART. 13.

The law of theft comprehends every species of wrongful taking and removal without regard to the means by which the offender effects his purpose,—whether he take and remove the thing clandestinely or otherwise without consent, or, subject

A taking and removing are essential to theft

to the above exceptions, with consent; or under pretence or colour of legal process, or other lawful authority, or by means of any other device, or under any other pretence whatsoever, practised with intent to despoil the owner, and fraudulently appropriate the thing taken. (*q*)

(*q*) As where a horse is taken by virtue of a replevin sued out for the purpose of taking and riding away with him. 3 Inst. 108. 1 Hale's P. C., 507. 2 East's P. C., 660. 1 Hawk. P. C. c. 33, s. 12. Or goods be taken under colour of a *capias utlagatum*, after an outlawry clandestinely obtained. 2 East's P. C., 660. Or by the fraudulent delivery of an ejectment. Case of Farre and Chadwicke, Kel. 43, 4. 2 Leach, 106. 2 East's P. C., 660.

ART. 14.

Any act of taking, by which the offender has such possession of the thing taken that he is enabled to remove it at his will to any distance however small, and any removal to any distance however small, so that no portion of the thing removed occupy the space it did before, are a taking and removing sufficient to constitute theft. (*r*)

(*r*) See the authorities 3 Inst., 108, 109. 2 East's P. C., 555. 3 Bacon's Abridgment, "Felony." (D.) 4 Black. Comm., 231. 1 Hale's P. C., 507, 508. Simpson's Case, Kelyng, 31. Coslett's Case, 1 Leach, 236. Walsh's Case, 1 Moody's Crown Cases, 14.

ART. 15.

The rule contained in the last preceding Article comprehends every kind of removal by lifting carrying, or otherwise; or by driving, leading, or otherwise, where an animal is the subject of theft: provided that such removal be effected by the offender, in furtherance of his intention to despoil the owner, and fraudulently appropriate the thing removed. (*s*)

(*s*) If an offender by accident, in the course of an assault with intent to rob, or by violence to the person of another, or by threat of violence, cause him to drop or lose or lay down any money or valuable, it is not theft, unless the offender take, and, by his own act, remove the property. It is an attempt punishable as such, or as a substantive offence, consisting in an assault, with intent to rob. For, in principle, the overt acts, which, coupled with the criminal intention, constitute the offence of theft, consist in a taking and removing; acts which in their own nature manifest an intention fraudulently to carry the property beyond the owner's reach, and to convert it. Other acts, such as the causing another to throw down his money, but where the offender does not actually take and remove the property, might no doubt be sufficient, though not in their own nature so proximate or strong, to show the intention of the offender fraudulently to appropriate the property; but in order to include such acts, it would be necessary either to enlarge the definition, or abandon the general principles of jurisprudence already adverted to. The latter branch of the alternative would be attended with great laxity and inconvenience; and the former course would constitute too material a departure from the common-law rule upon the subject to warrant its adoption, without reasons more cogent than any which have occurred to us.

ART. 16.

It is not essential to the offence that the thing taken be completely removed from any place of deposit in which it may have been taken, or completely freed from all impediment to further removal. (*t*)

(*t*) It has been uniformly considered, by ancient and modern authorities, that it is not necessary to constitute theft that the offender should have succeeded in beneficially appropriating to himself the property taken. If a guest at an inn rise in the night and take linen belonging to the landlord out of the room in which he lodged, he is guilty of theft, though he be apprehended with the linen before he has left the premises; "because, says Pulton, he had taken the goods from the place where the owner had assigned them to be. And so it is, if a man do take up another's horse in his close, with intent to steal him, and the owner or some other doth apprehend the party with the horse before he is gone out of the close, this is felony." Pulton, De Pace, 126. But it has been held that there is no sufficient taking, although the property has undergone a complete removal from the place which it before occupied, if any obstruction to the entire appropriation remain, as where goods in a shop were tied to a string which was fastened by one end to the bottom of the counter; Cherry's Case, 2 East's P. C., 556. Or where a purse, though taken from the pocket of the owner, but was by its strings attached to some keys, which keys were not disengaged from the pocket. Wilkinson's Case, 1 Hale's P. C., 508. There is, we conceive, no necessity for so nice a distinction; the actual removal of the thing from the place which it before occupied, being a plain overt act sufficient to manifest the intent to despoil, and to distinguish the offence from a mere attempt. Many cases might be suggested of impediments remaining to a complete removal, where it would be difficult to say that the offence ought not to be regarded as complete. Suppose, for instance, a hole to be cut in the shutter of a silversmith's shop, through which an offender, extending his hand, seizes and carries to the opening made a piece of plate too large for the opening;—here is a taking and removal with intent to steal, and no more seems to be necessary. There seems to be no distinction in principle between such an impediment to a complete removal; and one occasioned by a string, in the case above alluded to. There is not in either case any impediment which prevents a removal in *part execution* of the criminal purpose, though there is in both an impediment to a complete removal;—but it is the part removal, in part execution of the intent, which properly constitutes the offence. If an article of property were to be taken in a dwelling-house, removed to a distance from the dwelling-house, and then by a slight exertion an attached string were to be broken, and the article carried clear off, it would seem to be an unreasonable conclusion that this was not a stealing in the dwelling-house.

ART. 17.

The law of theft shall be deemed to extend to all moveable property; and also to property severed from the realty, although it be severed at the time and for the purpose of taking and removing the same. (*u*) What property is the subject of theft.

(*u*) See the reason for this rule, *ante*, Prefatory Remarks, p. 49. The consequence of adopting this rule, in connexion with Art. 7 of the Prefatory Articles, will be to obviate the necessity for various statutory provisions, such as the stealing of minerals, trees, shrubs, and other vegetable productions, and fixtures.

ART. 18.

It shall be limited, unless otherwise provided, to property which is either of value to the amount, at the least, of the lowest denomination of the current coin of the realm, or of value to the owner to that amount, (*v*) although it would be of no value to any other person; but it shall extend to property, the taking or severance of which diminishes to the owner the value of any other property to that amount. Value of such property.

(*v*) Clarke's Case, 2 Leach, 1036, where it was held that the paper and stamps of the notes of a firm of country bankers which had been paid by their correspondent bankers in London, and which were re-issuable by the country bankers, were the *valuable* property of such country bankers, whilst they were *in transitu*, for the purpose of being re-issued. The same was held as to promissory notes, which had been put into circulation and paid, and not re-issued, Ransom's case, 2 Leach, 1090, 1093. These establish the principle, that property may be the subject of theft if it be valuable to the possessor, although it be valuable to no one else.

ART. 19.

Theft may be committed by the taking and removing of the property of another, although the actual owner be unknown. (*w*) Ownership of the property.

(*w*) Where a leaden coffin was stolen which had been deposited near sixty years ago, it was held to be sufficient to describe it as the property of a person unknown, although no inquiry had been made to ascertain the personal representative. 2 East's P. C., p. 652. The offence consisting in the taking and removal with intent fraudulently to appropriate another's property, it is obviously immaterial to the substance of the offence to what other person in particular the property belonged.

ART. 20.

The rule contained in the last preceding Article shall be deemed to comprehend the wrongful taking of waifs, estrays, treasure-trove, and wreck previously to the vesting thereof respectively in the Crown or the Lord of the franchise. (*x*)

(*x*) See First Report of the Criminal Law Commissioners, p. 19, Art. 5.

ART. 21.

Where the taking is upon a finding or other casualty, the quality of the act depends on the intention of the party at the time; and it is not theft unless he took with intent to despoil the owner and fraudulently to appropriate the thing taken, although such owner be unknown. (*y*)

(*y*) See the authorities in 2 East's P. C. 663. Also, the judgment of Lord Eldon in the Case of Cartwright *v.* Green, 8 Vesey, 405; 2 Leach, 952; and 2 Russell on Crimes, 1044.

ART. 22.

Theft cannot be committed by one who is either the sole or a joint or a part owner of the thing taken. (*z*)

(*z*) To this general rule there are exceptions in the Books, according to which man or his wife may be guilty of theft in stealing the goods of the man from a bailee or servant, with intent to defraud the hundred or the bailee by charging either with the value. Staundford's P. C., 26 a. 3 Inst., 110. 1 Hale's P. C., 513, 514. 1 Hawkins' P. C., c. 33, s. 47. Foster, 123, 124. 2 East's P. C., 557. 4 Black. Comm. 231. This is one instance, amongst many, of extending the law of theft beyond the proper limits, for the sake of reaching an offender. The offence of theft is essentially founded on the criminal intention on the part of the offender to despoil another of his property and fraudulently to appropriate it to his (the offender's) use. In the case of stealing from a servant or carrier the offender's own goods, the intention is widely different; it is to commit a collateral fraud by cheating the hundred or the carrier of a sum of money. The taking the goods in such a case, is indeed wrongful; but it is not with intent to despoil the owner of his property in the goods, nor to convert them to the offender's use in fraud of the owner. For these reasons, and because this offence cannot, without straining the law, be brought within the scope of theft, it has been deemed advisable to include the offence under a more appropriate division, as being in effect an attempt to perpetrate a scheme for obtaining money by false pretences. If the scheme in such a case were to be carried to its full extent by obtaining the value of the property from the Hundred or from the carrier, the offender would, in fact, be guilty of obtaining money under false pretences—the taking the goods is mere machinery for executing the purpose. In the case of the King *v.* Wilkinson, Russ. and Ry. C. C. 470, the law was carried beyond the preceding authorities, and a more definite Rule seems to be required.—See First Report of the Criminal Law Commissioners, page 16. See also Prefatory Remarks, p. 52, and Rex v. Willis, 1 Moody's Crown Cases, p. 375.

ART. 23.

Nor by a wife in taking the property of her husband.

ART. 24.

Provided that no delivery from the wife of the property of her husband, or consent by her to any taking or removing of such property, shall in anywise justify or excuse the taking and removing of such property by one intending to despoil the husband, and fraudulently to appropriate the thing removed. (*a*)

(*a*) This rule differs from that of the existing law, according to which, it seems, that a stranger who takes the goods of the husband by the delivery of the wife, is not guilty of theft unless he be her adulterer.—1 Russell on Crimes, 27; First Report of the Criminal Law Commissioners, p. 18. That is, a man guilty of an immoral act of which the criminal law does not take any effectual cognizance, is punishable by being declared to be guilty of a theft which he might otherwise have perpetrated with impunity. As the wife has no legal power to dispose of the goods of her husband without his consent, it seems to be quite consistent with legal principles that a stranger taking the husband's goods with intent to despoil him, should be amenable as for theft.

ART. 25.

The law and all rules concerning theft shall be equally applicable whether the thing taken be the property of a sole owner, or of several owners, or of a body corporate, and also whether any such owner have or have not a right to the present possession of the thing taken, and also whether any such owner be or be not in possession of the thing taken. (*b*)

(*b*) This article is founded on the principle already adverted to, that the offence is against the right of property, and consequently that it is not material to the *corpus delicti* in what particular person or number of persons the right of property is vested, or what particular person, or whether any person, is in possession of the property.—See the Prefatory Remarks, p. 52.

ART. 26.

Intent to despoil.

The taking and removing are with intent to despoil the owner, and fraudulently appropriate the thing taken, whensoever those acts are done with intent to deprive the owner of the thing taken, and to have or deal with it as the property of the offender or some other person, in fraud of the owner, without regard to the offender's motive for committing such spoliation, or the particular use to which he intends to apply or does apply the thing taken. (*c*)

(*c*) The authorities are by no means precise on the question of distinction between theft and a bare trespass, and terms are used in the definition of the offence, which not only require definition to explain their own meaning, but which are the very terms proposed to be defined. Thus the act is stated to be a *theft* or *stealing* when it is done *animo furandi*, i. e. with intent to steal.—See Russell on Crimes, 1086. In other instances it is stated as part of the description of the offence, either that the taking, or intent in taking, be *felonious* or be done *felleo animo*.—2 Russell on Crimes, 1039. 1 Hale's P. C., 506. The sense in which the term *felonious* is there specially used, is not defined, and the general meaning of the term *felony*, as signifying an offence to which forfeiture of property is incident, affords no intelligible test of distinction. It is, however, sufficiently clear, notwithstanding the annexation of the term *felonious* in some instances to the act of taking, instead of using the words *animo furandi*, that the distinction depends and must depend on the intention of the offender. It is the mind, says Lord Hale (1 Hale's P.C., 508), that maketh the taking of another's goods to be a felony, or a bare trespass only. Yet Lord Hale does not expressly state *what mind and intention* shall constitute the offence, but only says that it must be done *animo furandi*, and that the intention must be judged of by the circumstances of the fact, many of which he proceeds to state. It may, however, reasonably be collected from this and other authorities, that the question is, whether the offender does the act with intent to deprive the owner of the property, and have it as his own—that is, in technical language, convert it to his own use. See the definition, 2 East's P. C., 553.

The ultimate principle and object of the law is to prevent one man from fraudulently appropriating to himself another man's goods—for preventing this, the mere taking and removal are to be regarded as sufficient overt acts to constitute a substantive offence, provided they be done with a criminal intent, and this intent can be no other than of doing that for the prevention of which the law was intended to operate, viz., the unlawful appropriation of the property. It is said, indeed, that "If A. take away the goods of B. openly before him or other persons, (otherwise than by apparent robbery) this carries with it evidence only of a trespass, because done openly, in the presence of the owner, or of other persons known to the owner." 1 Hale's P. C., 509. This, however, is but *evidence*, although cogent evidence, to shew that the offender contemplated a trespass only, and not the actual appropriation to himself of the property so taken, inasmuch as it might be difficult to suppose that he could contemplate a successful appropriation of the property, in despite of the owner who might by force stay it, or by law replevy, or otherwise recover it. These observations are in conformity with the opinion of the majority of the judges in Phillipps and Strong's Case. 2 East's P. C., 662-3.

ART. 27.

It is not theft unless the intent to despoil and fraudulently appropriate exist at the time of the taking and removing.

ART. 28.

It is not theft whensoever the acts of taking and removing, although wrongful, are done under a mistake of right or authority, or through inadvertence or by accident.

ART. 29.

It is not theft where the intent is to deprive the owner of the temporary possession only, and not of his absolute property in the thing taken. (*d*)

Intent to deprive the owner of the temporary possession only.

(*d*) See the Prefatory Remarks, p. 48.

ART. 30.

Neither the right of property nor of possession is in anywise altered by theft. (*e*)

Right of property or possession not altered.

(*e*) See the judgment of Gould, J., in Wilkins's Case, 1 Leach, 522, 3. But it is laid down by great authority (1 Hale, P. C., 507) that if A steal the horse of B, and afterwards deliver it to C, who was no party to the first stealing, and C ride away with it, *animo furandi*, yet C is no felon to B, because though the horse was stolen from B, yet it was stolen by A and not by C; for C did not take it: neither is he a felon to A, for he had it by his delivery. This seems to be contrary to principle; for the property remained in B and was taken by C *animo furandi*, and therefore the ingredients of the theft are complete. If C had taken the property without delivery from A, he would have committed theft in wrongfully taking another's property *animo furandi;* and as A had no property and C knew he had none (or he could not have taken it *animo furandi*,) the delivery was a nullity and could not alter the criminal nature of C.'s act.

ART. 31.

No restitution to the owner of a thing taken by theft shall absolve the offender. (*f*)

Restitution does not absolve the offender.

(*f*) 2 East's P. C., 557.

ART. 32.

Whosoever shall commit the crime of theft in respect of any property shall be deemed to steal the same. (*g*)

Definition of the term "steal."

(*g*) Although a stealing and taking by theft are commonly regarded as synonymous, they are not so in point of law; several modern statutes speak of stealing in a sense which cannot signify theft, and some inconvenience has arisen from this circumstance. To prevent ambiguity, we insert the above Article, which otherwise might appear to be superfluous.

ROBBERY.

Prefatory Remarks.

THE crime of robbery is a species of theft, aggravated by the circumstances of a taking of the property from the person, or whilst it is under the protection of the person, by means either of violence or putting in fear.

Formerly the offence seems to have been confined to cases of actual violence to the person; but in later times it has been extended to constructive violence by putting in fear, and not only to cases where property has been taken or delivered under a threat of bodily violence to the party robbed, or some other person, but also where the fear has resulted from the apprehension of violence to the habitation and property, or has been occasioned by threats of preferring a charge of an infamous crime. There is also this peculiarity to be noticed in respect of the ancient notion and definition of the crime of robbery, viz., that it was regarded not so much as an aggravation of the crime of theft, as a substantive crime. See Staundf. P. C., 27. Pulton, De Pace, 128. Later authorities, however regard it as an aggravation of theft, and it has been held by eminent judges that in case it appear on the trial of one charged with theft that the taking amount to a robbery, the prisoner may properly be convicted of theft. 2 East's P. C. 784. Considering the existing provisions made in respect of thefts from the person without violence, and also those made for the punishment of such as extort property by threats of various kinds; and considering also that the limits of the offence have been rendered indefinite by constructive extensions, and that the existing and proposed aggravations of the crime of robbery in respect of specific acts of violence to the person are seldom if ever applicable to any robbery which is not accomplished either by violence or threat of violence; we think that this crime ought to be rendered more definite by a partial restoration of its ancient boundaries. We propose to effect this by limiting the crime of robbery to a taking by personal violence, or threat of personal violence, to the party robbed or some other person; and by making the existing law respecting extortion by threats more comprehensive.

We may refer to the discussion which occurred among the judges in Donolly's Case, 2 East's P. C., 715, in illustration of the urgent necessity imposed by the exigencies of the times on the one hand to enlarge the operation of the law of robbery, and the difficulty on the other, of preserving any intelligible line of distinction between the offences of robbery and extortion by threats.

ROBBERY.

SUMMARY OF CONTENTS.

[Definition of robbery, Art. 34. What constitutes a stealing by violence, Art. 35—38. What constitutes a stealing by threat of violence to the person, Art. 39—40. Actual fear is not necessary, Art. 41. Violence, or apprehension of violence, is essential, Art. 42. Property may be taken in the absence of the owner, if abandoned under apprehension of violence, Art. 43. It is robbery although a person voluntarily expose himself to the offence, Art. 44. Aggravated robbery, Art, 45—46. Assault with intent to rob, Art. 47.]

Art. 33.

The characteristic of robbery.

The characteristic of the crime of robbery is theft committed with violence, or threat of violence, to the person.

Art. 34.

Definition of robbery.

Whosoever shall steal any property (*a*) from the person of another, or any property which is in his presence and possession, or under his care, by means of violence or threat of violence to his person or to the person of any other, shall be guilty of robbery, and incur the penalties of the ( ) class.

(*a*) 7 and 8 G. 4, c. 29, s. 6. See Phipoe's Case, 2 Leach, 673, where, the prisoner by threats having compelled the prosecutor to sign a note of hand, the prisoner supplying the materials, it was held not to be a robbery, the note being of no value, and, if it had been, being property of which the prosecutor had never for a moment the peaceable possession. This species of offence is provided for by a substantive enactment. See *post*, Art. 62. The same rules as to the taking and removing by the offender which apply to theft, are also applicable to this and every other species of aggravated theft; and as this is a necessary consequence of making stealing part of the definition, we have deemed it to be superfluous to introduce any specific enactment on the subject.

The cases of cutting a girdle by which the prosecutor's purse fell to the ground, but was not picked up by the prisoner, 1 Hale's P. C., c. 33. 3 Inst., 69—of compelling a man by threats to lay down a feather-bed which the immediate apprehension of the prisoner prevented him from taking up. Farrel's Case, 1 Leach, 322, note (b)—and other similar instances where the robbery has been held to be incomplete for want of sufficient overt acts of a taking and removing by the prisoner, are all governed by the general rule comprised in the law of theft. The same rule also applies in the one case as well as the other, as to the insufficiency of the return of the property to purge the offence. Peat's case, 1 Leach, 228—so also as to the sufficiency of a momentary possession coupled with a removal to some distance, however small, to constitute the offence.—Ibid, and Lapier's case, 1 Leach, 320.

Art. 35.

What constitutes a stealing by violence.

The stealing is by violence whensoever it is effected by doing any the least injury to the person, or whensoever the act of taking is accompanied by any degree of force employed to overcome resistance to such taking.

Art. 36.

A snatching or taking of property suddenly or unawares from the person, without some actual injury to the person, is not a sufficient degree of violence to constitute robbery. (*b*)

(*b*) Macauley's Case, 1 Leach, 287. Baker's Case, ib., 290; Robins's Case, ib., 290, Note (a). Horner's Case, 2 East's P. C., 703. Steward's Case, ib. Lapier's Case, 1 Leach, 320. Moore's Case, ib., 335.

Art. 37.

If violence be used, it is sufficient to constitute robbery, although it be used under the colour of executing legal process, or other lawful authority. (*c*)

(*c*) Gascoigne's Case. 1 Leach, 280. 2 East's P. C., 709.

Art. 38.

It is not essential to the offence that the violence, by means of which the property is obtained, should have been at first used for the purpose of obtaining it, provided such violence be unlawful, and the property be yielded and taken, or permitted to be taken, to prevent further violence. (*d*)

(*d*) Blackham's Case. 2 East's P. C. 711.

ART. 39.

The stealing is by threat of violence to the person whensoever possession of the thing stolen is obtained by any threat, menace, or other means calculated to excite apprehension of violence, present or future, to the person of the party threatened, or of any other. (*e*)

What constitutes a stealing by threat of violence to the to the person.

(*e*) The limits of the law of robbery, in respect of the nature of the threat sufficient to constitute the offence, are at present very vague. It has, however, been decided, that fear of present violence to a child of the person whose property is demanded, is sufficient to constitute the offence. Reane's Case, 2 East's P. C., 734. But as it seems to be impossible upon any rational ground to distinguish in such a case between a child, wife, mother, or any other near relation, or even connection, it seems that the rule cannot be limited to any in particular. Eyre, C. J., in Reane's Case, observed that a "man might be said to take by violence who deprived another of the power of resistance, by whatever means he did it;" adding that "he saw no sensible distinction between a personal violence to the party himself, and the case put by one of the judges of a man holding another's child over a river, and threatening to throw it in unless he gave him money."

ART. 40.

It is immaterial whether the threat be direct or indirect, or whether it be made by words, gestures, or signs, or be made under pretence of lawful claim, or of acting under the pretence of legal process or other authority, (*f*) or of asking charity, (*g*) or of making a purchase, (*h*) or other pretence whatsoever.

(*f*) Merriman *v.* the Hundred of Chippenham. 2 East's P. C., 709.

(*g*) 2 East's P. C., 711.]

(*h*) Simons's Case, 2 East's P. C., 712. It has been doubted whether the forcing a chapman to sell his wares, giving him the full price for them, amounts to robbery. It appears to us that such doubts do not warrant any special exception in favour of such offenders, and that it would not be politic to make any. To compel a man, under peril of his life, to transfer his property, is of itself an outrageous offence, even although an equivalent be tendered; and were it to be in any manner sanctioned, or even overlooked by the law, it is difficult to conjecture to what extent it might not endanger the security of property, and the peace of society.

ART. 41.

Actual fear is not material, provided the act of stealing be accompanied by such threats or menaces as are calculated to create an expectation that force will be used in case of resistance. (*i*)

Actual fear is not necessary.

(*i*) See 2 East's P. C., 713.

ART. 42.

Where no actual violence is used, and the threats or menaces used either do not create any apprehension of violence, or such apprehension has ceased to exist at the time when the property is taken, the offender is not guilty of robbery: (*k*)

Violence, or apprehension of violence, is essential.

(*k*) 3 Inst. 68. 1 Hale's P. C., 532. 2 East's P.C., 713. Reane's Case, 2 East's P. C., 734.

ART. 43.

Provided that where an offender, by violence or threat of violence, with intent to steal, shall cause the owner or possessor to relinquish his hold upon, or otherwise, wholly or in part, to abandon the possession of any property, and shall afterwards take and remove the same, the crime of robbery shall be deemed to be complete, although the offender took and removed such property in the absence of the owner or possessor, or after the apprehension of violence had ceased. (*l*)

Property may be taken in the absence of the owner, if abandoned under apprehension of violence.

(*l*) According to the present law the taking of property under the circumstances mentioned in this Article, would not be robbery, as the taking must be in the presence of the party robbed.

ART. 44.

It is robbery if property be taken by violence, or threat of violence, although the owner voluntarily exposed himself to the attack with intent to apprehend the offender. (*m*)

It is robbery, although a person voluntarily expose himself to the offence.

(*m*) Norden's Case, Foster, 129.

ART. 45.

Whosoever shall rob any person, and at the time of, or immediately (*n*) before, or immediately after such robbery, shall stab, cut, or wound any person, shall suffer death. (*o*)

Aggravated robbery.

(*n*) In this and the following Article respecting aggravated robbery we merely insert the words of the recent Statute, not thinking it right to make an alteration in the language which has been so lately adopted, upon consideration, by the Legislature. At the same time we doubt whether, according to the rules of legal construction, these words, "immediately before" and "immediately after" sufficiently connect the aggravation with the robbery as forming part of the same transaction. In the case of the King *v.* Frances and others, reported in Comyns's Reports, 478, and in Cases *temp.* Hardwicke, 113, the word "immediately," used in a special verdict in

a case of robbery, was held to be insufficient to connect the circumstances as to time. In that case the judges said it was "a term of large construction, and was not of any determinate signification."

(*o*) 7 Wm. 4, & 1 Vict. c. 87, s. 2.

ART. 46.

Whosoever shall, being armed with any offensive weapon or instrument, rob or assault, with intent to rob any person, or shall, together with one or more person or persons, rob, or assault with intent to rob any person, or shall rob any person, and, at the time of or immediately before or immediately after such robbery, shall beat, strike, or use any other personal violence to any person, shall incur the penalties of the ( ) class. (*p*)

(*p*) 7 Wm. 4 & 1 Vic. c. 87, s. 3.

ART. 47.

Assault, with intent to rob.

Whosoever shall assault any person with intent to rob, shall (except where any higher penalty is incurred) incur the penalties of the ( ) class. (*q*)

(*q*) 7 Wm. 4, & 1 Vic., c. 87, s. 6.

AGGRAVATED THEFT.*

SUMMARY OF CONTENTS.

[Stealing from the person, Art. 48. Demanding property by force, Art. 49. Sacrilege, Art. 50. Stealing in dwelling-houses, &c. Art. 51. Ditto, accompanied by certain aggravations, Art. 52—53. Cattle stealing, Art. 54. Stealing from ships, docks, quays, &c. Art. 55. Stealing from ships in distress, Art. 56. Stealing goods in progress of manufacture, Art. 57. Stealing by clerks or servants, Art. 58.]

ART. 48.

Stealing from the Person.

Whosoever shall steal any property from the person of another, shall incur the penalties of the ( ) class. (*a*)

(*a*) 7 Wm. 4, & 1 Vic., c. 87, s. 5.

ART. 49.

Demanding property by force.

Whosoever shall, with menaces or by force, demand any property of any person, with intent to steal the same, shall incur the penalties of the ( ) class. (*b*)

(*b*) 7 Wm. 4, & 1 Vic., c. 87, s. 7.

ART. 50.

Sacrilege.

Whosoever shall break and enter (*c*) any church or chapel, and steal any property therein, shall incur the penalties of the ( ) class. (*d*)

(*c*) The definition of the terms "breaking and entering" will be given under the head of Burglary.

(*d*) This offence was capital by the Stat. 7 and 8 Geo. IV., c. 29, s. 10, and is punishable with transportion for life by the Stat. 5 and 6 Will. IV., c. 81, and 6 and 7 Will. IV., c. 4.

The Stat. 7 and 8 Geo. IV., c. 29, extends to the offence of breaking *out* of a church or chapel after stealing therein: we have omitted this part of the offence, conceiving that it is not warranted by any sound principle; but we reserve the full explanation of the reasons upon which we found our opinion for that part of the Digest which will contain Burglary.

ART. 51.

Stealing in dwelling-houses, &c.

Whosoever shall steal in any dwelling-house, shop, warehouse, or counting-house, shall incur the penalties of the ( ) class.

ART. 52.

Ditto, accompanied by certain aggravations.

Whosoever shall commit any of the offences contained in the last preceding Article, such offence being attended with any two of the following aggravations, viz.:—

1. Breaking into such dwelling-house, shop, warehouse, or counting-house;
2. Putting any one being therein in bodily fear by any menace or threat;
3. Property being stolen to the value of 5*l.* or more;

shall incur the penalties of the ( ) class. (*e*)

(*e*) The above article supersedes the 7 & 8 Geo. 4, c. 29, ss. 12, 14, & 15, & the 7 Wm. 4, and 1 Vic., c. 86, s. 5.

ART. 53.

Whosoever shall commit any of the offences contained in Art. 51, the same being attended with any one of the aggravations mentioned in Art. 52, shall incur the penalties of the ( ) class.

* Although the things, the stealing of which is punishable under the following rules, are the subjects of theft under the general law, it is necessary to provide for them specially, in order to apply a higher degree of punishment to the offences.

ART. 54.

Whosoever shall steal any cattle, or shall wilfully kill any cattle, with intent to steal the carcase or skin, or any part of the cattle so killed, shall incur the penalties of the ( ) class. (*f*) Cattle stealing.

(*f*) 7 & 8 Geo. 4, c. 29, s. 25; 7 Wm. 4, & 1 Vic., c. 90, s. 1. By using the word "cattle" in this place, as defined by Art. 8 of the Prefatory Articles, we have included animals not specified in the former law, the exclusion of which could not, we think, be justified upon any reasonable principle.

ART. 55.

22. Whosoever shall steal any goods or merchandize in any vessel, barge, or boat, of any description whatsoever, in any port of entry or discharge, or upon any navigable river or canal, or in any creek belonging to or communicating with any such port, river, or canal, or shall steal any goods or merchandize from any dock, wharf, or quay adjacent to any such port, river, canal, or creek, shall incur the penalties of the ( ) class. (*g*) Stealing from ships, docks, quays, &c.

(*g*) 7 & 8 Geo. 4, c. 29, s. 17; 7 Wm. 4, & 1 Vic., c. 90, s. 2.

ART. 56.

Whosoever shall plunder or steal any part of any ship or vessel which shall be in distress or wrecked, stranded or cast on shore, or any goods, merchandize, or articles of any kind, belonging to such ship or vessel, shall incur the penalties of the ( ) class. (*h*) Stealing from ships in distress.

(*h*) 7 Wm. 4, & 1 Vic., c. 87, s. 8.

ART. 57.

Whosoever shall steal to the value of 10*s*. any goods or article of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, whilst laid, placed, or exposed during any stage, process, or progress of manufacture, in any building, field, or other place, shall incur the penalties of the ( ) class. (*i*) Stealing goods in progress of manufacture.

(*i*) 7 & 8 G. 4, c. 29, s. 16; 7 Wm. 4, & 1 Vic. c. 90, s, 2.

ART. 58.

Whosoever, being a clerk or servant, shall steal any property belonging to or in the possession or power of his master, shall incur the penalties of the ( ) class. (*k*) Stealing by clerks or servants.

(*k*) 7 & 8 G. 4, c. 29, s. 46.

EXTORTION BY THREATS.

Prefatory Remarks.

THIS class of crimes consists in the obtaining of property by means of such threats of injury as do not amount to robbery, as defined in Art. 34.

Where property is obtained, through fear of actual personal violence, it amounts to the crime of robbery, which includes that of theft. But although an obtaining by intimidation cannot, where the owner is induced to consent to transfer the right of property, be treated as theft, except in the instance of actual or threatened violence to the person, yet in other cases the obtaining of property by means of intimidation ought justly to be regarded as a serious offence—more especially where the object is effected by a threat to accuse another of any infamous crime. The offence thus constituted comprehends in principle not only extortions committed by threats of personal violence, in which case the obtaining amounts to the crime of robbery, but also to extortions effected by threats to charge another with the commission of any infamous crime or to destroy or damage property. The principle of making extortion by means of such intimidation penal, is fully recognized as well by the common as by the statute law. For although the crime of robbery is by no means well defined, it has in several instances been deemed to extend to intimidation by threatening to destroy dwelling houses and other property. It has also been frequently decided in modern times that extortions effected by the threat of accusing another of an infamous crime amount to the crime of robbery. This no doubt has been done by an extension of the crime *propter odium spoliatoris*, beyond its ancient limits. But by the statute of the 7th

and 8th year of King George the Fourth, c. 29. s. 7, it is made a substantive offence. In accordance with the principles above adverted to, we have deemed it better to constitute extortions by threats of destruction or damage to property a separate offence, than to retain it as a branch of the crime of robbery, and thus to reduce the crime of robbery more nearly to its ancient and more appropriate limits, as consisting in a taking accompanied either with actual violence or of threatened violence to the person.

This class of crime, therefore, is characterized as a species of unlawful appropriation effected by intimidation, under circumstances which do not constitute robbery.

EXTORTION BY THREATS.

SUMMARY OF CONTENTS.

[Obtaining property by threat of accusing of unnatural crimes, Art. 59. What property the subject of extortion by threats, Art. 60. Threatening to accuse of unnatural crimes with intent to extort property, Art. 61. Inducing a person by violence or threats to execute, &c., deeds, &c. Art. 62. Definition of an infamous crime, Art. 63. Threatening to destroy property with intent to extort, Art. 64.]

ART. 59.

Obtaining property by threat of accusing of unnatural crimes.

Whosoever shall accuse or threaten to accuse any person of any infamous crime, as hereinafter defined, with a view or intent to gain or extort from such person, and shall, by intimidating such person by such accusation or threat, extort or gain from such person any moveable property, shall incur the penalties of the ( ) class. (*a*)

(*a*) 7 & 8 G. 4, c. 29, s. 7; 7 Wm. 4; & 1 Vic., c. 87, s. 4.

ART. 60.

What property the subject of extortion by threats.

The law of extortion by threats extends to all moveable property; and also to property which, although not moveable at the time of the threat used, is afterwards severed and obtained by such threat.

ART. 61.

Threatening to accuse of unnatural crimes, with intent to extort property.

Whosoever shall knowingly send or deliver any letter or writing, demanding of any person with menaces, and without any reasonable or probable cause, any moveable property; or shall accuse or threaten to accuse, or shall knowingly send or deliver any letter or writing, accusing or threatening to accuse any person of any crime punishable by law with death or transportation, or any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime, as hereinafter defined, with a view or intent to extort or gain from such person any moveable property, shall incur the penalties of the ( ) class. (*b*)

(*b*) 7 & 8 Geo. 4, c. 29, s. 8.

ART. 62.

Inducing a person, by violence or threats, to execute deeds, &c.

Whosoever shall, by any unlawful violence or restraint, or threat of violence to the person of another, or by accusing or threatening to accuse any person of any crime punishable by law with death or transportation, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit rape, or of any infamous crime, as hereinafter defined, induce another to execute, make, alter, or destroy the whole or any part of any valuable security, muniment of title, or testamentary instrument, or any release, receipt, discharge, or acquittance, with intent to defraud or injure any person, shall incur the penalties of the ( ) class. (*c*)

(*c*) This is a new provision. See above, note to Art. 34.

ART. 63.

Definition of an infamous crime.

The terms "infamous crime" shall be deemed to include the crime of buggery committed either with mankind or with any animal, and every assault with intent to commit, and every attempt or endeavour to commit the said crime, and every solicitation, persuasion, promise, or threat offered or made to any person, whereby to move or induce such person to commit or permit the said crime. (*d*)

(*d*) 7 & 8 Geo. 4, c. 29, s. 9.

ART. 64.

Threatening to destroy property with intent to extort.

Whosoever shall, by threatening to destroy or damage any property, extort from any other any moveable property, shall incur the penalties of the ( ) class.

OBTAINING PROPERTY BY FALSE PRETENCES.

Prefatory Remarks.

The relation of this species to the general class of offences which consist in fraudulent appropriation has already been stated.

An obtaining by mere fraud where the owner is induced to transfer the right of property cannot, it has been seen, be included generally within the law of theft. But the exception is founded principally on the inconvenience which would result from the generality of the rule, were every fraudulent obtaining under such circumstances to constitute theft. The same objection is not applicable where the offence can properly and safely be limited by the means of obtaining. And in particular, it is not applicable where the property is obtained by means of a specific false pretence.

But in order to avoid the inconvenience of too great generality, it is essential that such pretence should consist in some false and fraudulent representation as to the existence or non-existence of some specific fact, by the credit given to which, either wholly or in part, the property is obtained. Were the offence to be extended to an obtaining, by means of any representation or promise, fraudulent merely because it was not meant to be fulfilled, the offence would be without any sufficient limit. This distinction is sufficiently plain for practical purposes. If a man purchasing goods promises to call and pay for them the next day, this is a mere prospective engagement, but no misrepresentation as to any specific fact; but if he be entrusted with goods, on giving his promissory note in payment, falsely representing that the banker to whom such note is directed has £1,000 of the maker's in his possession, the specific false pretence may be justly and conveniently dealt with as a crime.

The offence in principle extends to all property so obtained, whether it be moveable or not at the time of the pretence made. And also to pretences made by signs or actions, which, if made by words, would come within the principle.

By the common law the obtaining of goods and chattels by a mere false pretence whether oral or written, was not an indictable offence; but by the statute 7th and 8th of King Geo. IV. ch. 29, such offenders are punishable to the extent of seven years' transportation.

OBTAINING PROPERTY BY FALSE PRETENCES.

SUMMARY OF CONTENTS.

[Definition of the offence, Art. 65. What property the subject of the offence, Art. 66. Description of the false pretence essential to the offence, Art. 67—70. Offender liable to penalties of this law, although guilty of theft, Art. 71.]

Art. 65.

Whosoever shall, by any false pretence, obtain any property from any other person with intent to cheat or defraud any person, shall incur the penalties of the ( ) class. (*a*) Obtaining property by false pretences.

(*a*) 7 & 8 Geo. 4, c. 29, s. 53.

Art. 66.

The law of obtaining property by false pretences extends to all moveable property, and also to property which, although not moveable at the time of the false pretence made, is afterwards severed and obtained by means of such false pretence. (*b*) What property the subject of false pretences.

(*b*) The object of the latter part of this Article is to make the subjects of this offence correspond with those of theft, by including fixtures and other things attached to the realty.

Art. 67.

It is essential to this offence that the property be obtained wholly or partly on the credit of the false pretence. (*c*) The property must be obtained on the credit of false pretence.

(*c*) Witchell's Case, 2 East's P. C., 830.

ART. 68.

Whole of the pretence need not be false.

It is not essential that the whole of the pretence made be false, provided part be false, and that, upon credit given to such part as is false, property be obtained. (*d*)

(*d*) R. *v.* Hill, Russ. and Ry., C.C., 190.

ART. 69.

No prospective representation a false pretence.

No representation merely prospective shall be deemed to be a false pretence against this law. (*e*)

(*e*) R. *v.* Goodall, Russ. and Ry., C. C., 461; R. *v.* Wavell, Moody's C. C., 224; R. *v.* Douglas, Moody's C. C., 462.

ART. 70.

False pretence need not be in express terms.

It is not essential to this offence that such pretence be made in express terms; the law extends to pretences made impliedly by the act or conduct of the offender, provided such act be done, or conduct be adopted, with intent to create an impression which, if made by express words, would constitute a false pretence. (*f*)

(*f*) Freeth's case, Russ. 1395; R. *v.* Airy, 2 East's P. C., 831; 2 East's R. 30; R. *v* Jackson, 3 Campbell, 370.

ART. 71.

Offender liable to penalties of this law, although guilty of theft.

An offender against this law shall be subject to its penalties, although under the circumstances, by the taking and removing of the property, he was guilty of theft. (*g*)

(*g*) Where the consent of the owner extends only to the parting with the temporary possession, and not with the entire property, and is obtained by fraud, the offence amounts to theft (see the Prefatory Remarks on Theft). We introduce this Article in conformity with the present law; but as the offence consists in obtaining the property of another, and is properly limited to cases where the owner intends to transfer the right of property, and as any inconvenience would easily be obviated by the more legitimate course of introducing two counts in the indictment in a doubtful case, we do not think that it will be necessary to adopt this Article.

CHEATS.

Prefatory Remarks.

As a distinct species of offence, that usually denominated cheating stands in the same general relation to others within the description of fraudulent appropriation with that of obtaining by false pretences.

The consent of the owner to transfer his right of property, although fraudulently obtained, constitutes a general exception to the crime of theft. But although offenders within this exception cannot, on grounds of policy already adverted to, be brought within the scope of the law of theft, they may properly and conveniently be punishable where the fraud is accomplished by specific means capable of being defined, and therefore supplying the proper foundation of a particular law, including a defined class of offenders.

The question is, how this offence can be conveniently limited and defined in respect of the means used. It may be stated negatively that the offence cannot, consistently with the above suggestions, be extended to any fraud committed solely by the aid of any mere false assertion, be it oral or written. To make a fraud criminal in respect of a mere false or deceitful representation, whether oral or written, beyond the class already observed upon of obtaining by false pretences, would be inconvenient on account of its generality, and not sufficiently warranted upon any principle of necessity. On the other hand, all cases where the fraud is effected by means of any instrument or thing falsely constructed and used for the purpose of deceiving, may be made penal in furtherance of the great object of this branch of the law, the protection of property, without incurring the danger of inconvenience from laxity of definition,—the use of such an instrument or thing supplying a definite limit to the offence, and affording a practicable test of guilt. Within this description would fall, every case where a false and deceptive instrument was used to defraud; the rule would include false weights and measures, and any other instrument for ascertaining the weight and magnitude, or quality of any commodity; all false seals or tokens; all forged writings; everything, in short, false in its construction, and adapted to and used for the purpose of fraud.

And although no mere false representation would of itself, and independently of the deceptive use of some instrument or thing be criminal within the rule; yet it would extend not only to the use of such as were intrinsically false, but also to such as by representation, and in use were false. If A. were to assert to B., that a lump of metal weighed 12 ounces, when he knew that in truth it weighed but 11 ounces; and B., trusting to A's. representation, bought and paid for it, this would be nothing more than a deceit by a mere false assertion; but if A. representing that the same piece of metal weighed 12 ounces, when he knew that it weighed but 11, *used* it as a 12 ounce weight in the sale of some other commodity to B., and so cheated him to the amount in value of one ounce of that commodity, that would be a fraud committed by means of a false instrument; for although the lump of metal bearing no impression upon it could not be said to be false in its make or construction, as it would have been had it purported by an impression upon it to be warranted to be twelve ounces in weight, yet being represented to be of that weight and *used* as such, a false instrument is in effect *used*, and the deception does not consist merely in a bare naked lie.

The principle also extends to the false *use* of any instrument or thing to the deception of the senses, by sleight of hand or other device. It can make no reasonable difference in point of principle whether fraud be accomplished simply by means of a false balance, or by means of secret pressure, or other artifice which in each particular instance causes a true instrument to produce results apparently true but really false and deceptive. Frauds committed by falsely personating another, by the false assumption of any official character or authority, stand on the same foundation; the fraud is, in fact, committed not simply by a false assertion, but by the acting in a false name or character. It can make no difference in principle whether the false instrument *used* for the purpose of fraud be animate or inanimate.

Fraud by conspiracy between two or more is another offence of the same character and species; and this ought equally to constitute an offence, although the object be effected by mere misrepresentation; each may be regarded as a false instrument used by the other, and the fact of conspiracy is in itself a sufficient overt act to constitute a crime although the intention be not actually accomplished. The limits prescribed by the law of England to offences of this class are by no means definite, so far as may be collected from the authority of judicial dicta and of the text books, but the decisions seem to supply rules substantially the same with those which considerations of policy and convenience would naturally suggest. It has long been settled that no fraud committed by means of a "bare naked" lie, as it has been termed, is cognizable as a crime. But a conspiracy to defraud has frequently been held to be indictable; and in numerous instances it has been held that although a mere misrepresentation as to the quantity or quality of an article sold was not indictable, yet that the use of any false weight or measure, of false dice, of false seals or marks on cloth, signifying (according to the custom of the trade) that the cloth was of a certain description, was an indictable offence.

In Hawkins's Pleas of the Crown, b. i. c. 71, s. 1, the offence is defined to consist in "deceitful practices, in defrauding or endeavouring to defraud another of his known right by means of some *artful device* contrary to the plain rules of common honesty." This, however, appears to be too general and indefinite a description to supply any sufficient practical limit for determining the boundaries of the offence. In a more modern book of great authority,* the author, after animadverting on the generality of the above definition, says, "I should rather say that it consists in the fraudulent obtaining of the property of another by any deceitful and illegal practice or token (short of felony) which affects or may affect the public." And in a previous part of the same chapter the same learned author observes, "It is not, however, every species of fraud or dishonesty in transactions between individuals which is the subject matter of a criminal charge at common law, but in order to constitute it such according to the doctrine in Wheatley's Case, Young's Case, and other authorities, it must be such as affects the public, such as is public in its nature, calculated to defraud numbers, to deceive the people in general."†

But although, according to this and some other authorities, the fraud or means of fraud must be of a *public nature*, there is nothing in the principle on which the offence is founded, viz., the protection of property, or in any principle of policy or convenience which ought so to limit it, and several of the

* 2 East's P. C., 818. † 2 East's P. C. 816.

authorities go far to show that the common law offence is not limited by any such consideration. Thus the cheating, by means of false dice, was clearly a common law offence, yet the means in this instance are no more public in their nature than in that of any other false instrument which may be used to defraud a private individual. And in Pinkney's Case,* the Court intimated that if a party selling a commodity by the bushel had *put anything into the bushel to fill it up*, the offence might have been indictable. Here, again, the cheat committed by introducing some extraneous thing into the bushel, and so fraudulently lessening the commodity sold, in the particular instance, could not concern the public. Again it should seem, from the same authorities, that the means must be such as are calculated to defraud numbers—to deceive the people. This, of course, is to be regarded as a test for deciding on the efficiency of the means, and the probability of their adequacy to effect the fraud without detection, upon a principle of legal distinction that where the fraud, though effectual, might, by the exercise of a certain degree of vigilance, have been defeated, it ought not to be the occasion of punishment. Such a test, however, must obviously be one of a very uncertain and precarious application, and it may well be doubted whether it be founded on a just principle, without also taking into account the capacity of the person defrauded. It would be singular that the law should allow a weak-minded man to be defrauded with impunity, because he happened not to be gifted with that average quantity of intellect, by the exercise of which he might have been protected. For defining the extent of the offence, such a limit is not wanted; it is of too indefinite a nature to supply a practical boundary, and the offence is sufficiently and better defined by other means.

We have endeavoured to define this class of offences, as nearly as may be in conformity with the numerous decided cases, according to the description of the fraudulent means used. The offence thus defined differs from theft in this material circumstance, viz., that whilst the consent by the owner to transfer his right of property excludes that crime, such an intention is essential to the present offence.

It differs from the offence of obtaining property by false pretences in this essential respect, that though equally founded in fraud, no mere fraudulent pretence or representation, either oral or written, is within its scope.

CHEATS.

SUMMARY OF CONTENTS.

[Definition of the offence, Art. 73. Definition of false personation, Art. 74. Personating persons entitled to allowances from the Compassionate Fund, Art. 75. Personating owners of stock, Art. 76. Personating persons entitled to allowances for services in the army, Art. 77. A taking with intent to cheat, Art. 78.]

Art. 72.

Characteristics of the offence of cheating.

The characteristics of the offence of cheating are a fraudulent obtaining of another man's property, by certain defined fraudulent means other than mere false representations or pretences.

Art. 73.

Cheating.

Whosoever, by means of any false seal, signature, stamp, impression, or mark deceptively used to obtain undue credit, as a certificate, warrant, or test of the truth of the contents of any writing, or of the genuineness or quality of any commodity, or by means of any machine, instrument, or thing artfully contrived and fraudulently used for the purpose of deception, or by the false and deceptive use of any other instrument or thing by sleight of hand or other device, or by any false personation, or by conspiracy with any other by any false and subtle device or contrivance to cheat and defraud any other person, shall cheat and defraud, or shall

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* Cited 2 East's P. C., 820.

endeavour to cheat and defraud, any other person, shall incur the penalties of the ( ) class. (*a*)

(*a*) There are some other frauds usually denominated cheats; as, for instance, that which consists in procuring an illiterate person to execute a deed to his prejudice by a false representation of its contents: these we propose to consider under a different head.

ART. 74.

False personation consists in the offender's falsely representing himself, or assuming to be any other person, whether such other person ever existed or not, and in the former case whether such person be still living or not, or in falsely representing himself to be invested with, or to occupy or possess any office, official character, or station, or any authority of a public or private nature, or to be, or to have been the husband or wife of, or to stand or to have stood in any degree of relationship or kindred to any other person. Definition of false personation.

ART. 75.

Whosoever shall by any false and deceitful personation, endeavour to receive any wages, pay, half-pay, prize-money, bounty-money, pension, gratuity, or other allowance, from the Compassionate Fund of the Navy, with intent to defraud any other person, shall incur the penalties of the ( ) class. (*b*) Personating persons entitled to any allowance from the Compassionate Fund.

(*b*) 11 Geo. 4, & 1 Wm. 4, c. 20, s. 84.

ART. 76.

Whosoever shall, by falsely personating the owner of any share or interest of or in any Stock, Annuity, or other public fund which is, or hereafter may be, transferrable at the Bank of England or at the South Sea House, or of or in the capital stock of any body corporate, company, or society, which is, or hereafter may be, established by charter or Act of Parliament, endeavour to transfer any share or interest belonging to such owner, or to receive any money due to any such owner, shall incur the penalties of the ( ) class. (*c*) Personating the owner of any public stock, or certain other stock.

(*c*) 11 Geo. 4, & 1 Wm. 4, c. 66, s. 7.

ART. 77.

Whosoever shall falsely and deceitfully personate, or falsely assume, or procure any other person to personate or falsely assume the name or character of any officer, non-commissioned officer, soldier, or other person entitled or supposed to be entitled to any pension, wages, pay, prize-money, or relief, grant, bounty-money, share, or other allowance of money due or payable, or supposed to be due or payable, for or on account of any service performed, or supposed to have been performed, by any officer, non-commissioned officer, soldier, or other person, who shall have really served, or be supposed to have serrved in Her Majesty's army, or in any other military service, or shall personate or falsely assume, or act, aid, or assist in personating or falsely assuming, or procure any other person to personate or falsely assume, the name or character of the executor or administrator, wife, widow, next of kin, relation, or creditor of any such officer, non-commissioned officer, soldier, or other person as aforesaid, in order to receive, or to enable any other person to receive, any prize-money, grant, bounty-money, share, or other allowance of money due or payable, or supposed to be due or payable, for or on account of any service performed, or supposed to have been performed, by any such officer, non-commissioned officer, soldier, or other person as aforesaid, shall incur the penalties of the ( ) class. (*d*) Personating any person entitled to any pensions, prize-money, or other allowance for service performed in the army.

(*d*) 7 Geo. 4, c. 16, s. 38; 2 Wm. 4, c. 53, s. 49.

ART. 78.

Whosoever shall wrongfully and clandestinely take and remove any property, being in the lawful possession or custody of any other person, with intent fraudulently to deprive any other person of any security for any debt, claim, or interest, or fraudulently to subject any person to any charge or claim in respect of the loss of such property, shall, in case such taking be not by theft, incur the penalties of the ( ) class. (*e*) A taking with intent to cheat.

(*e*) By this clause it is proposed to reach such as, by reason of ownership, are not guilty of theft, but who fraudulently take goods with intent to defraud others, as where owners fraudulently purloin their own goods, being in the possession of a carrier, or bailee or agent, in order to charge him or some other in respect of the loss.

EMBEZZLEMENT.

Prefatory Remarks.

The general characteristics of this class of offences have already been adverted to.* The offence consists in some actual fraudulent appropriation of that which belongs to another, and to which a wrongful or fraudulent taking or obtaining of possession is not as in the instances of theft, or an obtaining by false pretences, essential. In a moral point of view the offence can scarcely be regarded as inferior in degree to that of theft, for although a wrong is not committed in obtaining possession of the property, the fraudulent appropriation frequently involves a violation of trust and confidence.

There is a material distinction between property entrusted to the offender by the owner, or by other lawful authority, and property which by casualty or otherwise, but without criminal means, comes into the offender's possession. In the former case, civil remedies not being adequate to the protection of property which must necessarily be entrusted to the hands of numerous agents, severer restraint by means of punishment is warranted.

The embezzlement of entrusted property admits of distinctions. The agent may be entrusted to receive money which he is bound to keep, deliver, or apply specifically, or he may merely become a debtor to his principal for so much in account. In the latter case (that is, where the party entrusted is not bound to keep, deliver, or apply the specific money or its proceeds) he does not commit any breach of faith in appropriating the specific money to his own use, or in mixing it up with his own funds, and consequently his doing so cannot properly be regarded as a crime, although he may afterwards be unable to satisfy his principal. It can make no difference in principle whether an agent be entrusted with the receipt of one sum only, or be employed generally to receive monies, except that, in the latter case, the temptation and the breach of confidence may be greater, and the necessity for penal restraint enhanced.

There may, however, be a distinction in the latter case in respect of the proof of the particular money embezzled. If evidence were required that the offender had embezzled any specific sum of money, or part of any specific sum paid to the principal's use by any particular person, such evidence might be impossible, although the clearest proof existed of an embezzlement having been committed. If, for instance, A., the agent of B., had received from each of 10 persons 10 sovereigns for B., and absconded with 50 of them, although the fraudulent absconding with B.'s money could clearly be proved, it might be impossible to show by whom the particular sovereigns embezzled had been paid.

Whilst a fraudulent breach of trust, by the embezzlement of property entrusted for a particular purpose, cannot but be regarded as a considerable aggravation of an act of fraudulent appropriation, the necessity which grows with increasing wealth and commerce, for entrusting various agents or contractors with property to a large amount, dictates the propriety of imposing penal restraints for the protection of property so circumstanced. The principle obviously extends to all in whom confidence is placed as to the custody or application of particular property, whether it be by legal authority or private contract or consent.

Another class of cases requires to be noticed. The appropriation of another's property although fraudulent, may yet involve no breach of confidence; the party may have had possession by some accident or casualty, or even by trespass not amounting to theft at the time of taking, and after possession thus obtained may have formed the resolution to embezzle the property. Considering that even in a moral point of view, where an article of property casually comes into the possession of another, who afterwards embezzles it, there is no strongly marked distinction between the offence of one who determined to appropriate the article at the time of finding, and that of one who formed the resolution afterwards,—that it is difficult, in point of fact, to decide which was the case,—that every one so situated is under a moral obligation to inquire for the owner and restore the property, and that the appropriation of such property without due inquiry is in itself evidence of fraud, the application of punishment to such an offence seems to be well warranted for the protection of property.

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* See Prefatory Remarks on the Law of Theft.

The common law made little or no provision against this class of offences. Such provisions were, indeed, excluded by the peculiar genius and general principles of the ancient law, which, as a man had usually the power of selecting those whom he chose to trust, regarded any loss or prejudice arising from breach of trust rather as the employer's fault in not having taken proper pains to ascertain the character of his agent, than as giving a title to criminal interposition.

These crude and early notions, which falsely assume that every principal must or ought to know the character of every agent whom he employs, and greatly tend to encourage villainy in agents, by exempting them from punishment in respect of depredations on their employer's property, were first partially impugned in the courts of Criminal Law by a circuitous course already adverted to. Carriers and other agents entrusted with goods, were, in certain cases of misconduct in respect of the goods, such as breaking open a bale or package, considered as having put an end to the contract, and to be guilty of theft in taking out and embezzling any part; and on this footing the law as to such agents stands at the present day. So strict was the old common law doctrine on the subject, that even domestic servants having the charge of plate or other valuables in their master's houses, were, by reason of the confidence reposed in them, not deemed to be guilty of theft in fraudulently taking and embezzling such articles. With respect to these, however, the ancient rule of law has long been relaxed. A butler or other servant having the custody of plate or other valuables, was considered as having nothing more than a bare charge, and not the possession of such articles, and in other instances, and especially of late years, some agents entrusted with the actual custody of property for purposes to be executed beyond the control of the employer, have been deemed to be guilty of theft in taking and fraudulently appropriating the articles with which they were entrusted, upon the principle, as it seems, that the owner had still the constructive possession. The decisions, however, upon this point, have not been uniform, and the extent to which the doctrine of a continuing presumptive possession would be carried, seems to be uncertain.

The necessity for penal laws against offenders guilty of embezzling property with which they have been entrusted, has been recognized in particular instances by several modern statutes, more especially by the stat. 7 and 8 of King Geo. IV. c. 29 (re-enacting, for the most part, the provisions of former Acts), which subjects clerks and servants guilty of embezzling property received for their employers to transportation for fourteen years, and bankers, brokers, and certain other agents embezzling property deposited with them to transportation for a like period.

Although the efforts of the common law to punish embezzlements by circuitous and constructive means as thefts, and the modern statutes, which visit such offences with even greater severity of punishment than would be incurred by actual thefts, fully recognize the necessity for penal interference, the law on this subject is at present very imperfect. We purpose to remedy this defect by more general enactments. Such an extension rests, we conceive, on principles fully recognized, not merely by the statute law, but by the practice of the courts of Criminal Law. If it be desirable to reach offenders of this description by indirect means, which, from the nature of the proof they require, must often fail, it cannot but be proper to attain the same end by direct and more certain means.

EMBEZZLEMENT.

SUMMARY OF CONTENTS.

[Definition of embezzlement, Art. 80—81. Rules relating to possession, Art. 82—85. No defence to charge of embezzlement that circumstances amount to theft, Art. 86. Owner cannot be guilty of embezzlement, Art. 87. Offence not embezzlement where owner parts with right of property to the offender, Art. 88. Exception in cases of parties liable to penalties of a lower class, Art. 89. Act of owner affording opportunity for the offence, no defence, Art. 90. Embezzlement by clerks or servants, Art. 91. Ditto by bankers, brokers, &c., Art. 92—93. Ditto by factors, &c., Art. 94—95. Laws against embezzlement not to affect civil remedy, Art. 96. Bankers, &c., not to be prosecuted for embezzlement respecting acts disclosed under process, Art. 97. Embezzlement by officers of the Bank of England and South Sea Company, Art. 98—99.]

ART. 79.

Characteristic of embezzlement.

THE crime of embezzlement is characterized by an actual fraudulent appropriation.

ART. 80.

Embezzlement.

Whosoever, being for any special purpose intrusted under any contract, express or implied, or other lawful authority, with the possession, or with power to take or deliver the possession, of any moveable property or fixture, being of the property of any other person, shall wrongfully and fraudulently embezzle the same, or any part, or any proceed thereof, shall incur the penalties of the ( ) class. (*a*)

(*a*) It may perhaps be proper to introduce a still more general clause, including the embezzlement of property, not specifically entrusted to the offender.

ART. 81.

Definition of the term "embezzle."

The term "embezzle" shall be deemed to comprehend every kind of fraudulent appropriation, provided the offender, by some act, manifest his intention to make such fraudulent appropriation.

ART. 82.

Rules relating to possession.

The law of embezzlement shall be applicable, indifferently, whether such possession of, or power to take or deliver possession of such moveable property or fixture be derived from the owner or any other person.

ART. 83.

And also whether any right of possession or power to take or deliver possession shall, or shall not continue to the time of such embezzlement. (*b*)

(*b*) As if A. hire a horse for a month, and after the expiration of the month fraudulently sells it.

ART. 84.

Possession by a husband of any moveable property or fixture let with lodgings to, or otherwise intrusted to, the possession of his wife, (*c*) shall be deemed to be a possession by him within the scope of the law of embezzlement, in case he embezzle the same.

(*c*) The present law applies only to the case of lodgings hired by the wife; but the principle extends generally whensoever the possession is obtained by the wife, and the husband taking advantage of that possession, embezzles the property.

ART. 85.

A husband having possession of any moveable property or fixture within the scope of the law of embezzlement, his wife shall be deemed to incur the penalties of such law if she embezzle the same.

ART. 86.

It is no defence to a charge of embezzlement that the circumstances amount to theft.

It shall not be available by way of defence to one accused of any embezzlement that, by reason of preconcerted fraud, he was guilty of theft in taking such moveable property or fixture. (*d*)

(*d*) An express rule of this kind founded on the well known principle that no one shall take advantage of his own wrong, is perhaps unnecessary. If A. hire a horse for two months and at the expiration of one and pending the contract, fraudulently sell him, it would be obviously unjust and impolitic to allow him to show in defence that, by reason of preconcerted fraud on his part, his possession was from the first illegal—that he therefore held under no legal contract or obligation and ought to have been prosecuted not for having embezzled but for having stolen the goods. Neither ought any one who still retained the possession, after the determination of a contract, and who before redelivery embezzled the property, to be allowed to defend himself on the plea that at the time of his embezzle-

ment his possession under the contract had ceased, and, still less, ought the plea to be admitted that it had been determined by any wrongful act of his own. For, in the former case, so long as the property actually remained in his possession, he held it at all events under an implied contract to keep or redeliver it to the owner, and, in the latter, if not in the former case, also would be taking advantage of his own wrong if he could avail himself of such a plea.

This rule is of great importance for the protection of moveable property, by ensuring the punishment of offenders in cases where doubts may exist whether the offender was guilty of theft in originally taking the property or of embezzlement by a subsequent appropriation, the original possession having been lawful by consent of the owner or otherwise. All difficulty would be avoided by charging the offence in one count as a theft—in another as an embezzlement. A series of rules and nice distinctions for deciding the question of possession, frequently of great difficulty in law as well as fact, is, to a great extent excluded. It is often a matter of doubt whether, under the circumstances, possession of particular property has been delivered by the owner to another. The following case is stated:—1 Hale's P. C., 505. A. delivers the key of his chamber to B., who unlocks the chamber and takes the goods of A., with intent to stea them. This, says Lord Hale, has been holden to be a felony, for the reason that the goods were not delivered to B., but taken by him, a judgment which appears (see Russell, 1092. 2 East's P. C., 684.) to have proceeded on the ground, that, by the delivery of the key, in this case, it was not in the contemplation of the parties to make a delivery of the goods contained in the room. But, supposing the key to have been delivered for the purpose of intrusting the party with the care of the goods, still it is argued that the taking of the goods out of the room with a felonious intent might have been felony, on the ground that, by the act of taking the goods with such an intent out of the room in which they were intended to remain for safe custody, the privity of contract would have been determined in the same manner as if they had been delivered in a box and taken out of it afterwards (see 2 East's P. C., 685.) This case affords an apt illustration of the difficulty of reaching offenders by extensions of the law of theft: on the other hand, considering the offence as an embezzlement, the case is simple and easy. B. having embezzled the property of A. is, at all events, guilty either of a theft in taking the property or of an embezzlement, and is liable to be convicted of the one offence or the other, according to the result of the investigation upon the question of possession. Similar observations are applicable to the case (Anon: *cor.* Holt C. J. O. B., 1701. 2 East's P. C., 697. 1 Leach, 415, Note [a]), where a woman had intrusted a porter to carry a bundle for her to Wapping, and *went with the porter*, and, in going to the place, the porter ran away with the bundle, which was lost. The learned judge, after telling the jury that, if they thought that the porter opened the bundle and took out the goods, it was felony, and they ought to find him guilty, further declared it to be his opinion that the facts as above stated were evidence of his having opened the bundle and taken out the goods. It has been well suggested (2 East's P. C., 698) that the better ground of determination would have been, that the bundle, though delivered, being intended to continue in the owner's presence, was, in point of law, still in her possession. Another ground has also been suggested, (2 East's P .C., 697) viz. that there was evidence to show that the porter took the bundle at first with intent to steal. The variety of learned endeavours employed for the solution of so simple a case seems strongly to show the expediency of a plain and simple rule.

The more modern doctrine, although more simple, is not altogether clear in point of principle: it has lately been held (and to that result several of the more modern decisions have tended), that one employed on a special contract to convey a heifer to a distant place, and who took possession without fraud, is guilty of theft in fraudulently selling the property. It is difficult, however, to recon cile the doctrine with the decisions in the cases of carriers and other bailees. A party so contracting has the actual possession quite as distinctly and exclusively as a carrier.

The still more difficult questions turning upon the determination of the contract, either according to its terms, or by the wrongful act of the offender, would to a great extent be excluded; for such questions never occur except in the case of an actual conversion and embezzlement; and upon a charge of embezzlement it would, under the above rule, be immaterial whether the original bailment had or had not been defeated by fraud, or whether such bailment had or had not been terminated, the possession of the offender still continuing.

Art. 87.

No one shall be deemed to offend against the law of embezzlement in respect of the misappropriation of any moveable property or fixture of which he shall be the sole or a joint or a part owner.

No owner of property can be guilty of embezzling it.

Art. 88.

Or, in respect of any moveable property or fixture fraudulently obtained by delivery from the owner or any other person having authority for that purpose, such owner or other person intending to part with the right of property.

It is not embezzlement where the owner parts with the right of property;

Art. 89.

No artificer, workman, or other person, who shall by virtue of any special enactment be liable to any penalties of a lower class, shall incur the penalties of the law of embezzlement.

Nor where the offender is liable to the penalties of a lower class.

Art. 90.

No act of the owner in affording an opportunity for committing the offence, or supplying means with a view that one expected to offend may be brought to justice, shall be available in defence, provided that such owner do not in anywise procure the commission of such offence. (*e*)

It is no defence that the owner afforded opportunity for the offence.

(*e*) If A. procure B. clandestinely to take his (A's.) goods, it is no theft in B.; for as regards A. the owner, the taking is not wrongful, however criminal the intent of B. may be.

ART. 91.

Embezzlement by clerks or servants.

Whosoever, being employed in the capacity of a clerk or servant shall embezzle any property of his employer, received or taken into possession by him in that capacity, shall incur the penalties of the ( ) class. (*f*)

(*f*) 7 & 8 Geo. 4, c. 29, s. 47.

ART. 92.

Embezzlement by bankers, brokers, &c.

Whosoever, to whom as a banker, merchant, broker, attorney, or other agent, any money, or security for the payment of money, shall have been intrusted, with any direction in writing, to apply such money, or any part thereof, or the proceeds, or any part of the proceeds, of such security, for any purpose specified in any such direction, shall, in violation of good faith, and contrary to the purpose so specified, in anywise convert to his own use or benefit such money, security, or proceeds, or any part thereof respectively; or whosoever to whom as a banker, merchant, broker, attorney, or other agent, any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, shall have been intrusted for safe custody, or any special purpose, without any authority to sell, negotiate, transfer, or pledge, shall, in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney, shall have been intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate or any part thereof, shall incur the penalties of the ( ) class. (*g*)

(*g*) 7 & 8 G. 4, c. 29. s. 49. This is an existing law, unaltered except in respect of formal phraseology. We have conceived that we should not be justified in making any material alteration in so modern a law, which was expressly founded on defects made apparent by Walsh's case (Rus. and Ryan's C. C. 215. 2 Leach, 1054), one so material to the interests of the commercial classes, for whose benefit several important limitations are annexed, and also because it has been deemed to be proper to visit offenders against this law with severer penalties than those incident to theft. We deem it, however, to be necessary to submit some observations on this law.

It is observable that the first branch of this law includes securities for the payment of money; the latter branch includes valuable securities; consequently that the offence of embezzling or misapplying any security for the payment of money contrary to a written direction, within the first branch, would also be an offence within the second branch, whether the trust or purpose of application were signified in writing or without.

It is also observable that the term "Agents," as used in this law, is somewhat indefinite, even when construed, as probably it would be, in reference to the context.

It is also observable that the provision made, it is presumed, for excluding any impediment to the prosecutor's civil remedy, which makes a disclosure under compulsory process previous to prosecution a bar to any prosecution, seems to be founded on very questionable policy, a general extension of which would be exceedingly pernicious.

ART. 93.

The provisions of this law relating to agents, not to affect trustees or mortgagees, nor bankers, receiving money due on securities, &c.

The provisions of the last preceding Article relating to agents shall not be deemed to affect any trustee in and under any instrument whatever, or any mortgagee of any property, real or personal, in respect of any act done by such trustee or mortgagee, in relation to the property comprised in or affected by any such trust or mortgage; nor shall restrain any banker, merchant, broker, attorney, or other agent, from receiving any money which shall be or become actually due and payable upon or by virtue of any valuable security, according to its tenor and effect, in such manner as he might have done if this law had not been made; nor from selling, transferring, or otherwise disposing of any securities or effects in his possession upon which he shall have any lien, claim, or demand entitling him by law so to do, unless such sale, transfer, or other disposal shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim, or demand. (*h*)

(*h*) 7 & 8 G. 4, c. 29, s. 50.

ART. 94.

Embezzlement by factors, &c.

Whosoever, being intrusted as factor or agent, for the purpose of sale, with any goods or merchandise, or being intrusted with any bill of lading, warehouse-keeper's or wharfinger's certificate, or warrant, or order for delivery of goods or merchandise, shall, for his own benefit and in violation of good faith, deposit or pledge any such goods or merchandise, or any of the said documents, as a security for any money or negotiable instrument borrowed or received by such factor or agent, at or before the time of making such deposit or pledge, or intended to be thereafter borrowed or received, shall incur the penalties of the ( ) class. (*i*)

(*i*) 7 & 8 G. 4, c. 29, s. 51.

ART. 95.

Provided that no such factor or agent shall incur such penalties for depositing or pledging any such goods or merchandise, or any of the said documents, in case the same shall not be made a security for, or subject to, the payment of any greater sum of money than the amount which, at the time of such deposit or pledge, was justly due and owing to such factor or agent from his principal, together with the amount of any bill or bills of exchange drawn by or on account of such principal, and accepted by such factor or agent. Proviso.

ART. 96.

The laws against embezzlement contained in Articles 92 and 94 shall not in anywise affect or lessen any civil remedy of any party. (*k*) Civil remedy of party not affected.

(*k*) 7 and 8 G. 4, c. 29, s. 52.

ART. 97.

No banker, merchant, broker, factor, attorney, or other agent, shall be liable to the penalties mentioned in Articles 92 and 94, in respect of any act done by him, if, previously to his prosecution, he shall, under any compulsory process of any court of law or equity, in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, have disclosed such act on oath, or if he shall have disclosed the same in any examination or deposition before any Commissioner of Bankrupt. (*l*) Bankers, &c. not to be liable for acts which they shall disclose under compulsory process.

(*l*) 7 and 8 G. 4, c. 29, s. 52. We have deemed it proper, for the reasons already stated, not to omit the articles 92 to 97 inclusive, especially as they contain some special enactments of a remarkable nature for preventing any interference with civil commercial rights. We conceive, however, that the following more concise provision would be sufficient to subject bankers and others to whom the above articles refer to the enhanced penalties in respect of embezzlements committed by them. We much doubt the policy of exempting such offenders from punishment in order to obviate the objection to their being compelled to give evidence under compulsory process :—" Whosoever, acting in the capacity of a banker, merchant, broker, attorney, or other commercial or law agent, shall embezzle any property of any other person entrusted to him in that capacity in violation of such trust, shall incur the penalties of the ( ) class." The present law uses the general term " other agents." It is presumed that the words would be restrained to other agents, *ejusdem generis* with those specified; but we have thought it better to restrain the generality of the expression.

ART. 98.

Whosoever, being an officer or servant of the Governor and Company of the Bank of England, or of the South Sea Company, and being intrusted with any note, bill, dividend-warrant, bond, deed, or any security, money, or other effects belonging to either of the said Companies, or having any bill, dividend-warrant, bond, deed, or any security, money, or effects of any other person or persons lodged or deposited with either of the said Companies, or with him as an officer or servant of either of the said Companies, shall embezzle any such note, bill, dividend-warrant, bond, deed, security, money, or effects, or any part of them, shall incur the penalties of the ( ) class. (*m*) Embezzlement by officers of the Bank of England and South Sea Company.

(*m*) 15 G. 2, c. 13, s. 12; 24 G. 2, c. 11, s. 3.

ART. 99.

The term " effects" shall be deemed to extend to all such securities as are entrusted to officers of either of the said Companies, although they be of no definite value. Definition of the term " effects.

RECEIVING PROPERTY STOLEN OR OTHERWISE WRONGFULLY OBTAINED.

[As the law concerning receivers of goods stolen or otherwise wrongfully obtained is closely connected with that relating to accessories, we propose to defer for the present the consideration of this subject.]

MALICIOUS INJURIES TO PROPERTY.

SUMMARY OF CONTENTS.

[What malice sufficient, Art. 101. Setting fire to a dwelling-house, any person being therein, Art. 102. Riotously demolishing, &c., buildings, Art. 103. Setting fire to buildings with intent to defraud, Art. 104. Setting fire to vessels with intent to murder, Art. 105. Exhibiting false lights or signals, Art. 106. Setting fire to vessels with intent to destroy the same, Art. 107. Damaging ships otherwise than by fire, Art. 108. Destroying wrecks, Art. 109. Setting fire to coal mines, Art. 110. Setting fire to agricultural produce, &c., Art. 111. Destroying sea-banks, &c., or works on rivers or canals, Art. 112. Doing damage to obstruct the navigation of rivers or canals, Art. 113. Destroying public bridges, Art. 114. Destroying turnpike gates, toll-houses, &c., Art. 115. Destroying trees in parks, gardens, &c., Art. 116. Ditto elsewhere, Art. 117. Malicious damage to trees to the amount of 1*s.*, Art. 118. Destroying fruit, &c., in gardens, &c., Art. 119. Destroying fixtures in public places, Art. 120. Destroying certain goods in the loom, &c., Art. 121. Destroying thrashing machines and certain other machinery, Art. 122. Drowning mines, Art. 123—124. Destroying engines, &c., used in mines, Art. 125. Destroying dams of fisheries, &c., Art. 126. Destroying mill-dams, Art. 127. Killing or maiming cattle, Art. 128. Setting fire to certain crops, &c., Art. 129. Destroying hop-binds, Art. 130. Setting fire to buildings in towns, &c., Art. 131. Preventing the conveyance of corn, &c., to market, Art. 132. Destroying granaries, Art. 133. Destroying buoys, &c., Art. 134.]

ART. 100.

Characteristic of the offence.

This class of offences is characterized by malice, as contradistinguished from fraud.

ART. 101.

What malice sufficient.

Any act shall be deemed to be maliciously done (as regards malicious injuries to property) whether the offender be actuated by express malice against any other person or against any animal which is the subject of injury, or wilfully do any injurious or prohibited act without lawful excuse.

ART. 102.

Setting fire to a dwelling-house, any person being therein.

WHOSOEVER shall unlawfully and maliciously set fire to any dwelling-house, any person being therein, shall suffer death. (*a*)

(*a*) 7 Wm. 4, & 1 Vic., c. 89, s. 2.

ART. 103.

Riotously demolishing, &c., buildings, &c.

Whosoever, being together with others riotously and tumultuously assembled to the disturbance of the public peace, shall unlawfully and with force, demolish, pull down, or destroy, or begin to demolish, pull down, or destroy, any church or chapel, or any chapel for the religious worship of persons dissenting from the united Church of England and Ireland, or any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam-engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk, for conveying minerals from any mine, shall suffer death. (*b*)

(*b*) 7 & 8 G. 4, c. 30. s 8. In completing that part of the Digest which contains Riots, it will probably be necessary materially to modify the provisions mentioned in this Article. On a former occasion we suggested the propriety of placing offences of this kind in an inferior class as to punishment. See Correspondence between the Secretary of State for the Home Department and the Commissioners, p. 15.

ART. 104.

Setting fire to buildings with intent to defraud.

Whosoever shall unlawfully and maliciously set fire to any church or chapel, or to any chapel for the religious worship of persons dissenting from the United Church of England and Ireland, or shall unlawfully and maliciously set fire to any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hopoast, barn, or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, with intent thereby to injure or defraud any person, shall incur the penalties of the ( ) class. (*c*)

(*c*) 7 Wm. 4, & 1 Vic., c. 89, s. 3.

ART. 105.

Setting fire to vessels with intent to murder.

Whosoever shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, either with intent to murder any person, or whereby the life of any person shall be endangered, shall suffer death. (*d*)

(*d*) 7 Wm. 4, & 1 Vic., c. 89, s. 4.

ART. 106.

Exhibiting false lights or signals.

Whosoever shall exhibit any false light or signal, with intent to bring any ship

or vessel into danger, or shall unlawfully and maliciously do anything tending to the immediate loss or destruction of any ship or vessel in distress, shall suffer death. (*e*)

(*e*) 7 Wm. 4, & 1 Vic., c. 89, s. 5.

ART. 107.

Setting fire to vessels with intent to destroy the same.

Whosoever shall unlawfully and maliciously set fire to or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state, or shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, with intent thereby to prejudice any owner, or part owner, of such ship or vessel, or of any goods on board the same, or any person that hath underwritten, or shall underwrite, any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall incur the penalties of the ( ) class. (*f*)

(*f*) 7 Wm. 4, &1 Vic., c. 89, s. 6.

ART. 108.

Damaging ships otherwise than by fire.

Whosoever shall unlawfully and maliciously damage, otherwise than by fire any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same, or to render the same useless, shall incur the penalties of the ( ) class. (*g*)

(*g*) 7 & 8 G. 4, c. 30, s. 10.

ART. 109.

Destroying wrecks.

Whosoever shall unlawfully and maliciously destroy any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall incur the penalties of the ( ) class. (*h*)

(*h*) 7 Wm. 4, & 1 Vic., c. 89, s. 8.

ART. 110.

Setting fire to coal-mines.

Whosoever shall unlawfully and maliciously set fire to any mine of coal or cannel coal, shall incur the penalties of the ( ) class. (*i*)

(*i*) 7 W. 4, & 1 Vic., c. 89, s. 9.

ART. 111.

Setting fire to agricultural produce, &c.

Whosoever shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, tares, straw, haulm, stubble, furze, heath, fern, hay, turf, peat, coals, charcoal, or wood, or any steer of wood, shall incur the penalties of the) class. (*k*)

(*k*) 7 Wm. 4, & 1 Vic., c. 89, s. 10.

ART. 112.

Destroying sea-banks, &c., or works on rivers or canals.

Whosoever shall unlawfully and maliciously break down, or cut down, any sea-bank or sea-wall, or the bank or wall of any river, canal, or marsh, whereby any lands shall be overflowed or damaged, or shall be in danger of being so, or shall unlawfully and maliciously throw down, level, or otherwise destroy any lock, sluice, floodgate, or other work on any navigable river or canal, shall incur the penalties of the ( ) class. (*l*)

(*l*) 7 & 8 Geo. 4, c. 30, s. 12.

ART. 113.

Removing piles of sea-banks, &c., or doing damage to obstruct the navigation of rivers or canals.

Whosoever shall unlawfully and maliciously cut off, draw up, or remove any piles, chalk, or other materials fixed in the ground, and used for securing any sea-bank or sea-wall, or the bank or wall of any river, canal, or marsh, or shall unlawfully and maliciously open or draw up any floodgate, or do any other injury or mischief to any navigable river or canal, with intent, and so as thereby to obstruct or prevent the carrying on, completing, or maintaining the navigation thereof, shall incur the penalties of the ( ) class. (*m*)

(*m*) 7 & 8 Geo. 4, c. 30, s. 12.

ART. 114.

Destroying public bridges.

Whosoever shall unlawfully and maliciously pull down or in anywise destroy any public bridge, or do any injury with intent and so as thereby to render such bridge, or any part thereof, dangerous or impassable, shall incur the penalties of the ( ) class. (*n*)

(*n*) 7 & 8 Geo. 4, c. 30, s. 13.

ART. 115.

Destroying turnpike-gates, toll-houses, &c.

Whosoever shall unlawfully and maliciously throw down, level, or otherwise destroy, in whole or in part, any turnpike-gate, or any wall, chain, rail, post, bar, or other fence, belonging to any turnpike-gate, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any Act or

Acts of Parliament relating thereto, or any house, building, or weighing engine, erected for the better collection, ascertainment, or security of any such toll, shall incur the penalties of the ( ) class. (*o*)

(*o*) 7 & 8 Geo. 4, c. 30, s. 14.

ART. 116.

Destroying trees in parks, gardens, &c.

Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood respectively growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining, or belonging to any dwelling-house, (in case the amount of the injury done shall exceed the sum of 1*l.*), shall incur the penalties of the ( ) class. (*p*)

(*p*) 7 & 8 Geo. 4, c. 30, s. 19.

ART. 117.

Trees elsewhere.

Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood respectively growing elsewhere than in any of the situations mentioned in Article 116, (in case the amount of the injury done shall exceed the sum of 5*l.*), shall incur the penalties of the ( ) class. (*q*)

(*q*) 7 & 8 Geo. 4, c. 30, s. 19.

ART. 118.

Malicious damage to trees to the amount of 1*s.*

Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub or any underwood, wheresoever the same may be growing, injury being done to the amount of 1*s.* at the least, shall incur, in respect of a third or any subsequent offence, the penalties of the ( ) class. (*r*)

(*r*) 7 and 8 Geo. IV. c. 30, s. 20.

ART. 119.

Destroying fruit, &c., in gardens, &c.

Whosoever shall unlawfully and maliciously destroy or damage with intent to destroy, any plant, root, fruit, or vegetable production growing in any garden, orchard, nursery-ground, hot-house, green-house, or conservatory, having been before convicted of any such offence, shall incur the penalties of the ( ) class. (*s*)

(*s*) 7 and 8 Geo. IV. c. 30, s. 21.

ART. 120.

Destroying fixtures in public places.

Whosoever shall rip, cut, break, or otherwise destroy or damage any glass or woodwork, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material respectively, fixed in any square, street, or other place dedicated to public use or ornament, shall incur the penalties of the ( ) class.

ART. 121.

Destroying silk, woollen, linen, or cotton goods in the loom, or any machinery belonging to those manufactures, &c.

Whosoever shall unlawfully and maliciously cut, break, or destroy, or damage, with intent to destroy or to render useless, any goods or article of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace respectively, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture, or shall unlawfully and maliciously cut, break, or destroy, or damage, with intent to destroy or to render useless, any warp or shute of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any loom, frame, machine, engine, rack, tackle, or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles, or shall by force enter into any house, shop, building, or place, with intent to commit any of the offences aforesaid, shall incur the penalties of the ( ) class. (*t*)

(*t*) 7 and 8 Geo. IV. c. 30, s. 3.

ART. 122.

Destroying threshing machines, or machinery in any other manufacture than the foregoing.

Whosoever shall unlawfully and maliciously cut, break, or destroy, or damage, with intent to destroy or to render useless, any threshing-machine, or any machine or engine, whether fixed or moveable, prepared for or employed in any manufacture whatsoever (except the manufacture of silk, woollen, linen, or cotton goods, or goods of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace) shall incur the penalties of the ( ) class. (*u*)

(*u*) 7 and 8 Geo. IV. c. 30, s. 4.

ART. 123.

Drowning mines

Whosoever shall unlawfully and maliciously cause any water to be conveyed into any mine, or into any subterraneous passage communicating therewith, with intent thereby to damage or destroy such mine, or to hinder or delay the working thereof, or shall, with the like intent, unlawfully and maliciously pull down, fill up, or obstruct any airway, waterway, drain, pit, level, or shaft, of or belonging to any mine, shall incur the penalties of the ( ) class. (*v*)

(*v*) 7 and 8 Geo. IV. c. 30, s. 6.

ART. 124.

Proviso.

The law contained in the last preceding Article shall not extend to any damage committed under ground by any owner of any adjoining mine in working the same, or by any person duly employed in such working. (*w*)

(*w*) These exceptions appear to be unnecessary where the mischief is not maliciously occasioned, and where it is so occasioned, the vicinity of the offender's mine does not seem to warrant any special exception.

ART. 125.

Destroying engines, erections, &c., used in mines.

Whosoever shall unlawfully and maliciously pull down or destroy, or damage with intent to destroy or to render useless, any steam-engine, or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, whether such engine, staith, building, erection, bridge, waggonway, or trunk be completed, or in an unfinished state, shall incur the penalties of the ( ) class. (*x*)

(*x*) 7 and 8 Geo. IV. c. 30, s. 7.

ART. 126.

Destroying dams of fisheries, &c.

Whosoever shall unlawfully and maliciously break down or otherwise destroy the dam of any fish-pond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully and maliciously put any lime or other noxious material in any such pond or water, with intent thereby to destroy any of the fish therein, shall incur the penalties of the ( ) class. (*y*)

(*y*) 7 and 8 Geo. IV. c. 30, s. 15.

ART. 127.

Destroying mill-dams.

Whosoever shall unlawfully and maliciously break down or otherwise destroy the dam of any mill-pond, shall incur the penalties of the ( ) class. (*z*)

(*z*) 7 and 8 Geo. IV. c. 30, s. 15.

ART. 128.

Killing or maiming cattle.

Whosoever shall unlawfully and maliciously kill, maim, or wound any cattle, shall incur the penalties of the ( ) class. (*a*)

(*a*) 7 and 8 Geo. IV. c. 30, s. 16; 7 Wm. IV., and 1 Vic. c. 90, s. 2 and 3.

ART. 129.

Setting fire to certain crops, plantations, and heath.

Whosoever shall unlawfully and maliciously set fire to any crop of corn, grain, or pulse, whether standing or cut down, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, wheresoever the same may be growing, shall incur the penalties of the ( ) class. (*b*)

(*b*) 7 and 8 Geo. IV. c. 30, s. 17.

ART. 130.

Destroying hop-binds.

Whosoever shall unlawfully and maliciously cut or otherwise destroy any hop-binds growing on poles in any plantation of hops, shall incur the penalties of the ( ) class. (*c*)

(*c*) 7 and 8 Geo. IV. c. 30, s. 18; and 7 Wm. IV., and 1 Vic. c. 90, s.2 and 3.

ART. 131.

Setting fire to buildings in towns, &c.

Whosoever shall wilfully set fire to any house or other building, situate in any town, or so nearly adjacent or contiguous to any dwelling-house wherever situated, that such dwelling-house may thereby be endangered, shall incur the penalties of the ( ) class. (*d*)

(*d*) By the common law, the wilful burning of a man's own house in a town is a high misdemeanor and punishable by fine, imprisonment, pillory, and perpetual sureties for good behaviour. 1 Hale's P. C., 568. 1 Haw. P. C., 106. 4 Bl. Comm., 221. The offence might reasonably be extended to the protection of all dwelling-houses.

ART. 132.

Preventing the conveyance of corn, &c., to market.

Whosoever shall unlawfully stop or seize any wheat, flour, meal, malt, or other grain, in or on the way to or from any city, market-town, or place in this kingdom, or shall wilfully and maliciously break, cut, or destroy any waggon, cart, or other carriage wherein any such wheat, flour, meal, malt, or other grain, shall be loaded, or the harness of any horse or horses drawing or carrying the same, or shall unlawfully take off from any such carriage or drive away, kill, or wound any such horse or horses, with intent to stop such wheat, flour, meal, malt, or other grain, or shall by cutting of the sacks or otherwise scatter or throw abroad any such wheat, flour, meal, malt, or other grain, or shall take or carry away, destroy, spoil, or damage the same, or any part thereof, having been before convicted of any such offence, shall incur the penalties of the ( ) class. (*e*)

(*e*) 36 Geo. III. c. 9, s. 1.

ART. 133.

Destroying Granaries.

Whosoever shall, with intent to prevent or hinder any corn, meal, flour, malt, or grain from being lawfully carried or removed from any place whatsoever, wilfully and maliciously pull down, throw down, or otherwise destroy, any storehouse or granary, or other place in which corn, meal, flour, malt, or grain shall be then kept, or shall unlawfully enter any such storehouse, granary, or other place, and take and carry away any corn, flour, meal, malt, or grain, therefrom, or shall throw abroad or spoil the same, or any part thereof, or shall unlawfully enter on board any ship, barge, boat, or vessel, and wilfully and maliciously take and carry away, cast or throw out therefrom, or otherwise spoil or damage any corn, flour, meal, malt, or grain therein, shall incur the penalties of the ( ) class. (*f*)

(*f*) 36 Geo. III. c. 9. s. 2.

ART. 134.

Destroying buoys, &c.

Whosoever shall wilfully cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall do or commit any act with intent and design to cut away, cast adrift, remove, alter, deface, sink, or destroy, or in any other way injure or conceal any buoy, buoy-rope, or mark belonging to any ship or vessel, or which may be attached to any anchor or cable belonging to any ship or vessel whatever, whether in distress or otherwise, shall incur the penalties of ( ) class. (*g*)

(*g*) 1 and 2 Geo. IV. c. 75, s. 11.

SPECIAL PROVISIONS FOR THE PROTECTION OF PARTICULAR PROPERTY.

SUMMARY OF CONTENTS.

[Deer stealing, Art. 135—136. Assaulting deer-keepers, Art. 137. Assaulting game-keepers, Art. 138—140. Taking hares or conies in the night-time, Art. 141. Taking fish in water belonging to a dwelling-house, Art. 142. Stealing oysters from oyster-beds, Art. 143. Dredging for oysters, Art. 144. Damaging any thing attached to the realty with intent to steal it, Art. 145. Stealing or destroying written instruments of justice, Art. 146. Do. testamentary instruments, Art. 147. Offence against the Post-office, Art. 148—155.]

ART. 135.

Stealing, &c., deer in any inclosed ground.

Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the inclosed part of any forest, chase or purlieu, or in any inclosed land wherein deer shall be usually kept, shall incur the penalties of the ( ) class. (*a*)

(*a*) 7 and 8 Geo. IV. c. 29, s. 26.

ART. 136.

Deer stealing in any uninclosed ground.

Whosoever having been previously convicted of unlawfully and wilfully coursing, hunting, snaring, or carrying away, or killing or wounding, or attempting to kill or wound, any deer kept or being in the uninclosed part of any forest, chase, or purlieu, or of any other offence relating to deer, for which a pecuniary penalty is imposed by an Act of the 7th and 8th year of the reign of King George IV, intituled "An Act for consolidating and amending the laws in England, relative to larciny and other offences connected therewith," shall offend a second time by committing any of the offences hereinbefore last enumerated, whether such second offence be of the same description as the first or not, shall incur the penalties of the ( ) class. (*b*)

(*b*) 7 and 8 Geo. IV. c. 29. s. 26.

ART. 137.

Assaulting deer-keepers.

Whosoever, having entered into any forest, chace, or purlieu, whether inclosed in or not, or into any inclosed land where deer shall be usually kept, withtent unlawfully to hunt, course, wound, kill, snare, or carry away any deer, shall unlawfully beat or wound any person intrusted with the care of such deer, or any of his assistants who shall demand from such offender any gun, fire-arms, snare, or engine in his possession, or any dog there brought for hunting, coursing, or killing deer, or who, in case such offender shall not immediately upon such demand deliver up the same, shall attempt to seize and take the same from him in any of those respective places, or, upon pursuit made, in any other place to which he may have escaped therefrom, for the use of the owner of the deer, shall incur the penalties of the ( ) class. (*b*)

(*b*) 7 and 8 Geo. IV. c. 29. s. 29.

ART. 138.

Assaulting game-keepers.

Whosoever, being found by night upon any land, whether open or inclosed, whilst unlawfully taking or destroying any game or rabbits in any such land, or with any gun, net, engine, or other instrument for the purpose of taking or destroying game, shall assault or offer any violence with any gun, cross-bow, firearms, bludgeon, stick, club, or any other offensive weapon whatsoever towards the owner or occupier of such land, or any person having a right of free warren or free chase thereon, or the lord of the manor or reputed manor wherein such land may be situate, or any gamekeeper or servant of any of the persons herein mentioned, or any person assisting such gamekeeper or servant, to seize and apprehend such offender, whether upon such land, or, in case of pursuit being made, in any other place to which he may have escaped therefrom, shall incur the penalties of the ( ) class. (*c*)

(*c*) 9 Geo. IV. c. 69. s. 2.

ART. 139.

Definition of night.

In respect of offences against the law, contained in the last preceding Article, the night (*d*) shall be deemed to commence at the expiration of the first hour after sun-set, and to conclude at the beginning of the last hour before sun-rise. (*e*)

(*d*) It will be necessary eventually to include in the Digest a definition of the "night-time," which shall be generally applicable to all offences in which it is an incident. The same remark applies to many other terms, such as ship, vessel, dwelling-house, &c. At present we merely adopt the language of the particular statutes abstracted.

(*e*) 9 Geo. IV. c. 69. s. 12.

ART. 140.

Definition of "Game."

The term "game" shall be deemed to include hares, pheasants, partridges grouse, heath or moor game, black game, and bustards. (*f*)

(*f*) 9 Geo. IV. c. 69. s. 13.

ART. 141.

Taking, &c., hares or conies in the night-time.

Whosoever shall unlawfully and wilfully in the night-time take or kill any hare or coney in any warren or ground lawfully used for the breeding or keeping of hares or conies, whether the same be inclosed or not, shall incur the penalties of the ( ) class. (*g*)

(*g*) 7 and 8 Geo. IV. c. 29. s. 30.

ART. 142.

Taking fish in water situate in land belonging to a dwelling-house.

Whosoever shall unlawfully and wilfully take or destroy any fish in any water which shall run through, or be in any land adjoining or belonging to the dwelling-house of any person being the owner of such water, or having a right of fishery therein, shall incur the penalties of the ( ) class. (*h*)

(*h*) 7 and 8 Geo. IV. c. 29. s. 34.

Proviso.

Provided that nothing in this Article contained shall extend to any person angling in the day-time.

ART. 143.

Stealing oysters from oyster-beds.

Whosoever shall steal any oysters or oyster-brood from any oyster-bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such, shall incur the penalties of the ( ) class. (*i*)

(*i*) 7 and 8 Geo. IV. c. 29. s. 36.

ART. 144.

Dredging for oysters.

Whosoever shall unlawfully and wilfully use any dredge, or any net, instrument, or engine whatsoever, within the limits of any such oyster fishery, for the purpose of taking oysters or oyster-brood, although none shall be actually taken, or shall with any net, instrument, or engine, drag upon the ground or soil of any such fishery, shall incur the penalties of the ( ) class. (*j*)

(*k*) 7 and 8 Geo. IV. c. 29. s. 36.

Proviso.

Provided that nothing in this Article contained shall prevent any person from catching or fishing for any floating fish within the limits of any oyster fishery, with any net, instrument, or engine adapted for taking floating fish only.

ART. 145.

Damaging anything attached to the realty, with intent to steal it.

Whosoever shall rip, cut, break, bark, or otherwise destroy or damage any thing, being parcel of the realty, or attached either immediately or mediately to the realty, or growing in any land, with intent to steal the same, shall incur the penalties of the ( ) class. (*k*)

(*j*) This general provision supersedes the necessity for several particular provisions contained in the statute 7th and 8th of King George IV. c. 29, as to ripping, cutting, &c. different kinds of property with intent to steal it.

ART. 146.

Stealing or destroying written instruments of justice.

Whosoever shall steal, or shall, for any fraudulent purpose, take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously obliterate, injure, or destroy, any written instrument of justice, shall incur the penalties of the ( ) class. (*l*)

(*l*) 7 and 8 Geo. IV. c. 29. s. 21.

ART. 147.

Stealing or destroying testamentary instruments.

Whosoever shall steal, or for any fraudulent purpose, destroy or conceal any testamentary instrument, shall incur the penalties of the ( ) class. (*m*)

(*m*) 7 and 8 Geo. IV. c. 29. s. 22.

ART. 148.

Stealing money, &c., out of letters.

Whosoever shall steal from, or out of a post letter, any chattel, money, or valuable security, shall incur the penalties of the ( ) class. (*n*)

(*n*) 7 Wm. IV. and 1 Vic. c. 36. s. 27.

ART. 149.

Stealing letter bags, or letters sent by the mail.

Whosoever shall steal a post-letter bag, or a post letter from a post-letter bag, or shall steal a post letter from a post office, or from an officer of the post office, or from a mail, or shall stop a mail with intent to rob or search the same, shall incur the penalties of the ( ) class. (*o*)

(*o*) 7 Wm. IV. and 1 Vic. c. 36. s. 28.

ART. 150.

Ditto sent by packet.

Whosoever shall steal, or unlawfully take away a post letter bag sent by a post office packet, or shall steal, or unlawfully take a letter out of any such bag, or shall unlawfully open any such bag, shall incur the penalties of the ( ) class. (*p*)

(*p*) 7 Will. IV. and 1 Vic. c. 36. s. 29.

ART. 151.

Receivers of property sent by the post and stolen.

Whosoever shall receive any post letter, or post letter bag, or any chattel, money, or valuable security, the stealing, taking, embezzling, or secreting whereof shall amount to a felony under any law concerning the Post Office, knowing the same to have been feloniously stolen, taken, embezzled, or secreted, and to have been sent, or to have been intended to be sent by the post, shall, on being convicted, either as an accessary after the fact, or for a substantive felony, incur the penalties of the ( ) class. (*q*)

(*q*) 7 Wm. IV. and 1 Vic. c. 36. s. 30.

ART. 152.

Opening or delaying letters.

Whosoever, being a person employed by, or under the Post Office, shall, contrary to his duty, open, or procure, or suffer to be opened, a post letter, or shall wilfully detain or delay, or procure or suffer to be detained or delayed, a post letter, shall incur the penalties of the ( ) class. (*r*)

(*r*) 7 Wm. IV. and 1 Vic. c. 36. s. 25.

Proviso.

Provided that nothing in this Article contained shall extend to the opening, or detaining, or delaying of a post letter returned for want of a true direction, or of a post letter returned by reason that the person to whom the same shall be directed is dead or cannot be found, or shall have refused the same, or shall have refused or neglected to pay the postage thereof; nor to the opening, or detaining, or delaying of a post letter in obedience to an express warrant in writing under the hand of one of the Principal Secretaries of State.

ART. 153.

Whosoever, being a person employed under the Post Office, shall steal, or shall, for any purpose whatever, embezzle, secrete, or destroy a post letter, shall incur the penalties of the ( ) class; and if any such post letter so stolen, or embezzled, secreted, or destroyed, shall contain therein any chattel, or money whatsoever, or any valuable security, shall incur the penalties of the ( ) class. (*s*)

Embezzling letters or packets.

(*s*) 7 Wm. IV. and 1 Vic. c. 36. s. 26.

ART. 154.

Whosoever, being a person employed in the Post Office, shall steal, or shall, for any purpose, embezzle, secrete, or destroy, or shall wilfully detain, or delay in course of conveyance, or delivery thereof by the post, any printed Votes, or proceedings in Parliament, or any printed newspaper, or any other printed paper whatever, sent by the post without covers, or in covers open at the sides, shall incur the penalties of the ( ) class. (*t*)

Stealing printed papers sent by the post.

(*t*) 7 Will. IV. and 1 Vic. c. 36. s. 32.

ART. 155.

Whosoever shall fraudulently retain, or shall wilfully secrete, or keep, or detain, or being required to deliver up by an officer of the Post Office, shall neglect, or refuse to deliver up a post letter which ought to have been delivered to any other person, or a post letter bag, or post letter which shall have been sent, whether the same shall have been found by the person secreting, keeping, or detaining, or neglecting, or refusing to deliver up the same, or by any other person, shall incur the penalties of the ( ) class. (*u*)

Fraudulently retaining letters delivered by mistake, or secreting letters, &c., that have been lost.

(*u*) 7 Wm. IV. and 1 Vic. c. 36. s. 31.

We humbly submit this, the Fourth Report of the Commissioners, to Your Majesty's Royal consideration.

THOMAS STARKIE, (L. S.)
H. BELLENDEN KER, (L. S.)
WILLIAM WIGHTMAN, (L. S.)
DAVID JARDINE, (L. S.)

Received the 8*th day of March* 1839.

COTTENHAM, C.

APPENDIX.*

Appendix No. 1.

LIST of TREASONS punishable with Death by the present Law.

Appendix No. 1.

[The judgment of Death in the case of Treason is that the offender, if a male, be drawn on a hurdle to the place of execution, and there hanged by the neck until dead; and that afterwards the head be severed from the body of such offender, and the body be divided into four quarters, to be disposed of as Her Majesty shall think fit (54 Geo. 3. c. 146)†; and, if a female, that the offender be drawn to the place of execution and there hanged by the neck until dead (30 Geo. 3. c. 48. s. 1): and, whether a male or female, *upon conviction*, the personal estate of every description, whether in action or possession, or settled by way of trust, which the offender has otherwise than as an executor (Cro. Car. 566), or a trustee or mortgagee (4 & 5 W. 4. c. 23. s. 3), at the time of conviction, is forfeited to the crown (Bac. Abrid. Forfeiture (B.); and, *upon attainder by judgment of death or outlawry*, the blood of such offender is corrupted, (but not so as to obstruct descents to his or her posterity where they are obliged to derive a title through him or her to a remoter ancestor [3 & 4 W. 4. c. 106. s. 10.]), and all the freehold lands and tenements of inheritance in fee-simple or fee-tail, and all other hereditaments (except copyholds), whether in possession, reversion, or remainder, and all the rights of entry on freehold lands and tenements which the offender has (otherwise than as a trustee or mortgagee, [4 & 5 W. 4. c. 23. s. 3,]) at the time of the offence committed or at any time afterwards, and also the profits of all freehold lands and tenements which the offender has in his or her own right for life, so long as such interest shall subsist, and, if the offender be a male, his wife's dower, are forfeited to the crown (4 Black. Com. 381; 26 Hen. 8. c. 13. s. 5; 33 Hen. 8. c. 20. s. 2; and 5 & 6 Edw. 6. c. 11. s. 9 & 13), and all the copyhold estates belonging to the offender at the time of the offence committed are forfeited to the lord of the manor.—(Com. Dig. Copyhold (M.) I.)]‡

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
In treason there are no accessaries,—all are principals. To conceal or keep secret any treason is, by the 1 & 2 P. & M. c. 10. s. 8, misprision of treason, which is punishable by loss of the profits of lands during life, forfeiture of goods, and imprisonment for life.—1 Hale 374; 4 Black. Com. 120. By 11 Hen. 7. c. 1. it is enacted, that no person who attends upon the King for the time being, to do him true and faithful service of allegiance, or is in other places by his commandment in wars, within this land or without, shall for the said deed be convicted of treason.	Compassing or imagining the death of our lord the King,* or of our lady his Queen, or of their eldest son and heir; or violating the King's companion, or the King's eldest daughter unmarried, or the wife of the King's eldest son and heir; or levying war against the lord our King in his realm, or being adherent to the King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere, and being thereof probably attainted of open deed by the people of one's condition; or slaying the Chancellor,† Treasurer, or the King's Justices of the one bench or the other, Justices in eyre or Justices of Assize, or any other Justices assigned to hear and determine, being in their places doing their offices.	25 Edw. 3. st. 5. c. 2.
‡ As to the punishment for the first and second offences *vide post*, p. 5.	Having been twice convicted and attainted‡ of advisedly, maliciously, and directly affirming, holding, standing with, setting forth, maintaining or defending (by writing, printing, teaching, preaching, express words, deed or act) the authority, pre-eminence, power or jurisdiction, spiritual or ecclesiastical, of any foreign prince, prelate, person, state or potentate whatsoever, before the passing of the 1 Eliz. c. 1. (an Act to restore to the Crown the	

* The words "our lord the King," have been construed to include a Queen regnant.—1 Hale's P. C. 101, 106; 3 Inst. 7.

† See 5 Eliz. c. 18. and 1 W. & M. c. 21. which seem to extend the 25 Edw. 3. st. 5. c. 2. to the lord keeper and lord commissioners of the great seal.

* The following Lists contain no offence comprised in the Annual Mutiny Acts, or the consequences of which may be relieved against, by taking any oath or making any declaration, or under the Annual Indemnity Acts.

The style of "King" or "Queen," or "His Majesty" or "Her Majesty," has been used throughout these lists, indiscriminately, according to the language of the particular Act abstracted.

† This judgment, however, may by warrant under the Royal sign manual, countersigned by a Principal Secretary of State, be changed into beheading only.—See sec. 2 of the 54 Geo. 3. c. 146.

‡ By the 39 Geo. 3. c. 37. s. 1. it is enacted that *all* offences committed upon the high seas out of the body of any county of this realm, shall be offences of the same nature, and liable to the same punishments, as if they had been committed upon the shore; and by the 7 & 8 Geo. 4. c. 28. s. 12. it is enacted that all offences prosecuted in the High Court of Admiralty of England, shall, upon every first and subsequent conviction, be subject to the same punishments, whether of death or otherwise, as if such offences had been committed upon the land.

Appendix No. 1.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
So far as the See of Rome is concerned, it is by a subsequent statute (5 Eliz. c. 1. s. 10.) *vide infra*, made treason to commit any of these offences for the *second* time.	ancient jurisdiction over the estate ecclesiastical and spiritual, and abolishing all Foreign Powers repugnant to the same) claimed, used, or usurped within this realm, or any dominion or country being within or under the power, dominion, or obeisance of Her Highness; or of advisedly, maliciously, and directly putting in use, or executing anything for the extolling, advancement, setting forth, maintenance, or defence of any such pretended or usurped jurisdiction, power, pre-eminence and authority, or any part thereof, committing or doing the third time the said offences or any of them in manner and form aforesaid, and being thereof duly convicted and attainted.	1 Eliz. c. 1. s. 30.
* The first offence is a præmunire, *vide post*, pp. 5 & 6. No attainder for this offence extends to make any corruption of blood, the disinheriting of any heir, forfeiture of dower, nor to the prejudice of the right or title of any other person than the offender during his life only.—See sec. 12.	Having been convicted and attainted* of advisedly and wittingly holding or standing with (by writing, ciphering, printing, preaching or teaching, deed or act), to extol, set forth, maintain or defend the authority, jurisdiction or power of the Bishop of Rome or of his See, before the passing of the 5 Eliz. c. 1. (an Act for the Assurance of the Queen's Royal Power over all Estates and Subjects within her Dominions), claimed, used, or usurped within this realm, or in any dominion or country, being of, within or under the Queen's power and obeisance; or of advisedly and wittingly attributing by any speech, open deed or act, any such manner of jurisdiction, authority or pre-eminence to the said See of Rome, or to any bishop of the same See for the time being, within this realm, or in any the Queen's dominions or countries, eftsoons committing or doing the said offences or any of them in manner and form aforesaid, and being thereof duly convicted and attainted.	5 Eliz. c. 1. s. 10.
Qy. If this enactment be not superseded by 3 Jac. 1. c. 4. s. 22 & 23, *vide post*. Qy. If the offence of receiving or taking absolution or reconciliation to the See of Rome be not repealed in favour of persons making the declaration prescribed by the 10 Geo. 4. c. 7.—See 23 sec. of that Act, and sec. 4 of the 31 Geo. 3. c. 32; and, if so, how is the offence of absolving or reconciling a person affected by that circumstance?	Using or putting in use in any place within this realm, or in any the Queen's dominions, any bull, writing or instrument, written or printed, of absolution or reconciliation (to the authority of the See of Rome) obtained or gotten from the Bishop of Rome, or any of his successors, or from any other person or persons authorized or claiming authority by or from the said Bishop of Rome, his predecessors or successors, or See of Rome; or taking upon oneself, by colour of any such bull, writing, instrument, or authority, to absolve or reconcile any person or persons, or to grant or promise to any person or persons within this realm, or any other the Queen's Majesty's dominions, any such absolution or reconciliation, by any speech, teaching, preaching, writing, or any other open deed; or willing receiving or taking any such absolution or reconciliation.	13 Eliz. c. 2. s. 2.
Sec. 3 of the 13 Eliz. c. 2, and sec. 22 of the 3 Jac. 1. c. 4, (*vide post*) seem to have, in a great measure, superseded all statutes of provisors and præmunire passed previously to those two Acts. * By sec. 5 of 13 Eliz. c. 2, it is provided that if any person or persons to whom any absolution, reconciliation, bull, writing or instrument shall be offered, moved or persuaded to be used, put in use or executed, shall conceal the same offer, motion or persuasion, and not disclose or signify the same, by writing or otherwise within six weeks then next following, to some of the Queen's Majesty's privy council, such person or persons shall incur the loss, danger, penalty and forfeiture of misprision of treason; as to the punishment of which, *vide ante*, p. 1.	Obtaining or getting from the Bishop of Rome, or any his successors, or See of Rome, any manner of bull, writing or instrument, written or printed, containing any thing, matter or cause whatsoever; or publishing, or by any ways or means putting in use any such bull, writing or instrument; or procuring, abetting or counselling to the fact, and committing of the said offence or offences.*	13 Eliz. c. 2 s. 3.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
See also 23 Eliz. c. I. s. 2, which is very nearly in the same words as the 3 Jac. 1. c. 4.	Upon the seas or beyond the seas, or in any other place within the dominions of the King's Majesty, his heirs or successors, putting in practice to absolve, persuade, or withdraw any of the subjects of the King's Majesty, or of his heirs and successors, of this realm of England, from their natural obedience to His Majesty, his heirs or successors, or to reconcile them to the Pope or See of Rome, or to move them or any of them to promise obedience to the pretended authority of the See of Rome, or to any other prince, state, or potentate; or procuring, counselling, aiding or maintaining any person committing any such offence knowing the same.	3 Jac. 1. c. 4. s. 22.
Qy. If this clause affected by 31 Geo. 3. c. 32. s. 4, and see observation on 13 Eliz. c. 2. s. 2, *ante*. This clause is not to be taken to extend to any person reconciled to the See of Rome, (touching the point of so being reconciled only), if he shall return into this realm and within six days after, before the bishop of the diocese or two justices of the peace, submit himself to His Majesty and his laws, and take the oath of supremacy mentioned in the 1 Eliz. c. 1, since replaced by the oaths of allegiance and supremacy by 1 W. & M. c. 8. See 3 Jac. 1. c. 4. s. 24. And qy. if the declaration mentioned in the 10 Geo. 4. c. 7, be not now substituted for the oaths of allegiance and supremacy. See sec. 23 of 10 Geo. 4. c. 7.	Either upon the seas or beyond the seas, or in any other place within the dominions of the King's Majesty, his heirs or successors, being willingly absolved or withdrawn as aforesaid, or willingly reconciled, or promising obedience to any such pretended authority, prince, state, or potentate as aforesaid; or procuring, counselling, aiding or maintaining, knowing the same, any person or persons committing any such offence.	3 Jac. 1. c. 4. s. 23.
	Endeavouring to deprive or hinder any person who shall be next in succession to the Crown for the time being, according to the limitations in the 1 W. & M. sess. 2. c. 2, (an Act declaring the Rights and Liberties of the Subject, and settling the succession of the Crown), and the 12 W. 3. c. 2, (an Act for the further limitation of the Crown, and better securing the rights and liberties of the Subject), from succeeding to the Imperial Crown of this realm and the dominions and territories thereunto belonging, and the same maliciously, advisedly, and directly attempting by any overt act or deed; and the abettors, procurers, and comforters of the offender or offenders therein, knowing the said offence to be done.	1 Ann, st 2. c. 17. s. 3.
	Maliciously, advisedly, and directly, by writing or printing, maintaining and affirming that any other person or persons hath or have any right or title to the Crown of these realms, otherwise than according to the 1 W. & M. sess. 2. c. 2 (an Act declaring the rights and liberties of the subject, and settling the succession of the Crown), and the 12 W. 3. c. 2 (an Act for the further limitation of the Crown, and better securing the rights and liberties of the Subject), and the Acts made in England and Scotland mutually for the union of the two kingdoms; or that the Kings or Queens of this realm, with and by the authority of Parliament, are not able to make laws and statutes of sufficient force and validity to limit and bind the Crown, and the descent, limitation, inheritance, and government thereof.	6 Ann, c. 7. s. 1.
	Within the realm or without, compassing, imagining, inventing, devising, or intending death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person of our Sovereign Lord the King, his heirs or successors, or to deprive or depose him	

Appendix No. 1.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	or them from the style, honour, or kingly name of the Imperial Crown of this realm, or of any other of His Majesty's dominions or countries; or to levy war against His Majesty, his heirs and successors, within this realm, in order, by force or constraint, to compel him or them to change his or their measures or counsels, or in order to put any force or constraint upon or to intimidate or overawe both houses or either house of Parliament; or to move or stir any foreigner or stranger with force to invade this realm, or any other of His Majesty's dominions or countries under the obeisance of His Majesty, his heirs and successors; and such compassings, imaginations, inventions, devices or intentions, or any of them, expressing, uttering or declaring, by publishing any printing or writing, or by any overt act or deed.	36 Geo. 3. c. 7. s. 1. 57 Geo. 3. c. 6.

Appendix No. 2.

Appendix No. 2.

Treason* punishable by Transportation beyond the Seas for Life, or for any term not less than Seven Years, or Imprisonment for any term not exceeding Four, nor less than Two Years, with or without Hard Labour, in the Common Gaol or House of Correction, and the Offender to be kept in Solitary Confinement for any portion or portions of such Imprisonment not exceeding One Month at any one time and not exceeding Three Months in any one year, as to the Court, in its discretion, shall seem meet.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
* The 2 & 3 W. 4. c. 123, takes away the penalty of death for forgery in all but the two cases of wills and powers of attorney to transfer stock, but leaves the *quality* of the offences enumerated in the 11 Geo. 4. & 1 W. 4. c. 66, without alteration. The forging the royal seals and sign manual is, therefore, treason, without the penalty of death. As to accessaries, *vide ante*, p. 1.	Forging or counterfeiting, or uttering, knowing the same to be forged or counterfeited, the great seal of the United Kingdom, His Majesty's privy seal, any privy signet of His Majesty, His Majesty's royal sign manual, any of His Majesty's seals appointed by the 24th article of the Union to be kept, used, and continued in Scotland, the great seal of Ireland, or the privy seal of Ireland.	11 Geo. 4. & 1 W. 4. c. 66. s. 2. 2 & 3 W. 4. c. 123. 3 & 4 W. 4. c. 44. s. 3. 7 W. 4. & 1 Vic. c. 84. s. 2 & 3.

Appendix No. 3.

LIST of OFFENCES liable to the Penalties of PRÆMUNIRE.

Appendix No. 3.

[Præmunire, (so called from the words of the writ preparatory to the prosecution thereof, "*præmunire* (for *præmoneri*) *facias* A. B.," that he appear before us to answer the contempt wherewith he stands charged,) meant, originally, the offence of introducing a foreign power into the kingdom, by paying that obedience to Papal process which constitutionally belongs only to the Sovereign of these realms; but the penalties of that offence being very considerable, have been subsequently applied to other heinous crimes, bearing, generally, more or less relation to the original offence, but in some instances none at all. The penalties of Præmunire, as shortly summed up by Sir Edward Coke, (1 Inst. 130a,) are, "that from the conviction the defendant shall be out of the King's protection" (but it is not lawful on that account to kill him [see 5 Eliz. c. 1. s. 21.]), "and his lands and tenements," (*i. e.* in fee-simple or for life, but not in tail,) "goods and chattels, forfeited to the King;* and that his body shall remain in prison *at the King's pleasure*, or, as other authorities have it, *during life*."]

* None of the Acts imposing the penalties of Præmunire, contained in this list, specify those penalties; but refer for the same to the 16 Rich. 2. c. 5. (called the statute of Præmunire,) which enacts, "That those	The dean and chapter of any cathedral church, where the See of an archbishop or bishop is within any the King's dominions, (after licence under the great seal to proceed to election of an archbishop or bishop of a See being void, with a letter missive, containing the name of the person whom they shall elect and choose, shall be delivered to them,) proceeding	

* This forfeiture does not make the offence a felony: to constitute an offence a felony, it is necessary that it should have worked a forfeiture of lands or goods at the Common Law—it is not sufficient that such forfeiture be made a part of the punishment by statute, merely.—See 4 Black. Com. pp. 94 and 118.

Appendix No. 3.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
who offend against the purport thereof shall be put out of the King's protection, and their lands and tenements, goods and chattels, forfeited to our Lord the King; and that they be attached by their bodies if they may be found and brought before the King and his Council there to answer to the cases aforesaid; or that process be made against them by *Præmunire facias*, in manner as is ordained in other statutes of provisors," Sir E. Coke's summary of the penalties of which is given above.	not to election, and signifying the same according to the tenor of the 25 Hen. 8. c. 20, (an Act for the Non-payment of First Fruits to the Bishop of Rome,) within 20 days next after such licence shall come to their hands;	
	Or any archbishop or bishop, within any the King's dominions, (after any such election, or in default thereof for 12 days, after any nomination or presentment by the King shall be signified unto them by the King's letters patent,) refusing and not confirming, investing and consecrating with all due circumstance, every such person as shall be so elected, nominated or presented, and to them signified, as is above mentioned, within 20 days next after the King's letters patent of such signification or presentation shall come to their hands;	16 Rich. 2. c. 5.* 25 Hen. 8. c. 20. s. 7.†‡ 1 Eliz. c. 1. s. 7.
† Besides the penalties of the 16 Rich. 2. c. 5, the offenders against the 25 Hen. 8. c. 20, are made subject to the penalties of the 25 Edw. 3. st. 5. c. 22, which declares that the offenders against that Act may be treated as enemies of the King. But see the 5 Eliz. c. 1. s. 21.	Or any of them, or any other person or persons admitting, maintaining, allowing, obeying, doing, or executing any censures, excommunications, interdictions, inhibitions, or any other process or act, of what nature, name or quality soever it be, to the contrary or let of the due execution of the said Act of the 25 Hen. 8;	
	Or being the aiders, counsellors, or abettors of any persons doing contrary to the said Act.	
Each individual person composing the chapter is liable to all the penalties of the 25 Hen. 8. c. 20.		
	By any process obtained out of any Ecclesiastical Court within this realm or without, or by pretence of any spiritual jurisdiction or otherwise, contrary to the laws of this realm, inquieting or molesting any person or persons or body politic, for any of the manors, lands, tenements, hereditaments or things of the late monasteries, &c. &c. contrary to the words, sentences, and meaning of the 1 & 2 Philip & Mary, c. 8, (an Act for Repealing all Articles and Provisions made against the See Apostolic of Rome, since the twentieth year of King Henry the Eighth, and for the Establishment of all Spiritual and Ecclesiastical Possessions and Hereditaments conveyed to the Laity.)	16 R. 2. c. 5. 1 & 2 P. & M. c. 8. s. 40.
So far as the See of Rome is concerned, it is by the 5 Eliz. c. 1. s. 2, *vide post*, made a præmunire to commit most of these offences for the *first* time, and by the 10th sec. of the same Act, treason to do so for the *second* time.	Having been convicted or attainted of committing any of the offences mentioned in the 27th section of the 1 Eliz. c. 1, (an Act to Restore to the Crown the Ancient Jurisdiction over the Estate Ecclesiastical and Spiritual, and abolishing all Foreign Powers repugnant to the same,) and enumerated at p. 1 & 2 of Appendix No. 1, eftsoons* committing or doing the said offences or any of them in manner and form therein mentioned, and being thereof duly convicted and attainted.	16 Rich. 2. c. 5. 1 Eliz. c. 1. s. 29.
* The first offence is a misdemeanor punishable by forfeiture of the offender's goods and chattels (*vide post*, p. 93.)		
	Committing any of the offences mentioned in the 2d section of the 5 Eliz. c. 1, (an Act for the Assurance of the Queen's Royal Power over all Estates and Subjects within her Dominions,) and enumerated at p. 2 of Appendix No. 1, or abetting, procuring or counselling, or aiding, assisting or comforting any person com-	16 Rich. 2. c. 5. 5 Eliz. c. 1. s. 2.

‡ There are several other statutes of Præmunire besides those included in this list, but which, being in effect either obsolete or superseded by other statutes comprised in it, have not been inserted. The following is a list of them:— 35 Edw. 1. st. 1. c. 2; 25 Edw. 3. st. 5. c. 22; 25 Edw. 3. st. 6; 27 Edw. 3. st. 1. c. 1; 38 Edw. 3. st. 2. cc. 1, 2, 3, & 4; 2 Rich. 2. c. 3; 7 Rich. 2. c. 12; 12 Rich. 2. c. 15; 13 Rich. 2. st. 2. cc. 2 & 3; 16 Rich. 2. c. 5; 2 Hen. 4. cc. 3 & 4; 7 Hen. 4. cc. 6 & 8; 3 Hen. 5. st. 2. c. 4; 24 Hen. 8. c. 12; 25 Hen. 8. cc. 19 & 21.

Also, to contribute to the maintenance of a Jesuits' college or any Popish seminary whatever beyond the sea, or of any person in the same, or to contribute to the maintenance of any Jesuit or Popish priest in England, was, by the 27 Eliz. c. 2, made subject to the penalties of Præmunire; but, qy., if that Act be not incidentally repealed by the Catholic Relief Act. (10 Geo. 4. c. 7. s. 28, et seq.)

Appendix No. 3.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	mitting any of the said offences, and being thereof lawfully convicted or attainted (for the first offence).	
The offences specified in the 2d and 3d sections of the 13 Eliz. c. 2, are treasons, and are given at page 2 of Appendix No. 1. See also the observation there on section 2 of 13 Eliz. c. 2, and qy. how this offence is affected by the circumstance there mentioned.	Aiding, comforting or maintaining any offender or offenders after the committing of any of the acts or offences specified in the 2d and 3d sections of 13 Eliz. c. 2, (an Act against the bringing in and putting in execution of Bulls, Writings or Instruments and other superstitious things from the See of Rome,) to the intent to set forth, uphold or allow the doing or execution of the usurped power, jurisdiction or authority of the See of Rome, touching or concerning the premises in the said Act mentioned, or any part thereof.	16 Rich. 2. c. 5. 13 Eliz. c. 2. s. 4.
The Act of 21 Jac. 1. c. 3, does not extend to letters patent and grants of privilege for the term of 14 years or under, of the sole working or making of new manufactures, to the true and first inventor of such manufactures, which others at the time of making such letters patent and grants shall not use, so as they be not contrary to the law nor mischievous to the state, by raising prices of commodities at home, or hurt of trade or generally inconvenient. See sec. 6; also sec. 7, 8, 9, 10, 11, 12, 13, & 14, as to several other cases to which it is declared that the Act shall not apply. * The writ of attaint was abolished by the 6 Geo. 4. c. 50. s. 60.	Any person or persons, after notice given that the action depending is grounded upon the 21 Jac. 1. c. 3, (an Act concerning Monopolies and Dispensations with Penal Laws and the forfeitures thereof,) for the remedy of any person who shall be hindered, grieved, disturbed or disquieted, or whose goods or chattels shall be any way seized, attached, distrained, taken, carried away or detained, by occasion or pretext of any monopoly or of any concession, grant, licence, charter or letters patents granted to any person or persons, bodies politic or corporate whatsoever of or for the sole buying, selling, making, working or using of anything within this realm or the dominion of Wales, or of any other monopolies, or of power, liberty or faculty to dispense with any others, or to give licence or toleration to do, use or exercise any thing against the tenor or purport of any law or statute, or to give or make any warrant or dispensation, licence or toleration to be had or made, or to agree or compound with any others for any penalty or forfeitures limited by any statute, or of any grant or promise of the benefit, profit or commodity of any forfeiture, penalty or sum of money that is or shall be due by any statute, before judgment thereupon had; or of any proclamation, inhibition, restraint, warrant of assistance or any other matter or thing whatsoever, any way tending to the instituting, erecting, strengthening, furthering or countenancing of the same or any of them, causing or procuring any action at the common law, grounded upon that statute, to be stayed or delayed before judgment, by colour or means of any order, warrant, power or authority, save only of the court wherein such action as aforesaid shall be brought and depending; or, after judgment had upon such action, causing or procuring the execution of or upon any such judgment to be stayed or delayed by colour or means of any order, warrant, power or authority, save only by writ of error or attaint.*	16 Rich. 2. c. 5. 21 Jac. 1. c. 3. s. 4.
	Causing or procuring any action at the common law, brought against any person or persons for making provision or purveyance for His Majesty, his heirs or successors, or any the Queens of England or children of the Royal Family for the time being, or for impressing or taking any carriages or other things whatsoever of any the subjects of His Majesty, his heirs or successors, without the free and full consent of the owner or owners thereof had and obtained without menace or inforcement, on any pretence or colour of any warrant under the great seal or otherwise, to be delayed or stayed before judgment, (after notice given that the action depending is grounded upon the 12 Car. 2. c. 24, an Act for taking away the Court of Wards and Liveries, and Tenures in Capite and by	16 Rich. 2. c. 5. 12 Car. 2. c. 24. s. 14.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	Knight's Service and Purveyance, and for settling a Revenue upon His Majesty in lieu thereof,) by colour or means of any order, power, warrant or authority, save only of the court where such action shall be brought and depending; or, after judgment had upon such action, causing or procuring execution of such judgment to be stayed or delayed by colour or means of any order, &c. save only by writ of error or order of such court, where such writ of error shall be depending.	
This Act is marked "Expired" in Ruffhead's edition of the Statutes. Qy. wherefore? The word "King" is used in the Act, and not "King, his heirs or successors." Can this be the reason? But qy. is not "King" a generic term, and as such capable of including "heirs or successors" being Kings?	Maliciously and advisedly (by writing, printing, preaching or other speaking) expressing, publishing, uttering, declaring or affirming that both Houses of Parliament or either House of Parliament have or hath a legislative power without the King, or any other words to the same effect.	16 Rich. 2. c. 5. 13 Car. 2. c 1. s 3.
By sec. 4. of the 13 Car. 2. c. 1, no person can be prosecuted for the above offences unless by order of the King's Majesty, his heirs or successors, under his or their sign manual, or by order of the council table of His Majesty, his heirs or successors, directed unto the Attorney-General for the time being, and the prosecution must take place within six months after the offence committed, and the indictment thereupon be within three months after such prosecution.		
* Except persons contracting or convicts praying to be transported, or having committed some capital offence in the place to which they are sent. See sec. 13, 14, & 16. † The offender is also disabled to bear any office of trust or profit within England, &c. or any of the dominions thereunto belonging. ‡ The King cannot pardon for this offence.	Knowingly framing, contriving, writing, sealing, or countersigning any warrant for the commitment, detainer or transportation of any subject of this realm,* now or at any time hereafter, being an inhabitant or resiant of this kingdom of England, dominion of Wales or town of Berwick-upon-Tweed, who shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands or places beyond the seas, which are or at any time hereafter shall be within or without the dominions of His Majesty, his heirs or successors; or committing, detaining, imprisoning or transporting any person or persons contrary to the 31 Car. 2. c. 2 (an Act for the better securing the liberty of the subject, and for prevention of Imprisonment beyond the Seas); or in anywise advising or assisting therein.† ‡	16 Rich. 2. c. . 31 Car. 2. c. 2. s. 12.
	Maliciously and directly, by preaching, teaching or advised speaking, declaring, maintaining and affirming that any other person or persons hath or have any right or title to the crown of these realms, otherwise than according to the 1 W. & M. sess. 2. c. 2, (an Act declaring the rights and liberties of the subject, and settling the succession of the Crown,) and the 12 W. 3. c. 2, (an Act for the further limitation of the Crown and better securing the rights and liberties of the subject,) and the Act made in England and Scotland mutually for the Union of the two Kingdoms; or that the Kings and Queens of this realm, with and by the authority of Parliament, are not able to make laws and statutes of sufficient force and validity to limit and bind the crown, and the descent, limitation, inheritance and government thereof.	16 Rich. 2. c. 5. 6 Anne c. 7. s. 2.
* By the 2d section of the 12 Geo. 3. c. 11, it is enacted, "That in case any such descendant of the body of His late Majesty King George the Second, being above the age of 25 years, shall persist in his or her resolution to contract a marriage disapproved of or dissented from	Knowingly or wilfully presuming to solemnize or to assist, or to be present at the celebration of any marriage with any descendant of the body of King George the Second, male or female, (other than the issue of Princesses who have been married or may hereafter marry into foreign families,) or at his or her making any matrimonial contract without the consent of His Majesty, his heirs or successors, signified under the great seal and declared in council, first had	16 Rich 2. c. 5. 12 Geo. 3. c. 11, s. 3.

Appendix No. 3.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
by the King, his heirs or successors; that then such descendant, upon giving notice to the King's Privy Council, which notice is hereby directed to be entered in the books thereof, may at any time, from the expiration of 12 calendar months after such notice given to the Privy Council as aforesaid, contract such marriage; and his or her marriage, with the person before proposed and rejected, may be duly solemnized without the previous consent of His Majesty, his heirs or successors; and such marriage shall be good as if this Act had never been made, unless both Houses of Parliament shall, before the expiration of the said 12 months, expressly declare their disapprobation of the said intended marriage."	and obtained (except in the case in the Act* mentioned).	

Appendix No. 4.

LIST of FELONIES punishable with Death by the present Law.

Appendix No. 4.

[The Judgment of Death in the case of all Capital Felonies (except Murder) is that the offender be hanged by the neck till dead* (2 Hale's P. C. 411), and, in the case of Murder, is the same, with the addition of directing that the offender's body be buried within the precincts of the prison in which he shall have been confined after conviction (2 & 3 W. 4. c. 75. s. 16, & 4 & 5 W. 4. c. 26.) In the case of *all* Felonies, whether capital or not, the offender, immediately *on conviction*, forfeits to the Crown all the personal estate of every description, whether in action or possession or settled by way of trust, which he has otherwise than as an executor (Cro. Car. 566,) or a trustee or mortgagee (4 & 5 W. 4. c. 23. s. 3,) at the time of conviction (Bac. Abrid. Forfeiture (B.) Co. Litt. 391a); and, in the case of all *Capital* Felonies, *upon attainder by judgment of death or outlawry*, forfeits to the Crown the profits of all estates of Freehold (4 Black. Com. 385) and of things not lying in tenure (Bac. Abrid. Forfeiture (A.)), and to the Lord of the Manor the profits of all estates of Copyhold (Hawk. P. C. b. 2. c. 49. s. 7, Lord Cornwallis's case, 2 Vent. 38–9,) which the offender has (otherwise than as a trustee or mortgagee [4 & 5 W. 4. c. 23. s. 3,]) at the time of the offence committed, during his life; and his blood is corrupted (but not so as to obstruct descents to the posterity of such offender where they are obliged to derive a title through him to a remoter ancestor [3 & 4 W. 4. c. 106. s. 10]), and after his death his copyholds, which he holds in fee-simple, escheat† to the Lord of the Manor (54 Geo. 3. c. 145, Scriven on Copyholds, 523, note (d.)); and also, in the case of Murder, all his freehold lands and tenements in fee-simple escheat (subject to the Crown's year, day and waste) to the Lord of the fee (54 Geo. 3. c. 145, Co. Litt. 391a, 4 Black. Comm. 385.)]

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
Similar provisions are contained in the 35 Geo. 3. c. 66 s. 6, & 37 Geo. 3. c. 46. s. 6, two Acts for making certain Irish Annuities payable at the Bank of England; and by the 24 Geo. 2. c. 11. s. 3, a similar provision is made with respect to the officers and servants of the South Sea Company. The 15 Geo. 2. c. 13, it has been decided, was not repealed by the general words of the subsequent embezzlement Act of the 39 Geo. 3. c. 85 (since repealed). Aslett's Second Case, 2 Leach, 958; & the 7 & 8 Geo. 4. c. 27. s 2, enacts that nothing in that Act contained " shall affect or alter any Act relating to the Bank of England or South Sea Company."	Officer or servant of the Governor and Company of the Bank of England, being intrusted with any note, bill, dividend warrant, bond, deed or any security, money or other effects belonging to the said Company, or having any bill, dividend warrant, bond, deed or any security or effects of any other person or persons lodged or deposited with the said Company, or with him as an officer or servant of the said Company, secreting, embezzling or running away with any such note, &c. or any part of them.	15 Geo. 2. c. 13. s. 12.

* By the 4 Geo. 4. c. 48. s. 1, it is enacted that whenever any persons shall be convicted of any felony, except murder, and shall by law be excluded the benefit of clergy, (abolished by the 7 & 8 Geo. 4. c. 28; but all felonies which were excluded from the benefit of clergy before or on the 14th November 1826, continue punishable with death,) in respect thereof, and the Court, before which such offender shall be convicted, shall be of opinion that, under the particular circumstances of the case, such offender is a fit and proper subject to be recommended for the Royal mercy, it shall and may be lawful for such Court, if it shall think fit so to do, to direct the proper officer, then being present in Court, to inquire and ask, whereupon such officer shall inquire and ask, if such offender hath or knoweth any thing to say why judgment of death should not be recorded against such offender; and in case such offender shall not allege any matter or thing sufficient in law to arrest or bar such judgment, the court shall abstain from pronouncing judgment of death upon such offender; and instead of pronouncing such judgment, order the same to be entered of record, and thereupon such proper officer as aforesaid shall enter judgment of death of record against such offender, in the usual and accustomed form, and in such and the same manner as is now used, and as if judgment of death had actually been pronounced in open Court against such offender, by the Court before which such offender shall have been convicted. And by the second section of the same Act, it is enacted that a record of every such judgment, so entered as aforesaid, shall have the like effect to all intents and purposes, and be followed by all the same consequences, as if such judgment had actually been pronounced in open Court, and the offender had been reprieved by the Court.

† Query, however, if copyholds escheat, by reason of corruption of blood, or are *forfeited* to the lord of the manor.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	Within this realm, or in any of the islands, countries, forts or places thereunto belonging, wilfully and maliciously setting on fire or burning, or otherwise destroying or causing to be set on fire, &c. or aiding, procuring, abetting or assisting in the setting on fire, &c. of any of His Majesty's ships or vessels of war, whether the said ships or vessels of war be on float or building, or begun to be built in any of His Majesty's dock-yards, or building or repairing by contract in any private yards for the use of His Majesty, or any of His Majesty's arsenals, magazines, dock-yards, rope-yards, victualling offices, or any of the buildings erected therein or belonging thereto; or any timber or materials there placed for building, repairing or fitting out of ships or vessels; or any of His Majesty's military, naval or victualling stores, or other ammunition of war, or any place or places where any such military, naval or victualling stores, or other ammunition of war, is, are or shall be kept, placed or deposited.	12 Geo. 3. c. 24.
In the case of all offences punishable with death under the 7 & 8 Geo. 4. c. 30, every principal in the second degree, and every accessary before the fact, is punishable with death, in the same manner as the principal in the first degree is punishable by that Act. See sec. 26.	Any persons riotously and tumultuously assembled together to the disturbance of the public peace, unlawfully and with force demolishing, pulling down or destroying or beginning to demolish, &c. any church or chapel, or any chapel for the religious worship of persons dissenting from the United Church of England and Ireland duly registered or recorded; or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malthouse, hop-oast, barn, or granary; or any building or erection used in carrying on any trade or manufacture or any branch thereof; or any machinery, whether fixed or movable, prepared for or employed in any manufacture or in any branch thereof; or any steam-engine or other engine for sinking, draining or working any mine or any staith, buildings, or erection used in conducting the business of any mine, or any bridge, waggon-way or trunk for conveying minerals from any mine.	7 & 8 Geo. 4. c. 30. s. 8.
Petit Treason is to be deemed to be Murder only, and punished accordingly. See 9 Geo. 4. c. 31. s. 2.	Being convicted of Murder or of being an accessory before the fact to murder.	9 Geo. 4. c. 31. s. 3.
In the case of prisoners convicted of Murder, the Court is to direct such prisoners to be buried within the precincts of the prison in which they shall have been confined after conviction; and the sentence to be pronounced by the Court is so to express it. 2 & 3 W. 4. c. 75; 4 & 5 W. 4. c. 26.		
	Buggery, committed either with mankind or with any animal.	9 Geo. 4. c. 31. s. 15.
	Rape.	9 Geo. 4. c. 31. s. 16.
	Unlawfully and carnally knowing and abusing any girl under the age of ten years.	9 Geo. 4. c. 31. s. 17.
By sec. 11 of the 7 W. 4, and 1 Vic. c. 85, it is enacted, that on the trial of any person for any of the offences thereinbefore mentioned, (including the offence here specified and the four others mentioned at p. 13,) or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony	Administering to or causing to be taken by any person any poison or other destructive thing, or stabbing, cutting, or wounding any person, or by any means whatsoever causing to any person any bodily injury dangerous to life, with intent in any of the cases aforesaid to commit murder.	7 W. 4. & 1 Vic. c. 85. s. 2.
	Burglariously breaking and entering into any dwelling-house, and assaulting with intent to murder any person being therein, or stabbing, cutting, wounding, beating or striking any such person.	7 W. 4, & 1 Vic. c. 86 s. 2.

Appendix No. 4.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding; and, when such verdict shall be found, the Court shall have power to imprison the person so found guilty of an assault for any term not exceeding three years.	Robbing any person, and, at the time of or immediately before or immediately after such robbery, stabbing, cutting, or wounding any person.	7 W. 4. & 1 Vic. c. 87. s. 2.
	With intent to commit, or at the time of or immediately before or immediately after committing, the crime of piracy in respect of any ship or vessel, assaulting with intent to murder any person being on board of or belonging to such ship or vessel, or stabbing, cutting or wounding any such person, or unlawfully doing any act by which the life of such person may be endangered.	7 W. 4. & 1 Vic. c. 88. s. 2.
By a clause contained in each of these Acts, every principal in the second degree, and every accessary before the fact, in the case of every felony punishable under any of such Acts, is made punishable with death or otherwise in the same manner as the principal in the first degree is by any of these Acts punishable; and every accessary after the fact to any felony punishable under any of these Acts, except (in the case of the 7 W. 4 & 1 Vic. c. c. 86 & 87) a receiver of stolen property, is liable on conviction to be imprisoned for any term not exceeding two years.	Unlawfully and maliciously setting fire to any dwelling-house, any person being therein.	7 W. 4. & 1 Vic. c. 89. s. 2.
	Unlawfully and maliciously setting fire to, casting away or in anywise destroying any ship or vessel, either with intent to murder any person, or whereby the life of any person shall be endangered.	7 W. 4. & 1 Vic. c. 89. s. 4.
	Unlawfully exhibiting any false light or signal with intent to bring any ship or vessel into danger, or unlawfully and maliciously doing anything tending to the immediate loss or destruction of any ship or vessel in distress.	7 W. 4, & 1 Vic. c. 89. s. 5.
Each of these Acts also contains a clause by which it is enacted that where any person shall be convicted of any offence punishable under any of such Acts for which imprisonment may be awarded, it shall be lawful for the Court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the Common Gaol or House of Correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the Court in its discretion shall seem meet.		

Appendix No. 5.

LIST of FELONIES* (not Capital), classed according to their Punishments under the present Law.

Appendix No. 5.

Transportation for Life, and, previously to Transportation, Imprisonment, with or without Hard Labour, in any Common Gaol, House of Correction, Prison, or Penitentiary, for any term not exceeding Four Years.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
As to return of offenders, on being transported from St. Helena, see 6 Geo. 4. c. 85. As to return of deserters,	Any offender who shall be sentenced or ordered to be transported or banished, or who shall agree to transport or banish himself or herself on certain conditions, either for life or any number of years, under the provisions of 5 Geo. 4, c. 84, (An Act for the Transportation of Offenders from Great Britain,) or any former Act, being afterwards at large within any part	5 Geo. 4. c. 84. s. 22. 4 & 5 W. 4. c. 67.

* By 7 and 8 Geo. 4. c. 28. s. 11, it is enacted, "that if any person shall be convicted of any felony not punishable with death, committed after a previous conviction for felony, such person shall, on such subsequent conviction, be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit) in addition to such imprisonment; and by the 9th sec. of the same Act, such imprisonment may be with or without hard labour in the common gaol or house of correction. The Court was also empowered by the same section to direct the offender to be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour; but now by the 7 W. 4. and 1 Vic. c. 90. s. 5. the Court cannot inflict that punishment for a longer period than one month at any one time, or three months in any one year.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
on being transported from the East Indies, see 4 Geo. 4. c. 81.	of His Majesty's dominions, without some lawful cause, before the expiration of the term for which such offender shall have been sentenced or ordered to be transported or banished, or shall have so agreed to transport or banish himself or herself.	

TRANSPORTATION beyond the Seas for LIFE, or for any term not less than FIFTEEN YRARS, or Imprisonment with or without Hard Labour in the Common Gaol or House of Correction for any term not exceeding Three Years, and the Offender to be kept in Solitary Confinement for any portion or portions of such Imprisonment, or of such Imprisonment with Hard Labour, not exceeding One Month at any one time and not exceeding Three Months in any one Year, as to the Court in its discretion shall seem meet.

See also 5 Geo. 4. c. 113, *post*. As to the punishment of principals in the second degree, and of accessaries before and after the fact in the case of this offence. See observation at p. 10.	Piracy	28 Hen. 8. c. 15. 11 & 12 W. 3. c. 7. 4 Geo. 1. c. 11. s. 7. 8 Geo. 1. c. 24. 18 Geo. 2. c. 30. 7 W. 4. & 1 Vic. c. 88. s. 3 & 5.
The prosecution for any of these offences must be commenced within 12 months after the offence committed.	Any persons, to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, and being required or commanded by any one or more justice or justices of the peace, or by any sheriff of the county, or his under sheriff, or by the mayor, bailiff or bailiffs, or other head officer or justice of the peace of any city or town corporate where such assembly shall be, by proclamation, to be made in the King's name, in the form directed in the 1 Geo. 1. stat. 2. c. 5. (an Act to prevent tumults and riotous assemblies, and for the more speedy and effectual punishing the rioters) to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, to the number of twelve or more (notwithstanding such proclamation made), unlawfully, riotously, and tumultuously remaining or continuing together by the space of one hour after such command or request made by proclamation.	1 Geo. 1. st. 2. c. 5. s. 1. 7 W. 4. & 1 Vic. c. 91. s. 1 & 2.
	With force and arms, wilfully and knowingly opposing, obstructing, or in any manner wilfully and knowingly letting, hindering or hurting any person or persons that shall begin to proclaim, or go to proclaim, according to the proclamation directed to be made by the said Act of 1 Geo. 1. st. 2. c. 5, whereby such proclamation shall not be made.	1 Geo. 1. st. 2. c. 5. s. 5. 7 W. 4. & 1 Vic. c. 91. s. 1 & 2.
	Any person or persons so being unlawfully, riotously and tumultuously assembled to the number of twelve as aforesaid or more, to whom proclamation should or ought to have been made, if the same had not been hindered as aforesaid, continuing together to the number of twelve or more, and not dispersing themselves within one hour after such let or hinderance so made, having knowledge of such let or hinderance so made.	1 Geo. 1. st. 2. c. 5. s. 5. 7 W. 4. & 1 Vic. c. 91. s. 1 & 2.
	By force setting at liberty or rescuing, or attempting to rescue or set at liberty, any person out of prison who shall be committed for or found guilty of murder, or rescuing or attempting to rescue any person convicted of murder going to execution or during execution.	25 Geo. 2. c. 37. s. 9. 7 W. 4. & 1 Vic. c. 91. s. 1 & 2.

Appendix No. 5.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	Maliciously and advisedly endeavouring to seduce any person or persons serving in His Majesty's forces, by sea or land, from his or their duty and allegiance to His Majesty, or to incite or stir up any such person or persons to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever.	37 Geo. 3. c. 70. 57 Geo. 3. c. 7. 7 W. 4. & 1 Vic. c. 91. s. 1 & 2.
	In any manner or form whatsoever, administering or causing to be administered, or aiding or assisting at the administering of any oath or engagement, purporting or intending to bind the person taking the same to commit any treason or murder, or any felony, punishable by law with death.	52 Geo. 3. c. 104. s. 1. 7 W. 4. & 1 Vic. c. 91. s. 1 & 2.
	Any convict, who, being ordered to be confined in the General Penitentiary at Millbank, shall at any time during the term of such confinement break prison or escape from the place of his or her confinement, or in his or her conveyance to such place of confinement, or from the person or persons having the lawful custody of such convict, and be for so doing punished by such addition to the term of confinement as is directed by the 59 Geo. 3. c. 136 (an Act for the better regulation of the General Penitentiary for Convicts at Millbank), being afterward convicted of a second escape or breach of prison.	59 Geo. 3. c. 136. s. 17. 7 W. 4. & 1 Vic. c. 91. s. 1 & 2.
The offences here detailed are declared to be Piracy, Felony and Robbery. See Geo. 4. c. 113.	Any subject or subjects of His Majesty, or any person or persons residing or being within any of the dominions, forts, settlements, factories, or territories now or hereafter belonging to His Majesty, or being in his Majesty's occupation or possession, or under the government of the United Company of Merchants of England trading to the East Indies, except in such cases as are permitted by the 5 Geo. 4. c. 113 (an Act to amend and consolidate the Laws relating to the abolition of the Slave Trade), upon the high seas, or in any haven, river, creek or place where the Admiral has jurisdiction, knowingly and wilfully carrying away, conveying or removing, or aiding or assisting in carrying away, &c., any person or persons as a slave or slaves, or for the purpose of his, her or their being imported or brought as a slave or slaves into any island, colony, country, territory or place whatsoever, or being sold, transferred, used or dealt with as a slave or slaves; or (except as aforesaid) upon the high seas, or within the jurisdiction aforesaid, knowingly and wilfully shipping, embarking, receiving, detaining or confining, or assisting in shipping, &c., on board any ship, vessel or boat any person or persons for the purpose of his, her or their being carried away, &c., as a slave or slaves, or being imported or brought as a slave or slaves into any island, &c., or of being sold, &c., as a slave or slaves.	5 Geo. 4. c. 113. s. 9. 7 W. 4. & 1 Vic. c. 91. s. 1 & 2.
	Any persons to the number of three or more, armed with fire-arms, or other offensive weapons, within the United Kingdom, or within the limits of any port, harbour or creek thereof, being assembled in order to be aiding and assisting in the illegal landing, running or carrying away of any prohibited goods, or any goods liable to any duties which have not been paid or secured, or in rescuing or taking away any such goods as aforesaid after seizure from the officers of the customs or other officers	

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	authorized to seize the same, or from any person or persons employed by them or assisting them, or from the place where the same shall have been lodged by them, or in rescuing any person who shall have been apprehended for any of the offences made felony by the 3 & 4 Will. 4. c. 53 (an Act for the Prevention of Smuggling), or any Act relating to the Customs, or in the preventing the apprehension of any person who shall have been guilty of such offence; or any persons to the number of three or more, so armed as aforesaid, within the United Kingdom, or within the limits of any port, &c., thereof, so aiding or assisting, or aiding, abetting or assisting therein.	3 & 4 W. 4. c. 53. s. 58. 7 W. 4. & 1 Vic. c. 91. s. 1 & 2.
	Maliciously shooting at any vessel or boat belonging to His Majesty's navy or in the service of the Revenue, within 100 leagues of any part of the coast of the United Kingdom; or maliciously shooting at, maiming or dangerously wounding, any officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or any officer of Customs or Excise, or any person acting in his aid or assistance, or duly employed for the prevention of smuggling, in the due execution of his office or duty; or aiding, abetting or assisting therein.	3 & 4 W. 4. c. 53 s. 59. 7 W. 4. & 1 Vic. c. 91. s. 1 & 2.
As to the punishment of principals in the second degree, and accessaries before and after the fact to this and the following ten offences, see observation at p. 10.	Attempting to administer to any person any poison or other destructive thing, or shooting at any person, or by drawing a trigger or in any other manner attempting to discharge any kind of loaded arms at any person, or attempting to drown, suffocate, or strangle any person, with intent in any of the cases aforesaid to commit the crime of murder, although no bodily injury shall be effected.	7 W. 4. & 1 Vic. c. 85. s. 3 & 8.
	Unlawfully and maliciously shooting at any person, or, by drawing a trigger or in any other manner, attempting to discharge any kind of loaded arms at any person, or stabbing, cutting, or wounding any person, with intent in any of the cases aforesaid to maim, disfigure or disable such person, or to do some other grievous bodily harm to such person, or with intent to resist or prevent the lawful apprehension or detainer of any person.	7 W. 4. & 1 Vic. c. 85. s. 4 & 8.
	Unlawfully and maliciously sending or delivering to, or causing to be taken or received by any person any explosive substance or any other dangerous or noxious thing, or casting or throwing upon or otherwise applying to any person any corrosive fluid or other destructive matter, with intent in any of the cases aforesaid to burn, maim, disfigure or disable any person, or to do some other grievous bodily harm to any person, and whereby in any of the cases aforesaid any person shall be burnt, maimed, disfigured or disabled, or receive some other grievous bodily harm.	7 W. 4. & 1 Vic. c. 85. s. 5 & 8.
	With intent to procure the miscarriage of any woman, unlawfully administering to her or causing to be taken by her any poison or other noxious thing, or unlawfully using any instrument or other means whatsoever, with the like intent.	7 W. 4. & 1 Vic. c. 85. s. 6 & 8.
	Being armed with any offensive weapon or instrument, robbing or assaulting with intent to rob any person, or, together with one or more person or persons, robbing or assaulting with intent to rob any person, or robbing any person, and at the time of, or immediately before or immediately after such robbery, beating, striking or using any other personal violence to any person.	7 W. 4. & 1 Vic. c. 87. s. 3 & 10.

Appendix No. 5.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
* By a clause contained in each of the Acts 7 W. 4. & 1 Vic. cc. 86 & 87, it is enacted that the word "property" shall throughout each of those Acts be deemed to denote everything included under the words "chattel, money, or valuable security," used in the 7 & 8 Geo. 4. c. 29. And by the 5 sec. of the 7 & 8 Geo. 4. c. 29, a valuable security is defined to be "any tally, order or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, or to any deposit in any savings' bank; or any debenture, deed, bond, bill, note, warrant, order or other security whatsoever, for money or for payment of money, whether of this kingdom, or of any foreign state; or any warrant or order for the delivery or transfer of any goods, or valuable thing." And by the same section it was enacted that if any person should steal any such valuable security, he should be deemed guilty of felony, "of the same nature, and in the same degree, and punishable in the same manner as if he had stolen any chattel of like value with the share, interest, or deposit to which the security so stolen might relate, or with the money due on the security so stolen, or secured thereby, and remaining unsatisfied, or with the value of the goods, or other valuable thing mentioned in the warrant or order."	Accusing or threatening to accuse any person of the abominable crime of buggery committed with mankind or with beast, or of any assault with intent to commit the said abominable crime, or of any attempt or endeavour to commit the said abominable crime, or of making or offering any solicitation, persuasion, promise or threat to any person whereby to move or induce such person to commit or permit the said abominable crime, with a view or intent in any of the cases aforesaid to extort or gain from such person, and by intimidating such person by such accusation or threat extorting or gaining from such person any *property*.*	7 W. 4. & 1 Vic. c. 87. s. 4 & 10.
	Unlawfully and maliciously setting fire to any church or chapel, or to any chapel for the religious worship of persons dissenting from the United Church of England and Ireland, or unlawfully and maliciously setting fire to any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, with intent thereby to injure or defraud any person.	7 W. 4. & 1 Vic. c. 89. s. 3 & 12.
	Unlawfully and maliciously setting fire to or in anywise destroying any ship or vessel, whether the same be complete or in an unfinished state, or unlawfully and maliciously setting fire to, casting away, or in anywise destroying any ship or vessel with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same.	7 W. 4. & 1 Vic. c. 89. s. 6 & 12
	By force preventing or impeding any person endeavouring to save his life from any ship or vessel which shall be in distress or wrecked, stranded or cast on shore (whether he shall be on board or shall have quitted the same).	7 W. 4. & 1 Vic. c. 89. s. 7 & 12.
	Unlawfully and maliciously setting fire to any mine of coal or cannel-coal.	7 W. 4. & 1 Vic. c. 89. s. 9 & 12.
	Unlawfully and maliciously setting fire to any stack of corn, grain, pulse, tares, straw, haulm, stubble, furze, heath, fern, hay, turf, peat, coals, charcoal, or wood, or any steer of wood.	7 W. 4. & 1 Vic. c. 89. s. 10 & 12.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
TRANSPORTATION beyond the Seas for LIFE or for any term not less than TEN YEARS, or Imprisonment with or without Hard Labour in the Common Gaol or House of Correction for any term not exceeding Three Years, and the Offender to be kept in Solitary Confinement for any portion or portions of such Imprisonment, or of such Imprisonment with Hard Labour, not exceeding One Month at any one time and not exceeding Three Months in any One Year, as to the Court in its discretion shall seem meet.		
As to the punishment of principals in the second degree, and of accessaries before and after the fact to this offence, see observation at p. 10. By the 4 sec. of the 7 W. 4. & 1 Vic. c. 86, it is enacted, that so far as the same is essential to the offence of burglary, the night shall be considered to commence at nine of the clock in the evening of each day and to conclude at six of the clock in the morning of the next succeeding day. By sec. 11 of 7 & 8 Geo. 4. c. 29, (unrepealed by the 7 W. 4. & 1 Vic. c. 86), it is declared that it shall be deemed burglary to enter the dwelling-house of another, with intent to commit felony, or, being in such dwelling-house, to commit any felony, and, in either case, to break out of the said dwelling-house in the night-time.	Being convicted of the crime of burglary.	7 W. 4. & 1 Vic. c. 86. s. 3 & 7.
TRANSPORTATION beyond the Seas for LIFE, or for any term not less than SEVEN YEARS, as the Court shall adjudge.		
See the 7 Geo. 4. c. 16. s. 38. for similar provisions with respect to army pensions; and which Act appears to be superseded by the 2 W. 4. c. 53. s. 49. so far as relates to prize-money.	Knowingly and willingly personating or falsely assuming the name or character, or procuring any other person to personate, &c. any officer, non-commissioned officer, soldier, or other person, entitled or supposed to be entitled to any prize-money, grant, bounty-money, share, or other allowance of money, due or payable, or supposed to be due or payable, for or on account of any service performed or supposed to have been performed by any officer, &c. who shall have really served or be supposed to have served in His Majesty's Army, or in any other military service; or personating or falsely assuming, or acting, aiding, or assisting in personating or falsely assuming the name or character, or procuring any other person to personate, &c. the executor or administrator, wife, widow, next of kin, relation, or creditor of any such officer, &c. as aforesaid, in order to receive or to enable any other person to receive any prize-money, &c. as aforesaid; or forging, or counterfeiting, or altering, or causing or procuring to be forged, &c. and knowingly and willingly acting, or aiding, or assisting in forging, &c. the name or handwriting of any officer, &c. entitled or supposed to be entitled to any prize-money, &c. or the name or handwriting of any officer or under-officer, clerk, or servant, of or in the employ of the Commissioners of the Royal Hospital of Chelsea, or the name or handwriting of any officer or person in any way concerned in the paying or the ordering, directing, or causing the payment of any such prize-money, as aforesaid; or falsely making, forging, counterfeiting, or altering, or willingly acting, aiding, or assisting in the false making, &c. any letter of attorney, bill, ticket, order, certificate, voucher, receipt, will, or any other power, instrument, warrant, authority, document, or writing whatsoever, relating to or in anywise concerning the payment of or the obtaining or claiming any such prize-money, &c. as aforesaid; or uttering or publishing as true,	2 W. 4. c. 53. s. 49.

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OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	or knowingly and willingly acting, or aiding or assisting in uttering, &c. any falsely-made, or forged, or counterfeited, or altered letter of attorney, bill, &c., with intention to receive, obtain, or claim from the said Commissioners of the said Royal Hospital, or from any officer, under-officer, clerk, or servant of the said Commissioners, or from any person whatsoever authorized or supposed to be authorized to pay the same, the payment of any such prize-money, &c. as aforesaid, with intention to defraud any person or persons whatsoever, or any body or bodies politic or corporate whatsoever; or knowingly taking a false oath in order to obtain letters of administration, or the probate of any will, in order to receive, obtain, or claim, or to enable any other person to receive, &c. any prize-money, &c., or demanding or receiving any prize-money, &c., as aforesaid, upon letters of administration, or a probate of a will, knowing the will on which such probate shall have been obtained to be false, forged, or counterfeited, or knowing such letters of administration, or the probate of such will, as last aforesaid, to have been obtained by means of any such false oath, with intention to defraud any person or persons whatsoever, or any body or bodies politic or corporate whatsoever.	

TRANSPORTATION for LIFE, or for such term of years as the Court shall adjudge.

Any society or club, the members whereof are required or admitted to take any oath or engagement herein specified, is an unlawful combination and confederacy, within the meaning of the 39 Geo. 3. c. 79. See 57 Geo. 3. c. 19.	Taking any oath or engagement purporting or intending to bind the person taking the same to commit any treason or murder, or any felony punishable by law with death, not being compelled thereto.	52 Geo. 3. c. 104. s. 1.

TRANSPORTATION for LIFE, or for such term of FOURTEEN or SEVEN YEARS, as the Court shall adjudge.

By sec. 2 of the 52 Geo. 3. c. 156, it is provided "that every person who shall knowingly and wilfully aid or assist any such prisoner at large on parole in quitting any part of His Majesty's dominions where he may be on his parole, although he shall not aid or assist such person in quitting the coast of any of His Majesty's dominions, shall be deemed guilty of aiding the escape of such person under the provisions of that Act."	Knowingly and wilfully aiding or assisting any alien enemy of His Majesty, being a prisoner of war in His Majesty's dominions, whether such prisoner shall be confined as a prisoner of war in any prison or other place of confinement, or shall be suffered to be at large in His Majesty's dominions, or any part thereof, on his parole, to escape from such prison, &c., or from His Majesty's dominions, if at large upon parole.	52 Geo. 3. c. 156. s. 1.
	Any person or persons owing allegiance to His Majesty, after such prisoner, as aforesaid, hath quitted the coast of any part of His Majesty's dominions in such his escape as aforesaid, knowingly and wilfully upon the high seas aiding or assisting such prisoner in his escape to or towards any other dominions or place.	52 Geo. 3. c. 156. s. 3.

TRANSPORTATION for LIFE, or for such term, not less than SEVEN YEARS, as the Court shall adjudge, or IMPRISONMENT only, or IMPRISONMENT and HARD LABOUR in any Common Gaol, Penitentiary House, or House of Correction, for any term not exceeding Seven Years.

	Stealing or embezzling His Majesty's ammunition, sails, cordage, or naval and military stores, or procuring, counselling, aiding, or abetting therein.	4 Geo. 4. c. 53. 7 & 8 Geo. 4. c. 27.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
The imprisonment for these offences is only directed to be in the Common Gaol or House of Correction.	Sending or delivering any letter or writing, with or without any name or signature subscribed thereto, or with a fictitious name or signature, threatening to kill or murder any of His Majesty's subjects, or to burn or destroy his or their houses, outhouses, barns, stacks of corn or grain, hay or straw; or procuring, counselling, aiding, or abetting the commission of the said offences, or any of them; or forcibly rescuing any person being lawfully in custody of any officer, or other person, for any of the said offences.	4 Geo. 4. c. 54. s. 3. 7 & 8 Geo. 4. c. 27.
	Being declared a bankrupt and not surrendering to the Commissioners, before three o'clock upon the 42d day after notice thereof in writing, to be left at the usual place of abode of the bankrupt, or personal notice, in case he be then in prison, and notice given in the London Gazette of the issuing of the fiat, and of the meetings of the Commissioners, and not signing or subscribing such surrender, and submitting to be examined before them, from time to time, upon oath, or, being a Quaker, upon solemn affirmation; or, upon such examination, not discovering all one's real or personal estate, and how and to whom, and upon what consideration, and when any of such estate was disposed of, assigned, or transferred, and all books, papers, and writings relating thereunto (except such part as shall have been really and *bonâ fide* before sold or disposed of in the way of trade, or laid out in the ordinary expense of one's family); or, upon such examination, not delivering up to the Commissioners all such part of such estate, and all books, papers, and writings relating thereunto, as be in one's possession, custody, or power (except the necessary wearing apparel of one's self, wife, and children); or removing, concealing, or embezzling any part of such estate to the value of £10 or upwards, or any books of account, papers, or writings relating thereto, with intent to defraud one's creditors.	6 Geo. 4. c. 16. s. 112. 1 & 2 W. 4. c. 56.

Transportation beyond the Seas for Life, or for any term not less than Seven Years, or Imprisonment for any term not exceeding Four nor less than Two Years, with or without Hard Labour, in the Common Gaol or House of Correction, and the offender to be kept in Solitary Confinement for any portion or portions of such Imprisonment not exceeding One Month at any one time, and not exceeding Three Months in any one Year, as to the Court in its discretion shall seem meet.

By the 1 sec. of the 11 Geo. 4. and 1 W. 4. c. 66, persons aiding, abetting, counselling or procuring the commission of any felony punishable under that section, (which is the case with respect to this and the following ten offences,) are made liable to the same punishment as the principal offender. Also by the 25 sec. of the same Act it is enacted, "That, in the case of every felony punishable under that Act, every principal in the second degree and every accessary before the fact shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by that Act punishable; and every accessary after the fact to any felony punishable under that Act, shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and, by the 26 sec. of the same Act, such imprisonment may be with or without hard labour in the Com-	Forging or counterfeiting the common seal of the Governor and Company of Merchants of Great Britain trading to the South Seas and other parts of America, and for encouraging the fishery; or forging, counterfeiting, or altering any bond or obligation under the common seal of the said Company; or offering to dispose of or pay away any such forged, counterfeited, or altered bond, knowing the same to be such, or demanding the money therein contained or pretended to be due thereon or any part thereof, of the same Company or any of their officers, knowing such bond or obligation to be forged, counterfeited, or altered, with intent to defraud the same Company or their successors, or any other person or persons whatsoever.	6 Geo. 1. c. 4. s. 56. 11 Geo. 4. & 1 W. 4. c. 66. s. 1 & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.

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OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
mon Gaol or House of Correction. The Court was also empowered by the same section to direct the offender to be kept in solitary confinement for the whole or any portion or portions of such imprisonment; but now, by the 7 W. 4. & 1 Vic. c. 90. s. 5, the Court cannot inflict that punishment for a longer period than one month at any one time, or three months in any one year.		
* By the 4 sec. of the 11 Geo. 4. and 1 W. 4. c. 66, it was enacted, "That where by any Act then in force any person was made liable to the punishment of death for forging or altering, or for offering, uttering, disposing of or putting off, knowing the same to be forged or altered, any instrument or writing designated in such Act by any special name or description, and such instrument or writing, however designated, is in law a will, testament, codicil, or testamentary writing, or a bill of exchange, or a promissory note for the payment of money, or an indorsement on or assignment of a bill of exchange or promissory note for the payment of money, or an acceptance of a bill of exchange or an undertaking, warrant, or order for the payment of money within the true intent and meaning of that Act, in every such case the person forging or altering such instrument or writing, or offering, uttering, disposing of or putting off such instrument or writing, knowing the same to be forged or altered, might be indicted as an offender against that Act, and punished with death accordingly." Qy. If the warrants intended by the 6 Geo. 1. c. 11. s. 50, be warrants for the payment of money within the meaning of the above sec. of the 11 Geo. 4. and 1 W. 4.; if so, the forgery of them continued capital until the passing of the 2 & 3 W. 4. c. 123, (amended by the 3 & 4 W. 4. c. 44,) which substituted transportation for life in all cases, (except the forgery of wills and powers of attorney to transfer stock), where the punishment of death was enjoined by the 11 Geo. 4 & 1 W. 4. c. 66, and, consequently, to forge such warrants is now punishable under the 7 W. 4. & 1 Vic. c. 84. s. 2 & 3. See the last-mentioned Act. As to receipts under the hands of the officers of the South Sea Company, the forgery of those instruments appears to be superseded by the 11 Geo. 4., and 1 W. 4. c. 66. s. 10, *vide post.*	Forging, counterfeiting, or altering any receipt or receipts under the hand or hands of one or more of the officers of the Governor and Company of Merchants of Great Britain trading to the South Seas and other parts of America, and for encouraging the fishery, which the same Company may issue from time to time upon or for subscriptions, to be by the said Company taken for increasing their capital stock pursuant to an Act of the 6 Geo. 1. in that behalf, or any warrant or warrants* under the hand or hands of one or more of their officers for the dividend from time to time to be made to the proprietors of the stock in the said Company, or any indorsement or writing, indorsements or writings thereupon or therein; or tendering any such forged, &c. receipt or receipts, warrant or warrants, or any such receipt or receipts, warrant or warrants, with such counterfeit indorsement or writing thereupon or therein, knowing the same to be so forged, &c. to the said Company or any of their officers; or offering to alienate or dispose of the same, knowing the same to be forged, &c., and with intent to defraud the said Company, or any other person or persons, bodies politic or corporate.	6 Geo. 1. c. 11. s. 50. 11 Geo. 4. & 1 W. 4. c. 66. s. 4. 2 & 3 W. 4. c. 123. 3 & 4 W. 4. c. 44. s. 3. 7 W. 4. & 1 Vic. c. 84. s. 2. & 3.
See also the 39 Geo. 3. c. lxxxiii. s. 22, which made it capital to forge on the Globe Insurance Company, and which offence, consequently, is now punishable under the 11 Geo. 4. & 1 W. 4. c. 66. s. 1 & 26. & the 7 W. 4. & 1 Vic. c. 90. s. 5. † Qy. If the bill here intended be a bill within the meaning of the 4 sec. of the 11 Geo. 4, and 1 W. 4. c. 66, and if as such the forgery thereof be punishable under the 7 W. 4. & 1 Vic. c. 84. s. 2 & 3. See also the 10 sec. of the 11 Geo. 4, and 1 W. 4. c. 66, which appears to affect some of the other offences here specified.	Forging or counterfeiting the common seal of either of the corporations for the assurance of ships and merchandize at sea, erected and established pursuant to the 6 Geo. 1. c. 18 (an Act for better securing certain powers and privileges intended to be granted by His Majesty by two charters for assurance of ships and merchandizes at sea, and for lending money on bottomry; and for restraining several extravagant and unwarrantable practices therein mentioned); or forging, counterfeiting, or altering any policy, *bill*,† *bond, or obligation* under the common seal of either of the same corporations, or offering to dispose of or pay away any such forged, &c. policy, &c., knowing the same to be such, or demanding the money therein contained or pretended to be due thereon, or any part thereof, of and from such of the same corporations as shall be mentioned or referred to therein, or any of their officers, knowing such policy, &c. to be forged, &c., with intent to defraud the same corporation or their successors, or any other person or persons whatsoever.	6 Geo. 1. c. 18. s. 13. 11 Geo. 4. & 1 W. 4. c. 66. s. 1 & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Forging or counterfeiting, or procuring to be forged, &c., or knowingly or wilfully acting and assisting in the forging, &c. any order or	

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	orders made forth, or to be made forth in pursuance of the 6 Geo. 1. c. 11. 6 Geo. 1. c. 17. 7 Geo. 1. st. 1. c. 30. 8 Geo. 1. c. 20. or of the 9 Geo. 1. c. 12. (an Act for the more easy assigning or transferring certain Redeemable Annuities, payable at the Exchequer, by indorsements on the standing orders for the same), or any assignment or assignments of such order or orders or of the annuities payable thereon, or of any receipt or discharge to the Exchequer for the annuities due, or to grow due, on any such standing order or orders, or of any letter of attorney or other authority or instrument to transfer, assign, alien, or convey any such order or orders, or to receive the annuities due, or to grow due, thereon, or any part thereof; or forging or counterfeiting, or procuring to be forged, &c., or knowingly or wilfully acting or assisting in the forging, &c. any the name or names of any of the proprietors of any such order or orders, in or to any such pretended assignment, receipt, letter of attorney, instrument, or authority; or knowingly and fraudulently demanding, or endeavouring to have or receive any such annuity or annuities, or any part thereof, by virtue of any such forged, &c. receipt, &c.; or falsely and deceitfully personating any true and real proprietor or proprietors of any the said order or orders, and thereby assigning or endeavouring to assign any of the said order or orders, or receiving or endeavouring to receive the money of such true and lawful proprietors, as if such offender were the true and lawful owner thereof.	9 Geo. 1. c. 12. s. 4. 11 Geo. 4. & 1 W. 4. c. 66. s. 1. & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.
See 11 Geo. 4. & 1 W. 4. c. 66, which appears to have superseded some of the branches of this enactment.		
Qy. If forging the instruments here specified, so far as relates to the obtaining *money*, be not punishable under the 7 W. 4. and 1 Vic. c. 84. s. 2 & 3. See observation *ante*, p. 18.	Forging or counterfeiting, or procuring to be forged, &c., or willingly acting or assisting in the forging, &c., the name or handwriting of the Accountant-general, the Register, the Clerk of the Report-office (of the Court of Chancery), or any of the Cashiers of the Governor and Company of the Bank of England, to any certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument, or writing whatsoever, for or in order to the receiving or obtaining any the money or effects of any of the suitors of the said Court of Chancery; or forging, &c. or procuring, &c. or wilfully acting, &c. in forging, &c. any certificate, &c. in form of a certificate, &c. made by such Accountant-general, &c.; or uttering or publishing any such, knowing the same to be forged, &c. with intention to defraud any person whatsoever.	12 Geo. 1. c. 32. s. 9. 11 Geo. 4. & 1 W. 4. c. 66. s. 1 & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Within Great Britain or Ireland, or any other His Majesty's dominions or without, falsely making, forging, or counterfeiting, or causing or procuring to be falsely made, forged or counterfeited, or wittingly or knowingly acting or assisting in the false making, forging or counterfeiting any pass or passes for any ship or ships whatsoever, commonly called a Mediterranean pass or Mediterranean passes, or counterfeiting the seal of the office of Lord High Admiral of Great Britain and Ireland, or the hand or hands of the Lord High Admiral of Great Britain and Ireland for the time being, or of any Commissioner or Commissioners for executing the said office for the time being, to any such pass or passes; or altering or erasing any true and authentic pass or passes issued or made out by the Lord High Admiral of Great Britain and Ireland, or the Commissioners for executing the said office for the time being; or uttering or publishing as true any such false, forged, counterfeited, altered, or erased pass or passes, knowing the same to be false, forged, counterfeited, altered or erased.	4 Geo. 2. c. 18. s. 1. 11 Geo. 4. & 1 W. 4. c. 66. s. 1 & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.

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OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
See 11 Geo. 4. & 1 W. 4. c. 66, s. 4, and 10, by which some of the offences herein specified appear to be affected. Qy. If forging a bill under the seal of this Company be not within the meaning of the 4 sec. of the above Act, and, as such, punishable under the 7 W. 4. & 1 Vic. c. 84. s. 2 & 3. *Vide ante*, p. 18.	Forging or counterfeiting the common seal of the English Linen Company, or forging, counterfeiting, or altering any *deed, bill, bond, or obligation*, under the common seal of the said corporation; or offering to dispose of or pay away any such forged, counterfeited, or altered bill, bond, or obligation, knowing the same to be such, or demanding any money therein mentioned or pretended to be due thereon, or on any part thereof, of and from the said corporation, or any members, officers, or servants thereof, knowing such bill, bond, or obligation to be forged, counterfeited, or altered, with intent to defraud the same corporation or their successors, or any person or persons whomsoever.	4 Geo. 3. c. 37. s. 15. 11 Geo. 4. & 1 W. 4. c. 66. s. 1 & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Forging or counterfeiting, or causing or procuring to be forged, or counterfeited, or wilfully acting or assisting in the forging or counterfeiting any certificate or certificates, order or orders, made forth by virtue of the 32 Geo. 3. c. 55. (An Act to render more effectual an Act made in the twenty-sixth year of His present Majesty's reign, intituled, "An Act for vesting certain Sums in Commissioners, at the end of every quarter of a Year, to be by them applied to the reduction of the National Debt;" and to direct the application of an additional sum to the reduction of the said debt, in case of future loans), or altering any number, figure, or word therein, or presenting for payment, uttering, vending, bartering, or disposing of any such forged, counterfeited, or altered certificate or certificates, order or orders, (knowing the same to be forged, counterfeited, or altered.)	32 Geo. 3. c. 55. s. 9. 11 Geo. 4. & 1 W. 4. c. 66. s. 1. & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.
This offence, which was originally punishable with death, was omitted from the Act consolidating the laws relating to offences against the coin (2 W. 4. c. 34); but had been previously repealed so far as relates to the capital punishment by the 1 sec. of the 11 Geo. 4. & 1 W. 4. c. 66, which, after enacting that all forgeries, counterfeitings, utterings, and other kindred offences, theretofore capital and not declared so by that Act, (which the present offence was not,) should be punished with transportation for life or not less than seven years, provided as follows: "that nothing herein contained shall affect or alter any Acts relating to the coin of this realm, or to any coin of any other realm, *lawfully current* within this realm." It will be observed that the coin mentioned in the 37 Geo. 3. c. 126, is coin *not permitted to be current within this realm.* The uttering such counterfeit coin, therefore, is not within the exception in the 1st sec. of the 11 Geo. 4. & 1 W. 4. c. 66.	Offending a third time in uttering or tendering in payment or giving in exchange, or paying or putting off to any person or persons, any false or counterfeit coin not the proper coin of this realm, nor permitted to be current within the same, resembling or made with intent to resemble or look like any gold or silver coin of any foreign prince, state or country, or to pass as such foreign coin, knowing the same to be false or counterfeit.	37 Geo. 3. c. 126. s. 4. 11 Geo. 4. & 1 W. 4. c. 66. s. 1 & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.
As to the punishment of principals in the second degree, and of accessaries before and after the fact to this and the next offence, see the observation at p. 28, which equally applies to these offences.	Knowingly and wilfully forging or counterfeiting, or causing, or procuring to be forged, &c., or knowingly and wilfully acting or assisting in forging, &c. the name or hand of the Treasurer of the Ordnance for the time being, or his deputy or any person or persons duly authorized, to any draft, instrument, or writing whatsoever, for, or in order to the receiving or obtaining any of the money in the hands of the Governor and Company of the Bank of England, on account of the Treasurer of the Ordnance; or forging, &c. any draft, instrument, or writing in form of a draft made by such Treasurer of the Ordnance or his deputy, or any person or persons authorized as aforesaid, or uttering or publishing any such, knowing the same to be forged, &c., with an intention to defraud any person whomsoever.	46 Geo. 3. c. 45. s. 9. 11 Geo. 4. & 1 W. 4. c. 66. s. 4. 2 & 3 W. 4. c. 123. 3 & 4 W. 4. c. 44. s. 3. 7 W. 4. & 1 Vic. c. 84. s. 2 & 3.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
* Now Receiver-general of Stamps and Taxes. See 5 & 6 W. 4. c. 20, which consolidates those offices. † Now Commissioners of Stamps and Taxes. See 4 & 5 W. 4. c. 60., which consolidates the Boards of Stamps and Taxes.	Knowingly and wilfully forging or counterfeiting, or causing or procuring to be forged, &c., or knowingly and wilfully acting or assisting in forging, &c. the name or handwriting of the Receiver-general of the *Stamp Duties*,* for the time being, or of his clerk, or of either of the Commissioners of *Stamps*,† to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the Governor and Company of the Bank of England, on account of the Receiver-general of the Stamp duties, or forging, &c. any draft, instrument, or writing in form of a draft made by such Receiver-general or his clerk, or uttering or publishing any such, knowing the same to be forged, &c., with intent to defraud any person whomsoever.	46 Geo. 3. c. 76. s. 9. 11 Geo. 4. & 1 W. 4. c. 66. s. 4. 2 & 3 W. 4. c. 123. 3 & 4 W. 4. c. 44. s. 3. 7 W. 4. & 1 Vic. c. 84. s. 2 & 3.
See 42 Geo. 3. c. 116, which consolidates the provisions of Land Tax Redemption Acts. As to the punishment of principals in the second degree, and of accessaries before and after the fact to this and the following eight offences, see observation at p. 17.	Forging, counterfeiting, or altering, or causing or procuring to be forged, &c., or knowingly or wilfully acting or assisting in the forging, &c. any contract, assignment, certificate, receipt, or attested copy of any certificate made out or purporting to be made out by any person or persons authorized to make out the same by any Act of Parliament touching the redemption or sale of the land tax or of any part thereof; or wilfully uttering any such forged, &c. contract, &c., knowing the same to be forged, &c., with intent to defraud His Majesty, his heirs or successors, or any body or bodies politic or corporate, or other person or persons.	52 Geo. 3. c. 143. s. 6. 11 Geo. 4, & 1 W. 4. c. 66. s. 1 & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.
The whole of this enactment is either superseded or repealed by 55 Geo. 3. c. 184. s. 7, c. 185. s. 7, and 9 Geo. 4. c. 18. s. 35 (*vide post*), except so far as relates to the forgery of stamps on any *other* than the *materials* specified in such enactment.	Forging or counterfeiting, or causing or procuring to be forged, &c., any mark, stamp, die, or plate, which, in pursuance of any Act or Acts of Parliament, shall have been provided, made, or used by or under the direction of the Commissioners appointed to manage the duties on stamped vellum, parchment, and paper, or by or under the direction of any other person or persons legally authorized in that behalf, for expressing or denoting any duty or duties, or any part thereof, which shall be under the care and management of the said Commissioners, or for denoting or testifying the payment of any such duty or duties, or any part thereof, or for denoting any device appointed by the said Commissioners for the Ace of Spades, to be used with any playing cards; or forging, &c. or causing, &c. to be forged, &c., the impression or any resemblance of the impression, of any such mark, stamp, die, or plate as aforesaid, upon any vellum, parchment, paper, card, ivory, gold or silver plate, or *other material*; or stamping or marking, or causing, &c. to be stamped, &c. any vellum, &c. with any such forged, &c. mark, &c. as aforesaid, with intent to defraud His Majesty, his heirs or successors, of any of the duties, or any part of the duties, under the care and management of the said Commissioners; or uttering or selling, or exposing to sale, any vellum, &c. having thereupon the impression of any such forged, &c. mark, &c., or any such forged, &c. impression as aforesaid, knowing the same respectively to be forged, &c.; or privately or secretly using any such mark, &c. which shall have been so provided, &c., by or under such direction as aforesaid, with intent to defraud His Majesty, his heirs or successors of any of the duties, &c. under the care and management of the said Commissioners.	52 Geo. 3. c. 143. s. 7. 11 Geo. 4. & 1 W. 4. c. 66. s. 1 & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.
See 41 Geo. 3. (U. K.) c. 91. s. 5; Qy. if same wholly superseded by 52 Geo. 3. c. 143. s. 10.	Falsely making, forging, counterfeiting, or altering, or causing or procuring to be falsely made, &c., or willingly assisting in falsely making, &c., with intent to defraud His Ma-	

[Appendix No. 5.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
Qy. If the certificate for the payment of money here intended be an order for the payment of money within the meaning of the 4 sec. of 11 Geo. 4. & 1 W. 4. c. 66; if so, the offence of forging the same is punishable under the 7 W. 4. & 1 Vic. c. 84. s. 2 & 3. *Vide ante*, p. 18. This offence so far as relates to the duties of Customs, appears to be repealed by the 3 & 4 W. 4. c. 50. s. 3.: the 6 Geo. 4. c. 105. s. 297. does not appear to have affected it.—See that Act.	jesty, any *debenture, or any certificate for the payment or return of any money*, or any part of any such debenture or certificate, or any signature thereon, in any case in which such debenture, &c. is by any Act or Acts of Parliament relating to the duties of *Customs* or Excise required or directed to be given or granted; or wilfully with such intent as aforesaid, uttering, publishing, or making use of any such debenture or certificate, or part thereof, so being wholly or in part falsely made, &c.	52 Geo. 3. c. 143. s. 10. 11 Geo. 4, & 1 W. 4. c. 66. s. 1 & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.
* The forgery enactments contained in such former Acts are still in force; but as they are superseded by the 55 Geo. 3. c. 184. s. 7, they have not been inserted in this list. The forging of the stamps on newspapers directed to be used by the 6 & 7 W. 4. c. 76 (an Act to reduce the duties on newspapers, and to amend the laws relating to the duties on newspapers and advertisements), appears to be punishable under the 55 Geo. 3. c. 184. See the 1st sec. of the 6 & 7 W. 4. c. 76, which enacts "that all the powers, provisions, clauses, regulations, and directions, fines, forfeitures, pains and penalties contained in and imposed by the several Acts of Parliament relating to the Stamp Duties, and not repealed by this Act, shall be of full force and effect with respect to the duties hereby granted as far as the same are or shall be applicable in all cases not hereby expressly provided for." There is no express provision contained in that Act respecting the forgery of stamps thereby directed to be used; and the 55 Geo. 3. c. 185, & 6 Geo. 4. c. 119, are repealed by the 32d sec. of the 6 & 7 W. 4. c. 76: the former so far as relates to newspapers, and the latter wholly. † Now Commissioners of Stamps and Taxes. See 4 & 5 W. 4. c. 60, consolidating the Boards of Stamps and Taxes.	Forging or counterfeiting, or causing or procuring to be forged, &c., any stamp or die, or any part of any stamp, &c., which shall have been provided, made, or used, in pursuance of the 55 Geo. 3. c. 184, *or in pursuance of any former Act or Acts relating to any Stamp duty or duties*,* or forging, counterfeiting, or resembling, or causing or procuring to be forged, &c. the impression or any part of the impression of any such stamp or die as aforesaid upon *any vellum, parchment, or paper*, or stamping or marking, or causing, or procuring to be stamped, &c. any vellum, &c., with any such forged, &c. stamp, &c., or part of any stamp, &c. as aforesaid, with intent to defraud His Majesty, his heirs or successors, of any of the duties granted by the said Act or any part thereof; or uttering, or selling, or exposing to sale any vellum, &c., having thereupon the impression of any such forged, &c. stamp, &c., or part of any stamp, &c., or any such forged, &c. impression or part of impression as aforesaid, knowing the same respectively to be forged, &c.; or privately and secretly using any stamp or die which shall have been so provided, &c., as aforesaid, with intent to defraud His Majesty, his heirs or successors, of any of the said duties or any part thereof; or fraudulently, cutting, tearing, or getting off, or causing or procuring to be cut, &c., the impression of any stamp, &c. which shall have been provided, &c., in pursuance of the said Act or any former Act, for expressing or denoting any duty or duties under the care and management of the Commissioners of *Stamps*,† or any part of such duty or duties from any vellum, &c. whatsoever, with intent to use the same for or upon any other vellum, &c., or any instrument or writing charged or chargeable with any of the duties by the said Act granted; or knowingly and wilfully aiding, abetting, or assisting in committing any such offence as aforesaid.	55 Geo. 3. c. 184. s. 7. 11 Geo. 4. & 1 W. 4. c. 66. s. 1 & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Forging or counterfeiting, or causing or procuring to be forged, &c. any mark, stamp, or die, which shall have been provided, made, or used in pursuance of the 55 Geo. 3. c. 185, or any former Act relating to any duties on gold or silver plate made or wrought in Great Britain, for the purpose of marking or stamping any such gold or silver plate in the manner directed by any such Act; or forging, counterfeiting, or resembling, or causing or procuring to be forged, &c. the impression of any such mark, &c. upon any such gold or silver plate, with intent to defraud His Majesty, his heirs	

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	or successors; or marking or stamping, or causing or procuring to be marked or stamped any such gold or silver plate, or any vessel or ware of base metal with any such forged, &c. stamp, &c. as aforesaid; or transposing, or removing, or causing or procuring to be transposed, &c. from one piece of gold or silver plate to another, or to any vessel or ware of base metal, any impression made with any mark, &c., which shall have been provided, made, or used in pursuance of the said Act or any former Act for the purpose of marking or stamping any such gold or silver plate as aforesaid; or selling, exchanging, or exposing to sale, or exporting out of Great Britain any such gold or silver plate, or any vessel or ware of base metal, having thereupon the impression of any such forged, &c. mark, &c. as aforesaid, or any forged, &c. impression of any mark, &c. so provided, made, or used as aforesaid, or any impression of any such mark, &c. which shall have been transposed or removed from any other piece of plate as aforesaid, knowing the same respectively to be forged, &c. as aforesaid; or wilfully and without lawful excuse having or being possessed of any such forged, &c. mark, &c. as aforesaid; or privately and secretly using any mark, &c. so provided, &c. as aforesaid; or knowingly and wilfully aiding, abetting, or assisting any person or persons in committing any such offence as aforesaid.	55 Geo. 3. c. 185. s. 7. 11 Geo. 4. & 1 W. 4. c. 66. s. 1 & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.
See also 57 Geo. 3. c. 124. 1 Geo. 4. cc. 60 & 81. 1 & 2 Geo. 4. c. 111. and 3 Geo. 4. c. 86. (*infra*), and the Acts referred to in the observation on the last-mentioned Act.	Forging, counterfeiting, or altering, or causing, or procuring to be forged, &c., or knowingly or wilfully acting or assisting in forging, &c. any certificate or certificates of the Commissioners for the execution of the 57 Geo. 3. c. 34 (an Act to authorize the issue of Exchequer bills and the advance of money out of the consolidated fund to a limited amount, for the carrying on of public works and fisheries in the United Kingdom, &c.), or any of them, or any receipt or receipts to be given by the Cashier or Cashiers of the Bank of England in pursuance of that Act, or wilfully delivering any such forged, &c. certificate, &c. to the Auditor of the Receipts of His Majesty's Exchequer in Great Britain, or to the Vice-Treasurer of Ireland for the time being, or to any officer appointed by them or either of them, or to the Commissioners for the execution of the said Act or any of them, or to any officer or officers appointed by them or any of them in execution of the powers of the said Act; or uttering any such forged, &c. certificate or certificates, receipt or receipts, knowing the same to be forged, &c., with intent to defraud His Majesty, his heirs or successors, or any body or bodies politic or corporate, or any person whomsoever.	57 Geo. 3. c. 34. s. 63. 11 Geo. 4. & 1 W. 4. c. 66. s. 1 & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.
Qy. If forging the instruments here specified, so far as re-	Forging or counterfeiting, or procuring to be forged, &c., or willingly aiding or assisting in the forging, &c., the name or handwriting of any Accountant-general of the Court of Exchequer; or any Lord Chief Baron or any of the barons of the said Court; or of the clerk of the reports; or of any of the cashiers of the Governor and Company of the Bank of England; or of any officer of any other body politic or corporate or company whom it may concern, to any certificate, report, entry, indorsement, transfer, declaration of trust, note, direction, authority, receipt, instrument or writ-	

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OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
lates to the obtaining *money*, be not punishable under 7 W. 4. & 1 Vic. c. 84. s. 2 & 3. See observation *ante*, p. 18.	ing whatsoever, for or in order to the receiving or obtaining any *money* or effects of any of the suitors of the said Court of Exchequer; or forging, &c. any certificate, &c., or any instrument or writing in form of a certificate, &c., made or given by such Accountant-general, clerk of the reports, or any of the cashiers of the Governor and Company of the Bank of England; or uttering or publishing any such, knowing the same to be forged, &c.; or claiming or demanding payment of any sum or sums of money therein mentioned, with intent to defraud any person or persons, or body politic or corporate, or any public company whomsoever.	1 Geo. 4. c. 35. s. 27. 11 Geo. 4. & 1 W. 4. c. 66. s. 1 & 26. 7 W. 4. & 1 Vic. c. 90 s. 5
See also 4 Geo. 4. c. 63. 5 Geo. 4. cc. 36 & 77. 6 Geo. 4. c. 35. 7 Geo. 4. c. 30. 7 & 8 Geo. 4. cc. 12 & 47. 1 & 2 W. 4. c. 24. 4 & 5 W. 4. c. 72. 7 W. 4. & 1 Vic. c. 51. and 1 & 2 Vic. c. 88.	Forging, counterfeiting, or altering, or causing or procuring to be forged, &c.; or knowingly or wilfully acting or assisting in the forging, &c. any certificate or certificates of the Commissioners for the execution of 3 Geo. 4. c. 86 (an Act to amend two Acts of the 57th year of His late Majesty and the 1st year of His present Majesty, for authorizing the issue of Exchequer Bills and the advance of money for carrying on public works, and fisheries, and employment of the poor; and to authorize a further issue of Exchequer Bills for the purposes of the said Acts), and of the Acts therein recited, or any of them, or any receipt or receipts, to be given by the cashier or cashiers of the Bank of England, in pursuance of the said recited Acts or the 3 Geo. 4. c. 86; or wilfully delivering any such forged, &c. certificate, &c. to the auditor of the receipt of His Majesty's Exchequer in Great Britain, or to any officer appointed by him, or to the Commissioners for the execution of the said Act, or any of them, or to any officer or officers appointed by them or any of them, in the execution of the powers of the said recited Acts or the 3 Geo. 4. c. 86; or uttering any such forged, &c. certificate, &c. knowing the same to be forged, &c., with intent to defraud His Majesty, his heirs or successors, or any body or bodies politic or corporate, or any person whomsoever.	3 Geo. 4. c. 86. s. 54. 11 Geo. 4. & 1 W. 4. c. 66. s. 1 & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Forging, counterfeiting, or altering, or causing or procuring to be forged, &c.; or knowingly or wilfully acting or assisting in forging, &c. any certificate or certificates, under the 3 Geo. 4. c. 113 (an Act to amend an Act passed in the 50th year of His late Majesty for directing that accounts of increase and diminution of public salaries, pensions, and allowances, shall be annually laid before Parliament, and for regulating and controlling the granting and paying such salaries, pensions, and allowances), or any appointment or appointments to be made under the said Act, or any of them, or any receipt or receipts to be given by the cashier or cashiers of the Bank of England or Bank of Ireland, in pursuance of the said Act; or wilfully uttering or delivering any such forged, counterfeited, or altered certificate, appointment or receipt, to any person or persons in the execution of the powers of the said Act; or uttering any such forged, &c. certificate, appointment or receipt, knowing the same to be forged, &c., with intent to defraud His Majesty, his heirs or successors, or any body or bodies politic or corporate, or any person or persons whomsoever.	3 Geo. 4. c. 113. s. 23. 11 Geo. 4. & 1 W. 4. c. 66. s. 1. & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
As to the punishment of principals in the second degree, and of accessaries before and after the fact to this offence, see the observation at p. 28, which equally applies to this offence.	Forging, counterfeiting or altering, or causing or procuring to be forged, &c. or knowingly or wilfully acting or assisting in forging, &c. any order or orders for any payment to be made under 3 Geo. 4. c. 113 (an Act to amend an Act passed in the 50th year of His late Majesty for directing that accounts of increase and diminution of public salaries, pensions, and allowances shall be annually laid before Parliament, and for regulating and controlling the granting and paying such salaries, pensions, and allowances), or wilfully uttering or delivering any such forged, &c. order to any person or persons in execution of the powers of the said Act, or uttering any such forged, &c. order, knowing the same to be forged, &c., with intent to defraud His Majesty, his heirs or successors, or any body or bodies politic or corporate, or any person or persons whomsoever.	3 Geo. 4. c. 113. s. 23. 11 Geo. 4. & 1 W. 4. c. 66. s. 4. 2 & 3 W. 4. c. 123. 3 & 4 W. 4. c. 44. s. 3. 7 W. 4. & 1 Vic. c. 84. s. 2 & 3.
As to the punishment of principals in the second degree, and of accessaries before and after the fact to this and the following three offences, see observation at p. 17.	Forging or counterfeiting, or causing or procuring to be forged, &c., or willingly acting or assisting in the forging, &c. any certificate or duplicate certificate required by 5 Geo. 4. c. 53 (an Act to permit the mutual transfer of capital in certain public stocks or funds transferable at the Banks of England and Ireland respectively); or altering any number, figure, or word therein; or altering or publishing as true any such false, forged, counterfeited, or altered certificate, with intent to defraud the Governor and Company of the Bank of England, or the Governor and Company of the Bank of Ireland, or any body politic or corporate, or any person or persons whomsoever.	5 Geo. 4. c. 53. s. 22. 11 Geo. 4. & 1 W. 4. c. 66. s. 1 & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.
Qy. If this offence, so far as relates to any draft, instrument, or writing for or in order to the receiving or obtaining any money, and the uttering and publishing thereof, be not punishable under the 7 W. 4. & 1 Vic. c. 84, s. 2 & 3, as having been a capital felony under the 3 & 4 secs. of 11 Geo. 4. & 1 W. 4. c. 66. *Vide ante*, p. 18.	Forging or counterfeiting, or causing or procuring to be forged, &c.; or knowingly and wilfully aiding or assisting in forging, &c. the name or handwriting of any Receiver-general of excise, or of any excise comptroller of the cash, or of any persons duly authorized, to any draft, instrument, or writing whatsoever, *for or in order to the receiving or obtaining any of the money*, bills, notes, drafts, checks, or orders for the payment of money in the hands or custody of the Governor and Company of the Bank of England on account of such Receiver-general as aforesaid; or any draft, instrument, or writing in the form of a draft, &c. made by any Receiver-general of excise, &c.; or uttering or publishing any draft, &c. so forged or counterfeited, knowing the same to be forged &c., with intent to defraud His Majesty, or any person whomsoever.	7 & 8 Geo. 4. c. 53. s. 56. 11 Geo. 4. & 1 W. 4. c. 66. s. 1 & 26. 7 W. 4. & 1 Vic. c. 90 s. 5.
* Now Commissioners of Stamps and Taxes. See 4 & 5 W. 4. c. 60, consolidating the Boards of Stamps and Taxes.	Forging or counterfeiting, or causing or procuring to be forged or counterfeited, any type, die, seal, stamp, mark, plate, or device, or any part of any type, &c., which shall be at any time provided, made, or used, by or under the authority of the Commissioners of stamps,* in pursuance of 9 Geo. 4. c. 18 (an Act to repeal the stamp duties on cards and dice made in the United Kingdom, and to grant other duties in lieu thereof, and to amend and consolidate the Acts relating to such cards and dice, and the exportation thereof); or counterfeiting or causing or procuring to be counterfeited or resembled the impression of any such type, &c., or any part thereof, upon any playing card or dice, or upon any label, thread, or paper; or forging or counterfeiting the name, handwriting, or signature of any sealing officer or other officer of stamps to or upon any wrapper, paper, or material in which any dice shall be actually inclosed; or forging or counterfeiting, or causing or procuring to be forged, &c. any mark or name or any part of any mark	9 Geo. 4. c. 18. s. 35. 11 Geo. 4. & 1 W. 4. c. 66. s. 1 & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.

Appendix No. 5.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	or name directed to be used by the Commissioners of Stamps in pursuance of the said Act in order to distinguish the maker of any such cards or dice respectively, and printed and marked on, or affixed to, or making part of the wrapper, label, or paper in which any playing cards or dice shall be actually inclosed, with intent to defraud His Majesty, his heirs or successors, of any of the duties at any time by law payable upon cards or dice; or uttering or selling or exposing to sale, or parting with for use in playing, any card, die, ace of spades, label, wrapper, or Jew whatsoever, with such counterfeit seal, stamp, mark, device, impression, name, or signature, knowing the same to be counterfeit, or shall privately or fraudulently use any seal, stamp, mark, plate, device, or label at any time provided, made, or used, by or under the authority of the Commissioners of Stamps, in pursuance of the said Act, with intent to defraud His Majesty, his heirs or successors, of any of the duties at any time by law payable upon cards or dice.	
Some of the branches of this enactment appear to be superseded by the 11 Geo. 4 & 1 W. 4. c. 66.	Forging, counterfeiting or altering, or causing or procuring to be forged, &c., or knowingly or wilfully acting or assisting in the forging, &c. any register or registers of the birth or baptism, or death or burial, of any person or persons to be appointed a nominee or nominees under the provisions of the 10 Geo. 4. c. 24. (an Act to enable the Commissioners for the Reduction of the National Debt to grant Life Annuities and Annuities for terms of years), or any copy or certificate of any such register, or the name or names of any witness or witnesses to any such certificate, or any affidavit or affirmation required to be taken for any of the purposes of that Act, or any certificate of any Justice of the Peace or Magistrate, or of any officer acting under the said Commissioners for the Reduction of the National Debt, of any such affidavit or affirmation having been taken before him, or any certificate of any governor or person acting as such, or minister or consul, or chief magistrate of any province, town, or place, or other person authorized by that Act to grant any certificate of the life or death of any nominee; or forging, &c., or causing, or procuring to be forged, &c., or knowingly or wilfully acting, or assisting in the forging, &c. any certificate or certificates of any officer of the Commissioners for the Reduction of the National Debt, or of any Cashier or Clerk of the Bank of England, or the name or names of any person or persons in or to any transfer of any Bank Annuities or Long Annuities, or in or to any certificate or other instrument for the payment of money for the purchase of any Annuity under the provisions of that Act, or in or to any transfer or acceptance of any such Annuity in the books of the Governor and Company of the Bank of England, or in or to any receipt or discharge for any such Annuity, or in or to any receipt or discharge for any payment or payments due or to become due thereon, or in or to any letter of attorney or other authority or instrument, to authorize or purporting to authorize the transfer or acceptance of any Bank Annuities or Long Annuities, or any life annuity, or any annuity for years of whatsoever kind, under the provisions of that Act, or authorizing, &c., the receipt of any life annuity, or any annuity for years of whatsoever kind, granted under that Act, or any payment or payments due or to become due thereon; or wilfully, falsely, and deceitfully personating any true and real nominee or	10 Geo. 4. c. 24. s. 41. 11 Geo. 4. & 1 W. 4. c. 66. s. 1 & 26 7 W. 4. & 1 Vic. c. 90. s. 5

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	nominees, or wilfully uttering, or delivering or producing, to any person or persons acting under the authority of that Act, any such forged register or copy of register, or any such forged certificate, affidavit, or affirmation, knowing the same to be forged, counterfeited, or altered, with intent to defraud His Majesty, his heirs and successors, or with intent to defraud any person or persons whomsoever.	
	Forging or offering, uttering, disposing of, or putting off, knowing the same to be forged, any ticket, pay list, extract from any ship's books, or any certificate whatever, authorized or required by 11 Geo. 4. and 1 Will. 4. c. 20 (an Act to amend and consolidate the laws relating to the pay of the Royal Navy), or any inspector's or other cheque, or any letter of attorney, assignment, power, or authority, in order to obtain, or to enable any other person to receive, any wages, pay, half-pay, prize-money, bounty-money, or other allowance of money due or supposed to be due in respect of the services of any commission, warrant or petty officer or seaman, or any commission or non-commissioned officer of marines, or marine, or any other person, performed or supposed to be performed in the Royal Navy; or forging or offering, uttering, disposing of, or putting off, any purser's or other certificate to a bill of exchange, or any approval of any such bill respectively required by the said Act; or forging or offering, or uttering, or putting off, knowing the same to forged, any receipt for wages payable under allotment or otherwise, in respect of the services of any person on board any of His Majesty's ships; or forging the name or handwriting of any officer of the Royal Navy or Royal Marines to any receipt for half-pay or arrears of half-pay, or the name or handwriting of any widow to any receipt for any pension or arrears of pension, or the name or handwriting of any person to any receipt for an allowance from the compassionate fund of the navy; or offering, uttering, or disposing of, or putting off, any forged receipt for half-pay or arrears of half-pay, or for any widow's pension or arrears of such pension, or for any allowance from the compassionate fund, knowing any such receipt to be forged, with intent in any of the said cases to defraud any person whomsoever.	11 Geo. 4. & 1 W. 4. c. 20. s. 83. 2 W. 4. c. 40. s. 35. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Falsely and deceitfully personating any commission, warrant, or petty officer or seaman, or commission or non-commissioned officer of marines, or marine, or the wife, widow, or relation, executor, administrator, or creditor, of any such officer, seaman, or marine, or any person intitled to any allowance from the compassionate fund of the navy, in order to receive any wages, pay, half-pay, prize-money, bounty-money, pension, or any part thereof, gratuity or other allowance for money due or payable, or supposed to be due or payable, to any such officer, seaman, or marine, or to the wife or widow, relation, executor, administrator, or creditor, of any such deceased officer, seaman, or marine, or any allowance to any person from the said compassionate fund, with intent to defraud any person whomsoever.	11 Geo. 4. & 1 W. 4. c. 20. s. 84. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Fraudulently and deceitfully taking a false oath in order to obtain probate of any will or letters of administration of the effects of any deceased commission, warrant or petty officer or	

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	seaman, or commission or non-commissioned officer of marines or marine; or fraudulently receiving or demanding any wages, pay, prize-money, bounty-money, pension, or any part thereof, or any allowance of money whatever, payable or supposed to be payable in respect of the services of any such officer, seaman, or marine, or from the compassionate fund of the navy, or any pension to the widow of an officer, upon or by virtue of any probate of a will or letters of administration, knowing such will to be forged, or such probate or letters of administration to have been obtained by means of a false oath, with intent in any of the said cases to defraud any person whomsoever.	11 Geo. 4. & 1 W. 4. c. 20. s. 85. 7 W. 4. & 1 Vic. c. 90. s. 5.
† Qy. If the forging Exchequer Bills made out in pursuance of the Annual Appropriation Acts be punishable in the same manner as the forgery of any other Exchequer Bills. In these Acts there is always contained a clause that all and every the clauses, provisoes, powers, privileges, advantages, penalties, forfeitures, and disabilities contained in the 48 Geo. 3. c. 1, shall be applied and extended to the Exchequer Bills to be made out in pursuance of those Acts, as fully and effectually, to all intents and purposes, as if the said several clauses or provisoes had been particularly repeated or re-enacted in the body of those Acts. By the 48 Geo. 3. c. 1, to forge the Exchequer Bills by that Act directed to be made out was capital. That Act, however, was repealed so far as relates to any forgery therein mentioned, by the 11 Geo. 4. & 1 W. 4. c. 66. Nevertheless, the Annual Appropriation Acts still continue to have inserted in them the before-mentioned clause. Qy. Therefore, if the forging Exchequer Bills under these Acts be capital. By sec. 25 of the 11 Geo. 4. & 1 W. 4. c. 66 (see observation at p. 17), principals in the second degree, and accessaries before the fact to this and the following two offences, were punishable with death or otherwise, in the same manner as the principal in the first degree was by that Act punishable. By the 11 Geo. 4. and 1 W. 4. c. 66, these three offences were capital, and, consequently, principals in the second degree, and accessaries before the fact, in the case of such crimes, were punishable with death. The 2 & 3 W. 4. c. 123, subsequently repealed the capital punishment, and substituted transportation for life, in all cases where death might have been inflicted under the 11 Geo. 4. & 1 W. 4. c. 66, (except for forging wills and powers of attorney to transfer stock); and since, by the 7 W. 4. & 1 Vic. 84. s. 2 & 3, such last-mentioned punishment has been repealed, and the one at the head of this class substituted for it: principals in the second degree and accessaries before the fact to these three offences are, therefore, now punishable under the 7 W. 4. & 1 Vic. c. 84. s. 2 & 3. With respect to the punishment of accessaries after the fact to these three offences, see the observation at p. 17.	Forging or altering, or offering, uttering, disposing of, or putting off, knowing the same to be forged or altered, any Exchequer bill† or Exchequer debenture, or any indorsement on or assignment of any Exchequer bill or Exchequer debenture, or any bond under the common seal of the United Company of Merchants of England trading to the East Indies, commonly called an East India bond, or any indorsement on or assignment of any East India bond, or any note or bill of exchange of the Governor and Company of the Bank of England, commonly called a bank note, a bank bill of Exchange, or a bank post-bill, or any indorsement on or assignment of any bank note, bank bill of exchange, or bank post-bill, or any bill of exchange, or any promissory note for the payment of money, or any indorsement on or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, or order for the payment of money, with intent, in any of the cases aforesaid, to defraud any person whatsoever.	11 Geo. 4. & 1 W. 4. c. 66. s. 3. 2 & 3 W. 4. c. 123. 3 & 4 W. 4. c. 44. s. 3. 7 W. 4. & 1 Vic. c. 84. s. 2 & 3.
	Wilfully making any false entry in, or wilfully altering any word or figure in, any of the books of account kept by the Governor and Company of the Bank of England, or by the Governor and Company of Merchants of Great Britain trading to the South Seas and other parts of America, and for encouraging the fishery, commonly called the South Sea Company; in which books the accounts of the owners of any stock, annuities, or other public funds which now are or hereafter may be trans-	

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	ferable at the Bank of England, or at the South Sea House shall be entered and kept; or in any manner wilfully falsifying the accounts of such owners in any of the said books, with intent in any of the cases aforesaid to defraud any person whatsoever; or wilfully making any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England or at the South Sea House, in the name of any person not being the true and lawful owner of such share or interest, with intent to defraud any person whatsoever.	11 Geo. 4. & 1 W. 4. c. 66. s. 5. 2 & 3 W. 4. c. 123. 3 & 4 W. 4. c. 44. s. 3. 7 W. 4. & 1 Vic. c. 84. s. 2 & 3.
The 2 & 3 W. 4. c. 123, took away the punishment of death for forgery, and substituted transportation for life in *all* cases, except for forging wills and powers of attorney to transfer any share of any Stock, Annuity, or public fund, transferable at the *Bank of England*, or *South Sea House*, or at the *Bank of Ireland*; consequently, the forging powers of attorney, with respect to the capital stock of the other bodies corporate, &c. referred to by this clause of 1 W. 4. c. 66, became, thereupon, punishable with transportation for life only; and that punishment has been since repealed by the 7 W. 4. & 1 Vic. c. 84. s. 2 & 3, and the one at the head of this class substituted for it.	Forging or altering, or uttering, knowing the same to be forged or altered, any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England, or at the South Sea House, or of or in the capital stock of any body corporate, company, or society which now is or hereafter may be established by charter or Act of Parliament, or forging or altering or uttering, knowing the same to be forged or altered, any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock as is hereinbefore mentioned, or to receive any dividend payable in respect of any such share or interest, or demanding or endeavouring to have any such share or interest transferred, or to receive any dividend payable in respect thereof, by virtue of any such forged or altered power of attorney or other authority, knowing the same to be forged or altered, with intent in any of the several cases aforesaid to defraud any person whatsoever; or falsely or deceitfully personating any owner of any such share, interest, or dividend as aforesaid, and thereby transferring any share or interest belonging to such owner, or thereby receiving any money due to such owner, as if such person were the true and lawful owner.	11 Geo. 4. & 1 W. 4. c. 66. s. 6. 2 & 3 W. 4. c. 123. 3 & 4 W. 4. c. 44. s. 3. 7 W. 4. & 1 Vic. c. 84. s. 2 & 3.
As to the punishment of principals in the second degree, and of accessaries before and after the fact to this and the following three offences, see observation at p. 17.	Falsely and deceitfully personating any owner of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England, or at the South Sea House, or any owner of any share or interest of or in the capital stock of any body corporate, company, or society, which now is or hereafter may be established by charter or Act of Parliament; or any owner of any dividend payable in respect of any such share or interest as aforesaid, and thereby endeavouring to transfer any share or interest belonging to any such owner, or thereby endeavouring to receive any money due to any such owner as if such offender were the true and lawful owner.	11 Geo. 4 & 1 W. 4. c. 66. s. 7. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Forging or altering, or offering, uttering, disposing of, or putting off, knowing the same to be forged or altered, any deed, bond, or writing obligatory, or any court-roll, or copy of any court-roll, relating to any copyhold or customary estate, or any acquittance or receipt either for money or goods, or any accountable receipt either for money or goods, or for any note, bill, or other security, for payment of money, or any warrant, order, or request, for the delivery or transfer of goods, or for the delivery of any note, bill, or other security for payment of money, with intent to defraud any person whomsoever.	11 Geo. 4 & 1 W. 4. c. 66. s. 10. 7 W. 4. & 1 Vic. c. 90. s. 5.

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Fines and recoveries have been abolished since the passing of the 11 Geo. 4, and 1 W. 4. c. 66. See 3 & 4 W. 4. c. 74.	Acknowledging any recognisance or bail, before any court, judge, or other person lawfully authorized to take the same, in the name of any other person not privy or consenting to the same, whether such recognisance or bail, in either case, be or be not filed; or in the name of any other person not privy or consenting to the same, acknowledging any fine, recovery, cognovit actionem, or judgment, or any deed to be enrolled.	11 Geo. 4. & 1 W. 4. c. 66. s. 11. 7 W. 4. & 1 Vic. c. 90. s. 5.
By sec. 21, it is provided, that no rector, vicar, curate, or officiating minister of any parish, district-parish, or chapelry, who shall discover any error in the form or substance of the entry in the register of any baptism, marriage, or burial, respectively by him solemnized, shall be liable to any of the penalties therein mentioned, if he shall within one calendar month after the discovery of such error, in the presence of the parent or parents of the child baptized, or of the parties married, or in the presence of two persons who shall have attended at any burial, or in the case of the death or absence of the respective parties aforesaid, then in the presence of the church-wardens or chapel-wardens, correct the entry which shall have been found erroneous, according to the truth of the case, by entry in the margin of the register wherein such erroneous entry shall have been made, without any alteration or obliteration of the original entry, and shall sign such entry in the margin, and add to such signature the day of the month and year when such correction shall be made; and such correction and signature shall be attested by the parties in whose presence the same are directed to be made as aforesaid; and that in the copy of the register which shall be transmitted to the registrar of the diocese, the rector, vicar, curate, or officiating minister shall certify the corrections so made by him as aforesaid. See the 6 & 7 W. 4. c. 86. ss. 43 & 44. (*post* p. 58.) which appear to supersede the above sections of the 11 Geo. 4. & 1 W. 4. c. 66. so far as relates to *Marriage* Register Books. As to registers of baptisms and burials, they are still in force, the 49th section of the 6 & 7 W. 4. c. 86, providing that nothing therein contained shall affect the registration of baptisms or burials, as then by law established.	Knowingly and wilfully inserting, or causing or permitting to be inserted in any register of baptisms, marriages, or burials, which hath been or shall be made or kept by the rector, vicar, curate, or officiating minister of any parish, district parish, or chapelry in England, any false entry of any matter relating to any baptism, marriage, or burial; or forging or altering in any such register any entry of any matter relating to any baptism, marriage, or burial; or uttering any writing as and for a copy of an entry in any such register of any matter relating to any baptism, marriage, or burial, knowing such writing to be false, forged, or altered; or uttering any entry in any such register of any matter relating to any baptism, marriage, or burial, knowing such entry to be false, forged, or altered; or uttering any copy of such entry, knowing such entry to be false, forged, or altered; or wilfully destroying, defacing, or injuring, or causing or permitting to be destroyed, &c., any such register or any part thereof; or forging or altering or uttering, knowing the same to be forged or altered, any licence of marriage.	11 Geo. 4. & 1 W. 4. c. 66. s. 20. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Forging, counterfeiting or altering, or procuring to be forged, &c., or knowingly or wilfully acting or assisting in the forging, &c., any declaration, warrant, order or other instrument, or any affidavit or affirmation required to be made by the 2 & 3 Will. 4. c. 59 (an Act to transfer the management of certain annuities on lives from the receipt of His Majesty's Exchequer, to the management of the Commissioners for the Reduction of the National Debt, and to amend an Act for enabling the said Commissioners to grant Life Annuities and Annuities for terms of years), or by the Commissioners for the Reduction of the National Debt, under any of the provisions of the said Act, or under any authority given to them for that purpose; or forging, &c., or causing or procuring to be forged, &c., or knowingly or wilfully acting or assisting in the forging, &c., any certificate or order of any officer of the Commissioners for the Reduction of the National	

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	Debt, or the name or names of any person or persons in or to any transfer of any annuities, or in or to any certificate, order, warrant, or other instrument for the payment of money for the purchase of any annuities under the provisions of the said Act, or in or to any transfer or acceptance of any such annuities in the books of the Commissioners for the Reduction of the National Debt, or in or to any receipt or discharge for any such annuities, or for any payment or payments due or to become due thereon, or in or to any letter of attorney or other authority or instrument to authorize, or purporting to authorize, the transfer or acceptance of any annuities, or any life annuities of whatsoever kind, or authorizing or purporting to authorize the receipt of any life annuities, of whatsoever kind, granted under the said Act or any of the Acts therein recited, or any payment or payments due or to become due thereon; or wilfully, falsely, and deceitfully personating any true and real nominee or nominees; or wilfully uttering or delivering or producing to any person or persons acting under the authority of the said Act any forged register or copy of register of any birth, baptism or marriage, or any forged declaration, affidavit or affirmation, knowing the same to be forged, counterfeited or altered, with intent to defraud His Majesty, his heirs or successors, or with intent to defraud any person or persons whomsoever.	2 & 3 W. 4. c. 59. s. 19. 7 W. 4. & 1 Vic. c. 84. s. 1 & 3.
	Forging or altering, or offering, uttering or disposing of, knowing the same to be forged or altered, any will, codicil or testamentary writing, with intent to defraud any body corporate or person whatsoever; or forging, or altering or uttering, knowing the same to be forged or altered, any power of attorney, or other authority, to transfer any share or interest of or in any stock, annuity, or other public fund, which now is or hereafter may be transferable at the Bank of England or South Sea House, or at the Bank of Ireland, or to receive any dividend payable in respect of any such share or interest, with intent to defraud any body corporate or person whatsoever, or procuring, aiding or assisting in the commission of the said offences.	2 & 3 W. 4. c. 123. s. 2. 7 W. 4. & 1 Vic. c. 84. s. 1 & 3.
By 5 & 6 W. 4. c. 51, the Commissioners are empowered to give relief to the Island of Dominica, as well as the places mentioned in 2 & 3 W. 4, c. 125, and the forging any certificate of the Commissioners, with respect to that island, is punishable in the same manner as directed by 2 & 3 W. 4. c. 125. By the 7 W. 4. & 1 Vic. c. 84, s. 1, the punishment inflicted by the 5 & 6 W. 4. c. 51, was repealed, and transportation for life, or for any term not less than seven years, or imprisonment for any term not exceeding four nor less than two years, substituted.	Forging, counterfeiting or altering, or causing or procuring to be forged, &c., or knowingly and wilfully acting or assisting in the forging, &c., any certificate or certificates of the commissioners appointed by the 2 & 3 Will. 4, c. 125 (an Act for enabling His Majesty to direct the issue of Exchequer Bills to a limited amount for the purposes and in the manner therein mentioned, and for giving relief to Trinidad, British Guiana, and St. Lucie), or any of them, or any receipt or receipts to be given by the cashier or cashiers of the Governor and Company of the Bank of England, in pursuance of the said Act; or wilfully delivering to the Auditor of the receipt of His Majesty's Exchequer for the time being, or to any officer appointed by him, or to the said Commissioners, by the said Act appointed, or any of them, or to any officer or officers appointed by them, or any of them, in the execution of the powers of the said Act, or uttering any such forged certificate or certificates, receipt or receipts, knowing the same to be forged, with intent to defraud His Majesty, his heirs or successors, or any body or bodies politic or corporate, or any person whomsoever.	2 & 3 W. 4. c. 125. s. 65. 7 W. 4. & 1 Vic. c. 84. s. 1 & 3.

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	Knowingly and wilfully forging or counterfeiting, or causing or procuring to be forged, &c., or knowingly and wilfully acting or assisting in forging, &c., the name or handwriting of any Receiver-general of the Customs, or of any Controller-general of the Customs, or of any person acting for them respectively, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the Governor and Company of the Bank of England, on account of the Receiver-general of the Customs; or forging or counterfeiting, or causing or procuring to be forged, &c., or knowingly and wilfully acting or assisting in the forging, &c. any draft, instrument, or writing, in form of a draft made by such Receiver-general or person as aforesaid; or uttering or publishing any such, knowing the same to be forged, &c. with an intention to defraud any person whomsoever.	3 & 4 W. 4. c. 51. s. 27. 7 W. 4. & 1 Vic. c. 84. s. 2 & 3.
	Forging or counterfeiting, or causing or procuring to be forged, &c., or willingly acting or assisting in the forging, &c., any receipt or receipts of the whole or of any part or parts of the contributions towards the sum of Fifteen Millions (part of the sum of Twenty Millions authorized to be raised by the 3 & 4 Will. 4. c. 73 [an Act for the Abolition of Slavery throughout the British Colonies, &c.]) either without the name or names of any person or persons being inserted therein as the contributor or contributors thereto, payer or payers thereof, or of any part or parts thereof, or any certificate or other instrument to be issued by the Commissioners for the reduction of the National Debt; or altering any number, figure or word therein; or uttering or publishing as true any such false, forged, counterfeited or altered receipt or receipts, &c., with intent to defraud the Governor and Company of the Bank of England or the Commissioners for the reduction of the National Debt, or any body politic or corporate, or any person or persons whatsoever, or willingly acting or assisting therein respectively.	5 & 6 W. 4. c. 45. s. 12. 7 W. 4. & 1 Vic. c. 84. s. 1 & 3.

TRANSPORTATION beyond the SEAS for LIFE, or for any term not less than SEVEN YEARS, or Imprisonment for any term not exceeding Four Years, nor less than Two, at the discretion of the Court.

* Now Commissioners of Stamps and Taxes. See 4 & 5 W. 4. c. 60, consolidating the Boards of Stamps and Taxes. By sec. 11 of the 3 & 4 W. 4. c. 97, it is enacted, "That whenever any vellum, parchment, or paper shall be found in the possession of any person licensed to vend or deal in stamps, or who shall have been so licensed at any time within six months then next preceding, such vellum, parchment, or paper having thereon any false, forged, or counterfeit stamp, mark, or impression, resembling or representing, or intended or liable to pass, or be mistaken for any stamp, &c. of any die, plate, or other in-	Knowingly, and without lawful excuse, having in possession any false, forged, or counterfeit die, plate, or other instrument, or part of any such die, &c., resembling, or intended to resemble, either wholly or in part, any die, &c., provided, made, or used by, or under the direction of the Commissioners of Stamps,* for the purpose of expressing or denoting any stamp duty whatever; or knowingly, and without lawful excuse, having in possession any vellum, parchment, or paper, having thereon the impression of any such false, &c., die, &c., or part of any such die, &c., as aforesaid, or having thereon any false, &c., stamp, mark, or impression, resembling or representing, either wholly or in part, or intended or liable to pass or be mistaken for, the stamp, &c., of any such die, &c., so provided, &c., as aforesaid, knowing such false, &c., stamp, &c., to be false, &c.; or fraudulently using, joining, fixing, or placing for, with, or upon any vellum, &c., any stamp, &c., which shall have been cut, torn, or gotten off, or removed from any other vellum, &c.; or fraudulently erasing, cutting, scraping, dis-	

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strument, which at any time whatever hath been or shall or may be provided, made or used by or under the direction of the Commissioners of Stamps, for the purpose of expressing or denoting any stamp duty whatever, then and in every such case the person in whose possession such vellum, &c. shall be so found shall be deemed and taken to have so had the same in his possession with intent to vend, use, or utter the same with such false, &c. stamp, &c. thereon, unless the contrary shall be satisfactorily proved; and such person shall also be deemed and taken to have such vellum, &c. so in his possession, knowing the stamp, &c. thereon to be false, &c., and such person shall be liable to all penalties and punishments by law imposed or inflicted upon persons vending, using, uttering, or having in possession false, &c. stamps, knowing the same to be false, &c., unless such person shall in every such case satisfactorily prove that such stamp or stamps was or were procured by or for such person from some distributor of stamps appointed by some person licensed to deal in stamps by virtue of this Act."	charging, or getting out of or from any stamped vellum, &c., any name, sum, date, or other matter or thing thereon written, printed, or expressed, with intent to use any stamp or mark then impressed or being upon such vellum, &c., or that the same may be used for any deed, instrument, matter, or thing, in respect whereof any stamp duty may be payable; or knowingly using, uttering, selling, or exposing to sale, or knowingly, and without lawful excuse, having in possession any stamped vellum, &c., from, or of, or out of which any such name, &c., as aforesaid, shall have been fraudulently erased, &c., as aforesaid; or knowingly and wilfully aiding, abetting, or assisting in committing any such offence, and being thereof lawfully convicted.	3 & 4 W. 4. c. 97. s. 12.

TRANSPORTATION beyond the SEAS for LIFE, or for any term not less than SEVEN YEARS, or Imprisonment for any term not exceeding Four Years, with or without hard labour, in the Common Gaol or House of Correction, and to be kept in solitary confinement for any portion or portions of such Imprisonment, or of such Imprisonment with Hard Labour, not exceeding One Month at any one time, and not exceeding Three Months in any One Year, as to the Court in its discretion shall seem meet; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such Imprisonment.

* For the definition of a *valuable security*, see p. 14.

† By the 9 sec. of the 7 & 8 Geo. 4. c. 29, an infamous crime is defined to be buggery committed either with mankind or beast, and every assault with intent to commit, and every attempt or endeavour to commit the said abominable crime, and every solicitation, persuasion, promise, or threat offered or made to any person whereby to move or induce such person to commit or permit the said abominable crime.

	Knowingly sending or delivering any letter or writing demanding of any person, with menaces, or without any reasonable or probable cause, any chattel, money, or *valuable security*;* or accusing, or threatening to accuse, or knowingly sending or delivering any letter or writing, accusing, or threatening to accuse any person of any crime punishable by law with death, transportation, or pillory, or with any assault to commit any rape, or of any attempt or endeavour to commit any rape, or of any *infamous crime*,† with a view or intent to extort or gain from such person, any chattel, money, or valuable security.	7 & 8 Geo. 4. c. 29. s. 4 & 8. 7 W. 4. & 1 Vic. c. 90. s. 5.

By sec. 61 of the 7 & 8 Geo. 4. c. 29, it is enacted, "That, in the case of every felony punishable under that Act, every principal in the second degree, and every accessary before the fact, shall be punishable with death, or otherwise, in the same manner as the principal in the first degree is by that Act punishable; and every accessary after the fact to any felony punishable under that Act (except only a receiver of stolen property) shall, on conviction, be liable to be imprisoned for any term not exceeding two years." And by the 4 sec. of the same Act, such imprisonment may be with or without hard labour in the Common Gaol or House of Correction. The Court was also empowered by the same section to direct the offender to be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the Court in its discretion should seem meet; but now, by the 7 W. 4, and 1 Vic. c. 90, s. 5, the Court cannot inflict that punishment for a longer period than one month at any one time, or three months in any one year.

	Corruptly taking any money or reward, directly or indirectly, under pretence or on account of helping any person to any chattel,	

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* See the definition of a *valuable security*, p. 14.	money, *valuable security*,* or other property whatsoever, which shall by any felony or misdemeanor have been stolen, taken, obtained, or converted (unless the person so taking such money, &c., as aforesaid, cause the offender to be apprehended and brought to trial for the same).	7 & 8 Geo. 4. c. 29. s. 4 & 58. 7 W. 4. & 1 Vic. c. 90. s. 5.
The punishment of principals in the second degree, and of accessaries before and after the fact to felonies punishable under the 7 & 8 Geo. 4. c. 30, is regulated by similar enactments (*vide supra*) as those relating to the same classes of offenders under the 7 & 8 Geo. 4. c. 29. See sec. 26 and 27 of 7 & 8 Geo. 4. c. 30, & 7 W. 4. & 1 Vic. c. 90, s. 5.	Unlawfully and maliciously cutting, breaking, or destroying, or damaging, with intent to destroy, or render useless, any goods or articles of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace respectively, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture; or any warp or shute of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any loom, frame, machine, engine, rack, tackle, or implement, (whether fixed or moveable,) prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles; or by force entering into any house, shop, building, or place, with intent to commit any of the offences aforesaid.	7 & 8 Geo. 4. c. 30. s. 3 & 27. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Unlawfully and maliciously breaking down or cutting down any sea-bank or sea-wall, or the bank or wall of any river, canal, or marsh, whereby any lands shall be overflowed or damaged, or shall be in danger of being so; or unlawfully and maliciously throwing down, levelling, or otherwise destroying any lock, sluice, floodgate, or other work, on any navigable river or canal.	7 & 8 Geo. 4. c. 30. s. 12 & 27. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Unlawfully and maliciously pulling down or in anywise destroying any public bridge, or doing any injury with intent, and so as thereby to render such bridge, or any part thereof, dangerous or impassable.	7 & 8 Geo. 4. c. 30. s. 13 & 27. 7 W. 4. & 1 Vic. c. 90. s. 5.

TRANSPORTATION beyond the SEAS for LIFE, or for any term not less than SEVEN YEARS, or to be Imprisoned, with or without Hard Labour, in the Common Gaol or House of Correction, for any term not exceeding Four Years, and to be kept in solitary confinement for any portion or portions of such Imprisonment, not exceeding One Month at any one time, and not exceeding Three Months in any one year, as to the Court in its discretion shall seem meet.

	Falsely making or counterfeiting any coin resembling, or apparently intended to resemble, or pass for, the king's current gold or silver coin.	2 W. 4. c. 34. s. 3. & 19. 7 W. 4. & 1 Vic. c. 90. s. 5.
By sec. 18 of the 2 W. 4. c. 34, it is enacted, "That, in the case of every felony punishable under that Act, every principal in the second degree, and every accessary before the fact, shall be punishable in the same manner as the principal in the first degree is by that Act punishable; and every accessary after the fact to any felony punishable under that Act shall, on conviction, be liable to be imprisoned for any term not exceeding two years." And by the 19 sec. of the same	Gilding or silvering, or with any wash or materials capable of producing the colour of gold or silver, washing, colouring, or casing over any coin whatever, resembling, or apparently intended to resemble, or pass for, any of the king's current gold or silver coin; or gilding, or silvering, or with any wash or material capable of producing the colour of gold or silver, washing, colouring, or casing over any piece of silver or copper, or of coarse gold, or coarse silver, or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined into false and counterfeit money resembling or apparently intended to resemble or pass for any of the king's current gold or silver coin; or gilding, or with any wash, &c., capable of producing the colour of gold, washing, colouring, or casing over any of	2 W. 4. c. 34. s. 4. & 19. 7 W. 4. & 1 Vic. c. 90. s. 5.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
Act, such imprisonment may be with or without hard labour in the Common Gaol or House of Correction. The Court was also empowered by the same section to direct the offender to be kept in solitary confinement for the whole or any portion or portions of such imprisonment, as to the Court in its discretion should seem meet; but now, by the 7 W. 4. & 1 Vic. c. 90, s. 5, the Court cannot inflict that punishment for a longer period than one month at any one time, or three months in any one year.	the king's current silver coin; or filing or in any manner altering such coin with intent to make the same resemble or pass for any of the king's current gold coin; or gilding or silvering, or with any wash, &c., capable of producing the colour of gold or silver, washing, colouring, or casing over any of the king's current copper coin; or filing or in any manner altering such coin, with intent to make the same resemble or pass for any of the king's current gold or silver coin.	
	Buying, selling, receiving, paying, or putting off, or offering to buy, &c., any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the king's current gold or silver coin, at or for a lower rate or value than the same by its denomination imports or was coined or counterfeited for; or importing into the United Kingdom from beyond the seas any false or counterfeit coin resembling, &c., any of the king's current gold or silver coin, knowing the same to be false or counterfeit.	2 W. 4. c. 34. s. 6 & 19. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Being convicted of tendering, uttering or putting off any false or counterfeit coin resembling, &c., any of the king's current gold or silver coin, knowing the same to be false, &c.; or of doing so, and at the time of doing so, of having in his possession, besides the false or counterfeit coin so tendered, &c., one or more piece or pieces of false, &c., coin, resembling, &c., any of the king's current gold or silver coin; or of, either on the day of such tendering, &c., or within the space of ten days then next ensuing, tendering, &c., any more or other false, &c., coin, resembling any of the king's current gold or silver coin, knowing the same to be false or counterfeit, and afterwards committing any of the said misdemeanors.	2 W. 4. c. 34. s. 7 & 19. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Being convicted of having in one's custody or possession three or more pieces of false, &c., coin, resembling, &c., any of the king's current gold or silver coin, knowing the same to be false, &c., and with intent to utter or put off the same; and afterwards committing any of the said misdemeanors.	2 W. 4. c. 34. s. 8 & 19. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Knowingly and without lawful authority making or mending, or beginning or proceeding to make or mend; or buying or selling, or knowingly and without lawful excuse having in one's custody or possession any puncheon, counter-puncheon, matrix, stamp, die, pattern, or mould, in or upon which there shall be made or impressed, or which will make or impress, or which shall be intended to make or impress, the figure, stamp, or apparent resemblance of both or either of the sides of any of the king's current gold or silver coin, or any part of parts of both or either of such sides; or, without lawful authority, making or mending, &c., or, without lawful excuse, having in one's custody, &c. any edger, edging-tool, collar, instrument, or engine, adapted and intended for the marking of coin round the edges with letters, grainings, or other marks or figures apparently resembling those on the edges of any of the king's current gold or silver coin, knowing the same to be so adapted and intended as aforesaid; or, without lawful authority, making or mending, &c., or, without lawful excuse, having in one's custody or possession, any press for coinage, or any cutting-engine for cutting by force of a screw or of	2 W. 4. c. 34. s. 10 & 19. 7 W. 4. & 1 Vic. c. 90. s. 5.

Appendix No. 5.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	any other contrivance round blanks out of gold, silver, or other metal, knowing such press to be a press for coinage, or knowing such engine to have been used for, or in order to, the counterfeiting of any of the king's current gold or silver coin.	
	Without lawful authority, knowingly conveying out of any of His Majesty's mints any puncheon, counter-puncheon, matrix, stamp, die, pattern, mould, edger, edging-tool, collar, instrument, press, or engine used or employed in or about the coinage of coin, or any useful part of any of the several matters aforesaid, or any coin, bullion, metal, or mixture of metals.	2 W. 4. c. c. 34. s. 11 & 19. 7 W. 4. & 1 Vic. c. 90. s. 5.
* A similar definition of "valuable security" is given by sec. 47 of 7 W. 4. & 1 Vic. c. 36, to the one contained in the 5 sec. of the 7 & 8 Geo. 4. c. 29 (see observation at p. 14), except that, by the former Act, it is made to extend to *any part* as well as the whole of the things specified in the 7 & 8 Geo. 4. c. 29.	Any person employed under the Post-office stealing, or for any purpose whatever embezzling, secreting, or destroying a post-letter containing any chattel or money whatsoever, or any valuable security.*	7 W. 4. & 1 Vic. c. 36. s. 26, 41, & 42. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Stealing from or out of a post-letter any chattel or money or valuable security.*	7 W. 4. & 1 Vic. c. 36. s. 27, 41, & 42. 7 W. 4. & 1 Vic. c. 90. s. 5.
By sec. 35 of the 7 W. 4. & 1 Vic. c. 36, it is enacted, "That, in the case of every felony punishable under the Post-office Acts, every principal in the second degree, and every accessary before the fact, shall be punishable in the same manner as the principal in the first degree is by the Post-office Acts punishable; and every accessary after the fact to any felony punishable under the Post-office Acts (except only a receiver of any property or thing stolen, taken, embezzled or secreted) shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and, by the 42 sec. of the same Act, such imprisonment may be with or without hard labour in the common gaol or house of correction. The Court was also empowered by the same section to direct the offender to be kept in solitary confinement for the whole or any portion of such imprisonment; but now, by the 7 W. 4. & 1 Vic. c. 90. s. 5, the Court cannot inflict that punishment for a longer period than one month at any one time, or three months in any one year.	Stealing a post letter-bag or a post-letter from a post-letter-bag, or stealing a post-letter from a post-office or from an officer of the Post-office or from a mail, or stopping a mail with intent to rob or search the same.	7 W. 4. & 1 Vic. c. 36. s. 28, 41, & 42. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Receiving any post-letter or post-letter-bag, or any chattel or money or valuable security,* the stealing or taking or embezzling or secreting whereof shall amount to a felony under the Post-office Act, knowing the same to have been feloniously stolen, taken, embezzled or secreted, and to have been sent, or to have been intended to be sent, by the post.	7 W. 4. & 1 Vic. c. 36. s. 30, 41, & 42. 7 W. 4. & 1 Vic. c. 90. s. 5.
The person committing this offence may be indicted and convicted either as an accessary after the fact, or for a substantive felony, and, in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; but, however convicted, shall be liable to the above punishment. See sec. 30.		
	Knowingly and wilfully forging or counterfeiting the name or handwriting of the Receiver-general for the time being of the General Post-office in England or Ireland, or of any person employed by or under him, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining of any money in the hands or custody of the Governor and Company of the Bank of England or Ireland on account of the Receiver-general of the Post-office; or forging or altering, or offering, uttering, disposing of or putting off, knowing the same to be forged or altered, any draft, warrant, or order of such Receiver-general, or of any person employed by or under him, for money or for payment of money, with intent to defraud any person whomsoever.	7 W. 4. & 1 Vic. c. 36. s. 33, 41, & 42. 7 W. 4. & 1 Vic. c. 90. s. 5.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
TRANSPORTATION for LIFE, for any term not less than SEVEN YEARS, or to be imprisoned, with or without Hard Labour, in the Common Gaol or House of Correction for any term not exceeding Four Years.		
By the 31 sec. of the 9 Geo. 4. c. 31, it is enacted, "That every accessary after the fact to any felony punishable under that Act (except murder) shall be liable to be imprisoned with or without hard labour in the Common Gaol or House of Correction for any term not exceeding two years."	Where any woman shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be an heiress presumptive, or next of kin to any one having such interest, taking away or detaining, from motives of lucre, such woman against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person; or counselling, aiding, or abetting therein.	9 Geo. 4. c. 31. s. 19.
TRANSPORTATION beyond the Seas for LIFE, or for any term not less than SEVEN YEARS, or Imprisonment, with or without Hard Labour, in the Common Gaol or House of Correction, for any term not exceeding Four Years, or the offender to pay such fine as the Court shall award.		
It is said there cannot be an accessary to a manslaughter. 1 Hale 347.	Manslaughter.	9 Geo. 4. c. 31. s. 9.
TRANSPORTATION beyond the Seas for LIFE, or for any term not less than SEVEN YEARS, or Imprisonment for any term not exceeding Four Years.		
	Person belonging to or employed in the Public Record Office, certifying any writing as a true and authentic copy of a Record in the custody of the Master of the Rolls, knowing the same to be false in any material part.	1 & 2 Vic. c. 94 s. 19.
	Counterfeiting the signature of any assistant Record keeper for the purpose of counterfeiting a certified copy of a Record, or forging or counterfeiting the seal of the Public Record Office.	1 & 2 Vic. c. 94. s. 19.
TRANSPORTATION for LIFE, or for any term of Years not less than SEVEN, or to be imprisoned for any term not exceeding Three Years, with or without Hard Labour, and for any period of Solitary Confinement during such Imprisonment, not exceeding One Month at a time, or Three Months in the space of one year, at the discretion of the Court or Judge by or before whom the offender may be tried.		
	Breaking and entering any church or chapel and stealing therein any chattel; or, having stolen any chattel in any church or chapel, breaking out of the same; or aiding or abetting, counselling or procuring the commission of such offences.	7 & 8 Geo. 4. c. 29. s. 10. 5 & 6 W. 4. c. 81. 6 & 7 W. 4. c. 4. 7 W. 4. & 1 Vic. c. 90. s. 5.
TRANSPORTATION for any term not exceeding FIFTEEN nor less than TEN YEARS, or Imprisonment with or without Hard Labour in the Common Gaol or House of Correction for any term not exceeding Three Years, and the offender to be kept in solitary confinement for any portion or portions of such Imprisonment, or of such Imprisonment with Hard Labour, not exceeding One Month at any one time, and not exceeding Three Months in any one year, as to the Court in its discretion shall seem meet.		
*For the definition of "*valuable security*," see p. 14.	Stealing in a dwelling-house any chattel, money, or *valuable security*,* to the value in the whole of £5 or more; or counselling, aiding, or abetting the Commission thereof.	7 & 8 Geo. 4. c. 29. s. 12. 2 & 3 W. 4. c. 62. 3 & 4 W. 4. c. 44. s. 3. 7 W. 4. & 1 Vic. c. 90. s. 1 & 3.
	Stealing any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, or wilfully killing any of such cattle, with intent to steal the carcase or skin, or any part of the cattle so killed; or counselling, aiding, or abetting the commission thereof.	7 & 8 Geo. 4. c. 29. s. 25. 2 & 3 W. 4. c. 62. 3 & 4 W. 4. c. 44. s. 3. 7 W. 4. & 1 Vic. c. 90. s. 1 & 3.
	Breaking and entering a dwelling-house, and stealing therein any chattel, money, or *valuable security*,* to any value whatever; and every principal in the second degree, and accessary before the fact.	7 & 8 Geo. 4. c. 29. s. 12. 3 & 4 W. 4. c. 44. s. 2. 7 W. 4. & 1 Vic. c. 90. s. 1 & 3.
As to the punishment of principals in the second degree, and of accessaries before and after the fact to this and the following three offences, see observation at p. 33.	Breaking and entering any building, and stealing therein any chattel, money, or *valuable security*,* such building being within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof.	7 & 8 Geo. 4. c. 29. s. 4 & 14. 7 W. 4. & 1 Vic. c. 90. s. 2 & 3.

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OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	Breaking and entering any shop, warehouse, or counting-house, and stealing therein any chattel, money, or *valuable security*.*	7 & 8 Geo. 4. c. 29. s. 4 & 15. 7 W. 4. & 1 Vic. c. 90. s. 2 & 3.
See 15 Geo. 2. c. 27.	Stealing to the value of 10*s*. any goods or articles of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, whilst laid, placed, or exposed, during any stage, process, or progress of manufacture, in any building, field, or other place.	7 & 8 Geo. 4. c. 29. s. 4 & 16. 7 W. 4. & 1 Vic. c. 90. s. 2 & 3.
	Stealing any goods or merchandize in any vessel, barge, or boat, of any description whatsoever, in any port of entry or discharge, or upon any navigable river or canal, or in any creek belonging to, or communicating with, any such port, river, or canal, or stealing any goods or merchandize from any dock, wharf, or quay, adjacent to any such port, river, canal, or creek.	7 & 8 Geo. 4. c. 29. s. 4 & 17. 7 W. 4. & 1 Vic. c. 90. s. 2 & 3.
As to the punishment of principals in the second degree, and of accessaries before and after the fact to this and the next offences, see observation at p. 34.	Unlawfully and maliciously killing, maiming, or wounding any cattle.	7 & 8 Geo. 4. c. 30. s. 16 & 27. 7 W. 4. & 1 Vic. c. 90. s. 2 & 3.
	Unlawfully and maliciously cutting or otherwise destroying any hopbinds growing on poles in any plantation of hops.	7 & 8 Geo. 4. c. 30. s. 18 & 27. 7 W. 4. & 1 Vic. c. 90. s. 2 & 3.
As to the punishment of principals in the second degree, and of accessaries before and after the fact, to this and the following three offences, see observation at p. 10.	Stealing any property in any dwelling-house, and by any menace or threat putting any one being therein, in bodily fear.	7 W. 4. & 1 Vic. c. 86. s. 5 & 7.
	Robbing any person, or stealing any property from the person of another.	7 W. 4. & 1 Vic. c. 87. s. 5 & 10.
	Plundering or stealing any part of any ship or vessel which shall be in distress or wrecked, stranded or cast on shore, or any goods, merchandize, or articles of any kind belonging to such ship or vessel.	7 W. 4. & 1 Vic. c. 87. s. 8 & 10.
	Unlawfully and maliciously destroying any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandize, or articles of any kind belonging to such ship or vessel.	7 W. 4. & 1 Vic. c. 89. s. 8 & 12.

TRANSPORTATION beyond the Seas for the term of FOURTEEN YEARS.

	Casting, forging, or counterfeiting, or causing or procuring to be cast, &c., any mark or stamp used for the marking or stamping gold or silver plate, in pursuance of any Act or Acts of Parliament in force at the time of passing the 13 Geo. 3. c. 59, (An Act for repealing so much of an Act of the 31 of His late Majesty as inflicts capital punishment for frauds and abuses in the marking or stamping of gold and silver plate, and for inflicting another punishment for the said offence,) by the Company of Goldsmiths in London or by the wardens or assayer or assayers at York, Exeter, Bristol, Chester, Norwich, or Newcastle-upon-Tyne, or by any maker or worker of gold or silver plate or any or either of them; or any mark, stamp, or impression, in imitation of or to resemble any mark, &c., made with any mark or stamp used as aforesaid by the said Company of Goldsmiths in London, &c.; or marking or stamping, or causing or procuring to be marked, &c.,	

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
See also the 28 Edw. 1. st. 3. c. 20	any wrought plate of gold or silver or any wares of brass or other base metal, silvered or gilt over and resembling plate of gold or silver, with any mark or stamp which hath been forged, &c., at any time, in imitation of or to resemble any mark, &c., used as aforesaid by the said Company of Goldsmiths in London, &c.; or transposing or removing, or causing or procuring to be transposed, &c., from one piece of wrought plate to another or to any vessel of such base metal as aforesaid, any mark, stamp, or impression, made by or with any mark or stamp used as aforesaid by the said Company of Goldsmiths in London, &c.; or selling, exchanging, or exposing to sale, or exporting out of this kingdom, any wrought plate of gold or silver or any vessel of such base metal as aforesaid with any such forged or counterfeit mark, stamp, or impression, or any mark, &c., which hath been transposed or removed from any other piece of plate, knowing such mark, &c. to be forged, &c; or wilfully or knowingly having or being possessed of any mark or stamp which hath been forged or counterfeited in imitation of or to resemble any mark or stamp used by the said Company of Goldsmiths in London, &c.	12 Geo. 2. c. 26. 31 Geo. 2. c. 32. s. 15. 13 Geo 3. c. 59. s. 2.
	Buying or receiving any part of any cargo or loading of, or any goods, stores, or things of or belonging to, any ship or vessel in the river Thames, knowing the same to be stolen or unlawfully come by; or privately buying or receiving any such goods, stores, or things, or any part of such cargo or loading, by suffering any door, window, or shutter to be left open or unfastened between sun-setting and sun-rising, for that purpose; or buying or receiving the same or any of them, at any time, in any clasdestine manner, from any person or persons whomsoever.	2 Geo. 3. c. 28. s. 12.
This offence appears to be incidentally repealed in part by the 6 & 7 W. 4. c. 85. s. 39.—*Vide post*, p. 57. All prosecutions for this felony must be commenced within the space of three years after the offence committed	Solemnizing matrimony in any other place than a church or such public chapel wherein banns may be lawfully published, or at any other time than between the hours of 8 and 12 in the forenoon, unless by special licence from the Archbishop of Canterbury, or solemnizing matrimony without due publication of banns, unless licence of marriage be first had and obtained from some person or persons having authority to grant the same; or falsely pretending to be in Holy Orders and solemnizing matrimony according to the rites of the Church of England.	4 Geo. 4. c. 76. s. 21.
As to the punishment of principals in the second degree, and of accessaries before and after the fact, in the case of this and the following three offences, see observation at p. 17.	Without lawful excuse purchasing or receiving from any other person, or having in one's custody or possession, any forged bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, knowing the same respectively to be forged.	11 Geo. 4. & 1 W. 4. c. 66. s. 12.
	Without the authority of the Governor and Company of the Bank of England, making or using, or, without lawful excuse, knowingly having in one's custody or possession, any frame, mould, or instrument, for the making of paper with the words "Bank of England" visible in the substance of the paper; or for the making of paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount, expressed in a word or words in Roman letters, visible in the substance of the paper; or, without such authority, manu-	

Appendix No. 5.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	facturing, using, selling, exposing to sale, uttering, or disposing of, or, without lawful excuse, knowingly having in one's custody or possession, any paper whatsoever with the words "Bank of England" visible in the substance of the paper, or any paper with curved or waving bar lines, &c.; or, without such authority by any art or contrivance, causing the words "Bank of England," to appear visible in the substance of any paper; or causing the numerical sum or amount of any bank note, bank bill of exchange, or bank post bill, blank bank note, blank bank bill of exchange, or blank bank post bill, in a word or words, in Roman letters, to appear visible in the substance of the paper whereon the same shall be written or printed.	11 Geo. 4. & 1 W. 4. c. 66. s. 13.
	Engraving or in anywise making upon any plate whatever, or upon any wood, stone, or other material, any promissory note or bill of exchange, or blank promissory note, or blank bill of exchange, or part of a promissory note or bill of exchange, purporting to be a bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, or part of a bank note, bank bill of exchange, or bank post bill, without the authority of the Governor and Company of the Bank of England; or using such plate, &c., or any other instrument or device, for the making or printing any bank note, &c., without such authority; or, without lawful excuse, knowingly having in one's custody or possession any such plate, &c., or any such instrument or device; or, without such authority, knowingly offering, uttering, disposing of, or putting off, any paper upon which any blank bank note, &c., shall be made or printed; or, without lawful excuse, knowingly having in one's custody or possession any such paper.	11 Geo. 4. & 1 W. 4. c. 66. s. 15.
	Engraving or in anywise making upon any plate whatever, or upon any wood, stone, or other material, any word, number, figure, character, or ornament, the impression taken from which shall resemble, or apparently be intended to resemble, any part of a bank note, bank bill of exchange, or bank post bill, without the authority of the Governor and Company of the Bank of England; or using any such plate, &c., for the making upon any paper or other material the impression of any words, &c., without such authority as aforesaid; or, without lawful excuse, knowingly having in one's custody or possession any such plate, &c.; or, without such authority, knowingly offering, uttering, disposing of, or putting off any paper or other material upon which there shall be an impression of any such matter as aforesaid; or, without lawful excuse, knowingly having in one's custody or possession any paper or other material upon which there shall be an impression of any such matter as aforesaid.	11 Geo. 4. & 1 W. 4. c. 66. s. 16.

TRANSPORTATION for any term not exceeding FOURTEEN YEARS.

* By the same section it is enacted, "That if any person shall convey into any prison to which the 4 Geo. 4. c. 64, (An Act for Consoli-	By any means whatever* aiding and assisting any prisoner to escape, or in attempting to escape from any prison (whether an escape be actually made or not).	4 Geo. 4. c. 64. s. 43.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
dating and Amending the Laws relating to the building, repairing, and regulating certain Gaols and Houses of Correction in England and Wales,) shall extend, any mask, vizor or other disguise, or any instrument or arms proper to facilitate the escape of any prisoners, and the same shall deliver or cause to be delivered to any prisoner in such prison, or to any other person there, for the use of any such prisoner, without the consent or privity of the keeper of such prison, every such person shall be deemed to have delivered such vizor or disguise, instrument or arms, with intent to aid and assist such prisoner to escape, or attempt to escape." By the 22d sec. of the 5 Geo. 4. c. 84, it is enacted That if any person shall rescue or attempt to rescue, or assist in rescuing, &c. any offender (who shall have been sentenced or ordered to be transported or banished, or who shall have agreed to transport, &c. himself or herself on certain conditions, either for life or any number of years) from the custody of the superintendent or overseer, or of any sheriff or gaoler or other person conveying, removing, transporting or re-conveying him or her, or shall convey or cause to be conveyed any disguise, instrument for effecting escape, or arms to such offender, every such offence shall be punishable in the same manner as if such offender had been confined in a gaol or prison in the custody of the sheriff or gaoler for the crime of which such offender shall have been convicted.		

TRANSPORTATION beyond the Seas for any term not exceeding FOURTEEN nor less than SEVEN YEARS, or Imprisonment for any term not exceeding Three nor less than One Year, with or without Hard Labour, in the Common Gaol or House of Correction, and to be kept in Solitary Confinement for any portion or portions of such Imprisonment not exceeding One Month at a time, or Three Months in the space of one Year, as to the Court in its discretion shall seem meet.

The 2 & 3 Ann. c. 4. was for the registering of deeds, wills, and conveyances only. See 5 Ann. c. 18. and observation, *infra*. As to the punishment of principals in the second degree, and of accessaries before and after the fact to this and the following four offences, see observation at p. 17.	Forging or counterfeiting any such memorial or certificate as are mentioned and directed in and by the 2 & 3 Ann. c. 4, (An Act for the public registering of all deeds, conveyances, and wills that shall be made of any honors, manors, lands, tenements, or hereditaments, within the west riding of the county of York, after the nine-and-twentieth day of September 1704.)	2 & 3 Ann. c. 4. s. 19. 11 Geo. 4. & 1 W. 4. c. 66. s. 23 & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.
The 5 Ann. c. 18. extends the register established by the 2 & 3 Ann. c. 4. to judgments, statutes, and recognisances, and authorizes the enrolment of bargains and sales of lands, in the west riding of Yorkshire, in the Register's Office, established by 2 & 3 Ann. c. 4.	Forging or counterfeiting any entry of the acknowledgment of any bargainor in any bargain and sale of any manors, lands, tenements, or hereditaments situate, lying and being within the west riding of the county of York, or any such memorial, certificate, or indorsement as are mentioned or directed in and by the 5 Ann. c. 18, (An Act for inrolments of bargains and sales, within the west riding of the county of York, in the Register Office there lately provided, and for making the said register more effectual.)	5 Ann. c. 18. s. 8. 11 Geo. 4. & 1 W. 4. c. 66. s. 23 & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Forging or counterfeiting any entry of the acknowledgment of any bargainor in any bargain and sale of any manors, lands, tenements, or hereditaments situate, lying and being within the east riding of the county of York, or the town and county of the town of Kingston-upon-Hull, or any such memorial, certificate, or indorsement as is mentioned or directed in and by the 6 Ann. c. 35, (An Act for the public registering of all deeds, conveyances, wills, and other incumbrances that shall be made of, or that may affect, any honors, manors, lands, tenements, or hereditaments, within the east riding of the county of York or the town and county of the town of Kingston-upon-Hull, after the nine-and-twentieth day of September 1708; and for rendering the Register of the west riding more complete.)	6 Ann. c. 35. s. 26. 11 Geo. 4, & 1 W. 4. c. 66. s. 23 & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.

Appendix No. 5.

OBSERVATIONS.	OFFENCE.	Act or Act of Parliament, by whic the Offence is defined or made punishable.
	Forging or counterfeiting any entry of the acknowledgment of any memorial, certificate, or indorsement as is mentioned and directed in and by the 7 Ann. c. 20, (An Act for the public registering of deeds, conveyances, and wills and other incumbrances, which shall be made of, or that may affect, any honors, manors, lands, tenements, or hereditaments, within the county of Middlesex, after the twenty-ninth day of September 1709.)	7 Ann. c. 20. s. 15. 11 Geo. 4, & 1 W. 4. c. 66. s. 23 & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Forging or counterfeiting any entry of the acknowledgment of any bargainor in any bargain and sale of any manors, lands, tenements, and hereditaments situate, lying and being within the north riding of the county of York; or any such memorial, certificate, or indorsement as is mentioned and directed in and by the 8 Geo. 2. c. 6 (An Act for the public registering of all deeds, conveyances, wills, and other incumbrances that shall be made of, or that may affect, any honors, manors, lands, tenements, or hereditaments, within the north riding of the county of York, after the nine-and-twentieth day of September 1736.)	8 Geo. 2. c. 6. s. 31. 11 Geo. 4, & 1 W. 4 c. 66. s. 23 & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.
* All petitions or applications must now be made to the Secretary of the Admiralty. See 2 W. 4. c. 40. † The office of Paymaster of Royal Marines abolished by 2 W. 4. c. 40.	Subscribing any false petition or application to the Treasurer of His Majesty's Navy* or to the Paymaster of Royal Marines,† falsely and deceitfully representing oneself therein to be the widow, executor, nearest or one of the nearest of kindred of any deceased commission or warrant officer of the navy, or commission officer of marines, or of any petty officer or seaman, non-commissioned officer of marines or marine, or uttering or publishing any such petition or application, knowing the same to be false, in order to procure or to enable any other person to procure a certificate from the Inspector of Seamen's Wills or from the Paymaster of Royal Marines, as by the 11 Geo. 4. & 1 W. 4. c. 20, (an Act to amend and consolidate the laws relating to the pay of the Royal Navy,) respectively provided, thereby to obtain or to enable any other person to obtain, without probate or letters of administration, payment of any wages, pay, half-pay, or pension, or any allowance from the compassionate fund of the navy, or payment of any wages, prize-money, or allowances payable in respect of the services of any officer, seaman, or marine in the royal navy, or thereby to obtain or to enable any other person to obtain probate of the will or letters of administration of the effects of any deceased petty officer, &c.; or receiving or demanding any wages, pay, half-pay, prize-money, bounty-money, pension, or arrears thereof, or any other allowance due or payable in respect of the services of any commission or warrant officer of the navy, or commission officer of the royal marines, or of any petty officer, &c., upon or by virtue of any certificate of the Inspector of Seamen's Wills or Paymaster of Royal Marines respectively as aforesaid, knowing any such certificate to have been obtained by any false representation or pretence.	11 Geo. 4, & 1 W. 4. c. 20. s. 86. 2 W. 4. c. 40. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Forging or uttering, offering or exhibiting, knowing the same to be forged, any paper writing, purporting to be an extract from any register of marriage, baptism or burial, or any certificate of marriage, &c., in order to sustain any claim to any wages, prize-money, or other monies due or payable in respect of the services of any officer, seaman, or marine in His Majesty's navy; or to sustain any claim to any half-pay payable to an officer of the royal	

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	navy or marines, or to any pension as the widow of an officer, or to any payment or allowance from the compassionate fund of the navy, or to any gratuity or bounty of His Majesty given to the relatives of persons slain in fight with the enemy; or making any false affidavit, or uttering or exhibiting any false affidavit, certificate, or other voucher or document in order fraudulently to procure any person to be admitted a pensioner as the widow of an officer of the Royal navy, or in order to sustain any claim to any wages, prize-money, or other monies, or to any half-pay or pension, or arrears thereof, or any allowance from the compassionate fund of the Navy, or to any gratuity or bounty as aforesaid, with intent to defraud any person whomsoever.	11 Geo. 4, & 1 W. 4. c. 20. s. 87. 7 W. 4. & 1 Vic. c. 90. s. 5.
As to the punishment of principals in the second degree, and of accessaries before and after the fact to this and the following two offences, see observation at p. 17.	Making or using any frame, mould, or instrument for the manufacture of paper, with the name or firm of any person or persons, body corporate or company, carrying on the business of bankers (other than and except the Bank of England), appearing visible in the substance of the paper, without the authority of such person or persons, body corporate or company; or, without lawful excuse, knowingly having in one's custody or possession any such frame, mould, or instrument; or, without such authority, manufacturing, using, selling, exposing to sale, uttering, or disposing of, or, without lawful excuse, knowingly having in one's custody or possession any paper, in the substance of which the name or firm of any such person or persons, body corporate or company, carrying on the business of bankers shall appear visible; or, without such authority, causing the name or firm of any such person, &c., to appear visible in the substance of the paper upon which the same shall be written or printed.	11 Geo. 4. & 1 W. 4. c. 66. s. 17 & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Engraving or in anywise making upon any plate whatever, or upon any wood, stone, or other material, any bill of exchange or promissory note for the payment of money, or any part of any bill of exchange, &c., for the payment of money, purporting to be the bill or note or part of the bill or note of any person or persons, body corporate, or company carrying on the business of bankers (other than and except the Bank of England), without the authority of such person or persons, body corporate or company; or engraving or making upon any plate, &c., any word or words resembling, or apparently intended to resemble, any subscription subjoined to any bill of exchange or promissory note for the payment of money issued by any such person or persons, body corporate, or company carrying on the business of bankers, without such authority; or, without such authority, using, or, without lawful excuse, knowingly having in one's custody or possession any plate, &c., upon which any such bill or note, or part thereof, or any word or words, &c., shall be engraved or made; or, without such authority, knowingly offering, uttering, disposing of or putting off, or, without lawful excuse, knowingly having in one's custody or possession any paper upon which any part of such bill or note, or any word or words, &c., shall be made or printed.	11 Geo. 4. & 1 W. 4. c. 66. s. 18 & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Engraving or in anywise making upon any plate whatever, or upon any wood, stone, or other material, any bill of exchange, promissory	

Appendix No. 5.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	note, undertaking, or order for payment of money, or any part of any bill of exchange, &c., in whatever language or languages the same may be expressed, and whether the same shall or shall not be or be intended to be under seal, purporting to be the bill, note, undertaking, or order, or part of the bill, &c., of any foreign prince or state, or of any minister or officer in the service of any foreign prince or state, or of any body corporate, or body of the like nature, constituted or recognised by any foreign prince or state, or of any person or company of persons resident in any country not under the dominion of His Majesty, without the authority of such foreign prince, &c.; or, without such authority, using, or, without lawful excuse, knowingly having in his custody or possession any plate, &c., upon which any such foreign bill, &c., or any part thereof, shall be engraved or made; or, without such authority, knowingly offering, uttering, disposing of, or putting off, or without lawful excuse, knowingly having in one's custody or possession any paper upon which any part of such foreign bill, &c., shall be made or printed.	11 Geo. 4. & 1 W. 4. c. 66. s. 19 & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.

TRANSPORTATION beyond the Seas for any term not exceeding FOURTEEN nor less than SEVEN YEARS, or Imprisonment for any term not exceeding Three nor less than One Year, at the discretion of the Court.

	Subscribing, transmitting, uttering or publishing any false petition or application to the Inspector of Seamen's Wills, knowing the same to be false, in order to obtain or to enable any other person to obtain any check or certificate, in lieu of probate or letters of administration, in cases of claims where the deceased's assets shall not exceed £32 and £20 respectively.	2 W. 4. c. 40. s. 33.

TRANSPORTATION beyond the Seas for any term not exceeding FOURTEEN YEARS nor less than SEVEN YEARS, or Imprisonment for any term not exceeding Three Years, with or without Hard Labour, in the Common Gaol or House of Correction, and to be kept in solitary confinement for any portion or portions of such Imprisonment, or of such Imprisonment with Hard Labour, not exceeding One Month at a time, or Three Months in the space of one year, as to the Court in its discretion shall seem meet, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such Imprisonment.

As to the punishment of principals in the second degree, and of accessaries before and after the fact to this and the following two offences, see above, p. 33.	Any clerk or servant stealing any chattel, money, or valuable security* belonging to or in the possession or power of his master.	7 & 8 Geo. 4. c. 29. s. 4 & 46. 7 W. 4. & 1 Vic. c. 90. s. 5.
* For the definition of a *valuable security*, see p. 14.	Any clerk or servant or any person employed for the purpose or in the capacity of a clerk or servant, by virtue of such employment receiving or taking into his possession any chattel, money, or valuable security,* for or in the name or on the account of his master, and fraudulently embezzling the same or any part thereof.†	7 & 8 Geo. 4. c. 29. s. 4 & 47. 7 W. 4. & 1 Vic. c. 90. s. 5.
†By the same sec. of the 7 & 8 Geo. 4. c. 29, it is declared that the person committing the offence here specified shall be deemed to have feloniously stolen the property so embezzled from his master, and that, although the same was not received into the possession of such master, otherwise than by the actual possession of his clerk, servant, or other person so employed.	Receiving any chattel, money, valuable security,* or other property whatsoever, the stealing or taking whereof shall amount to a felony, either at common law or by virtue of the 7 and 8 Geo. 4. c. 29 (Larceny Act), knowing the same to have been feloniously stolen or taken.	7 & 8 Geo. 4. c. 29. s. 4 & 54. 7 W. 4. & 1 Vic. c. 90. s. 5.

THE like punishment as for receiving goods stolen on shore, knowing them to have been stolen.

	Any pilot, boatman, hoveller or other person, wilfully and fraudulently taking possession of, or retaining, or concealing, or secreting any	

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
Qy. If the punishment for this offence regulated by secs. 54 and 55 of 7 & 8 Geo. 4. c. 29, or if it continues the same as for receiving stolen goods at the time of passing the 1 & 2 Geo. 4. c. 75. The person committing this offence forfeits all claim to salvage. Similar provisions are made for the Cinque Ports by 1 & 2 Geo. 4. c. 76. s. 7.	anchors or cables, tackle, apparel, furniture, stores or materials, or any goods or merchandise, or defacing, taking out or obliterating the marks and numbers thereon, or altering the same in any manner, with intent thereby directly or indirectly to prevent the discovery and identification of such articles so found, weighed, swept for or taken possession of as aforesaid, and not reporting and delivering the same at some proper warehouse or other place, in the manner and within the time mentioned and limited in the 1 & 2 Geo. 4. c. 75 (an Act to continue and amend certain Acts for preventing Frauds and Depredations committed on Merchants, &c.)	1 & 2 Geo. 4. c. 75.

TRANSPORTATION beyond the Seas for any term not exceeding FOURTEEN nor less than SEVEN YEARS, or Imprisonment for any term not exceeding Three Years, with or without Hard Labour in the Common Gaol or House of Correction, and to be kept in solitary confinement for any portion or portions of such Imprisonment, not exceeding One Month at a time, or Three Months in the space of one year, as to the Court in its discretion shall seem meet.

As to the punishment of principals in the second degree, and of accessaries before and after the fact, see above, p. 34.	Impairing, diminishing, or lightening any of the King's current gold or silver coin, with intent to make the coin so impaired, &c., pass for the King's current gold or silver coin.	2 W. 4. c. 34. s. 5. 7 W. 4. & 1 Vic. c. 90. s. 5.
As to the punishment of principals in the second degree, and of accessaries before and after the fact, see observation at p. 36.	Stealing or unlawfully taking away a post-letter-bag sent by a Post-office packet, or stealing or unlawfully taking a letter out of any such bag, or unlawfully opening any such bag.	7 W. 4. & 1 Vic. c. 36. s. 29, 41, & 42. 7 W. 4. & 1 Vic. c. 90. s. 5.

TRANSPORTATION beyond the Seas for any term not exceeding FOURTEEN nor less than SEVEN YEARS, or Imprisonment, with or without Hard Labour, as to the Court shall seem meet, for any term not exceeding Three Years.

	Any person employed in the public service of His Majesty, and intrusted by virtue of such employment with the receipt, custody, management, or control, of any chattel, money, or valuable security, embezzling the same or any part thereof, or in any manner fraudulently applying or disposing of the same or any part thereof to his own use or benefit, or for any purpose whatsoever except for the public service.	2 W. 4. c. 4. s. 1.

TRANSPORTATION beyond the Seas for any term not exceeding FOURTEEN nor less than SEVEN YEARS, or to be Imprisoned for any term not exceeding Two Years, with or without Hard Labour, in the Common Gaol or House of Correction, and to be kept in solitary confinement for any portion or portions of such Imprisonment, not exceeding One Month at a time, or Three Months in the space of one year, as to the Court in its discretion shall seem meet.

As to the punishment of principals in the second degree, and of accessaries before and after the fact, see above, p. 34.	Where a person having been convicted of any offence against the 2 W. 4. c. 34, shall afterwards be indicted of any offence against that Act committed subsequent to such conviction, any clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or the deputy of such clerk or officer, certifying or uttering as true any false copy of any indictment or conviction for any offence against the said Act, knowing the same to be false; or any person other than such clerk, officer, or deputy, signing or certifying any copy of any such indictment or conviction, as such clerk, officer, or deputy, or uttering any copy thereof with a false or counterfeit signature thereto, knowing the same to be false or counterfeit.	2 W. 4. c. 34. s. 9. 7 W. 4. & 1 Vic. c. 90. s. 5.

Appendix No. 5.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
TRANSPORTATION beyond the Seas for a term not exceeding FOURTEEN YEARS, or confinement with Hard Labour for a term not exceeding Five nor less than Three Years, at the discretion of the Court.		
	Dealing or trading in, purchasing, selling, bartering, or transferring, or contracting for the dealing or trading in, &c. (except in such special cases as are permitted or otherwise provided for by the 5 Geo. 4. c. 113., an Act to amend and consolidate the laws relating to the abolition of the slave-trade), of slaves or persons intended to be dealt with as slaves; Or otherwise than as aforesaid carrying away or removing or contracting for the carrying away, &c. of slaves or other persons as or in order to their being dealt with as slaves; Or importing or bringing or contracting for the importing, &c. into any place whatsoever slaves or other persons, as or in order to their being dealt with as slaves; Or otherwise than as aforesaid shipping, transhipping, embarking, receiving, detaining, or confining on board, or contracting for the shipping, &c., on board of any ship, vessel, or boat, slaves or other persons for the purpose of their being carried away or removed, as or in order to their being dealt with as slaves; Or shipping, &c., on board, or contracting for the shipping, &c., on board of any ship, &c., slaves or other persons for the purpose of their being imported or brought into any place whatsoever, as or in order to their being dealt with as slaves; Or fitting out, manning, navigating, equipping, dispatching, using, employing, letting, or taking to freight or on hire, or contracting for the fitting out, &c., any ship, &c., in order to accomplish any of the objects or theo ntracts in relation to the objects which are by the said Act declared unlawful; Or knowingly and wilfully lending or advancing or becoming security for the loan or advance, or contracting for the lending, &c., of money, goods, or effects employed or to be employed in accomplishing any of the objects &c.; or knowingly and wilfully becoming guarantee or security, or contracting for the becoming guarantee &c. for agents employed or to be employed in accomplishing any of the objects &c., or in any other manner engaging or contracting to engage, directly or indirectly, therein, as a partner, agent, or otherwise; Or knowingly and wilfully shipping, transshipping, lading, receiving, or putting on board, or contracting for the shipping, &c. on board of any ship &c., money, goods, or effects, to be employed in the accomplishing &c.; or taking the charge or command, or navigating, or entering and embarking on board, or contracting for the taking the charge &c. of any ship &c., as captain, master, mate, surgeon, or supercargo, knowing that such ship &c. is actually employed or is in the same voyage or on the same occasion, in respect of which they shall so take the charge &c., or contract so to do as aforesaid, intended to be employed in accomplishing &c. Or knowingly and wilfully insuring or contracting for the insuring of any slaves or any property or other subject-matter engaged or employed in accomplishing &c.; Or wilfully and fraudulently forging or counterfeiting any certificate, certificate of valuation, sentence or decree of condemnation or restitution, copy of sentence or decree of condemnation, &c., or any receipt (such receipts being required by the said Act), or any part of such certificate, &c. as aforesaid; Or knowingly and wilfully uttering or publishing the same, knowing it to be forged, &c., with intent to defraud His Majesty, his heirs or successors, or any other person or persons whatsoever, or any body politic or corporate.	5 Geo. 4. c. 113. s. 10.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
TRANSPORTATION beyond the Seas for the term of FOURTEEN YEARS, or in mitigation or commutation* of such punishment to be publicly whipped, fined, or imprisoned, or all or any one or more of them, as the Court in its discretion shall think fit.		
* In case of a second offence the Fourteen Years' Transportation is absolute. See 55 Geo. 3. c. 127, which extends these provisions to *all public stores*, marked as therein mentioned.	Wilfully and fraudulently destroying, beating out, taking out, cutting out, defacing, obliterating, or erasing wholly or in part any of the marks mentioned in the 9 and 10 W. 3. c. 41 (an Act for the better preventing the embezzlement of His Majesty's stores of war, and preventing cheats, frauds, and abuses in paying seamen's wages), and in the 39 and 40 Geo. 3. c. 89 (an Act for the better preventing the embezzlement of His Majesty's naval, ordnance, and victualling stores), or any other mark whatsoever denoting the property of His Majesty, his heirs or successors, in or to any warlike or naval, ordnance, or victualling stores, or causing, procuring, employing, or directing any other person or persons so to do for the purpose of concealing His Majesty's property in such stores.	9 & 10 W. 3. c. 41. 39 & 40 Geo. 3. c. 89. s. 4. 56 Geo. 3. c. 138.
	TRANSPORTATION for SEVEN YEARS.	
	Any number of persons not less than three within the hamlet of Wapping, Stepney, or any other place within the limits of the weekly bills of mortality of the cities of London and Westminster, wherein persons shall unlawfully assemble and associate for the sheltering themselves from their debts, of which complaint shall have been made by a presentment of the grand jury at a general or quarter sessions of the proper county, knowingly and wilfully obstructing and opposing any person or persons serving or endeavouring or attempting to serve or execute any writ or any rule or order of any court of law or equity or other legal process whatsoever, and in making such obstruction or opposition, assaulting, or abusing any person or persons serving or executing any such writ, &c., or for having so done, whereby any such person or persons shall receive any bodily hurt.	11 Geo. 1. c. 22. s. 1.
	Knowingly and wilfully resisting or opposing any officer or officers of justice, or any person or persons who shall be aiding or assisting to such officer or officers, in the execution of any writ or of any legal process, execution or extent, within the said hamlet of Wapping, Stepney, and places adjacent, or elsewhere, within the said bills of mortality, wherein persons shall unlawfully assemble and associate for the sheltering themselves from their debts, of which complaint shall have been made by a presentment of the grand jury at a general or quarter sessions of the proper county; or making rescue of any prisoner taken upon any such process, &c. within the places aforesaid; or knowingly harbouring or concealing any prisoner so taken, or any person or persons who rescued any such prisoner; or anywise contriving, or knowingly and wilfully abetting, aiding, or assisting in resisting any such officer or officers, or in rescuing any such prisoner or prisoners taken as aforesaid.	11 Geo. 1. c. 22. s. 2.
* See 5 Geo. 4. c. 84. s. 22, *ante*, p. 41, which appears to supersede the latter branch of this enactment, though it still continues in force, being excepted in the repeal of other parts of the	Aiding or assisting any prisoner to attempt to make his or her escape from the custody of any constable, headborough, tithingman, or other officer or person who shall then have the lawful charge of such prisoner in order to carry him or her to gaol by virtue of a warrant of commitment for treason or any felony expressed	

Appendix No. 5.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
16 Geo. 2. c. 31, by the 4 Geo. 4. c. 64. s. 1. See also 1 & 2 Geo. 4. c. 88. s. 1, by which it is enacted "That if any person shall rescue, or aid and assist in rescuing, from the lawful custody of any constable, officer, headborough or other person whomsoever, any person charged with or suspected of or committed for any felony, or on suspicion thereof, then if the person or persons so offending shall be convicted of felony and be entitled to the benefit of clergy, and be liable to be imprisoned for any term not exceeding one year, it shall be lawful for the court by or before whom any such person or persons shall be convicted, to order and direct, in case it shall think fit, that such person or persons, instead of being so fined and imprisoned as aforesaid, shall be transported beyond the seas for seven years, or be imprisoned only, or be imprisoned and kept to hard labour in the Common Gaol, House of Correction, or Penitentiary-house, for any term not less than one and not exceeding three years." By the common law, the offence of rescuing a prisoner in custody for felony (although such felony was not within clergy) was punishable as a felony with benefit of clergy, and consequently the offender, previously to the passing of the 1 & 2 Geo. 4. c. 88, could not be transported.	in such warrant; or aiding or assisting to any felon to attempt to make his escape from on board any boat, ship or vessel carrying felons for transportation, or from the contractor for the transportation of such felons, his assigns or agents, or any other person to whom such felon shall have been lawfully delivered in order for transportation.*	16 Geo. 2. c. 31. s. 3.
	Any persons, to the number of five or more, in a tumultuous and riotous manner assembling themselves to rescue any offenders against the 24 Geo. 2. c. 40, or any other Act relating to spirituous liquors or strong waters or for licensing the retailers thereof, or to assault, beat or wound any person or persons who shall have given or be about to give any information against, or shall have discovered or given evidence against, or shall seize or bring to justice any person or persons offending against the 24 Geo. 2. c. 40, or any of the said former Acts, or forcibly to oppose the execution of any of the powers given by the 24 Geo. 2. c. 40; or aiding or abetting therein.	24 Geo. 2. c. 40. s. 28.
	After execution had of a person convicted of murder, by force rescuing or attempting to rescue the body of such offender out of the custody of the sheriff or his officers during the conveyance of such body to any of the places directed by the 25 Geo. 2. c. 37 (an Act for better preventing the horrid crime of murder).	25 Geo. 2. c. 37. s. 9 & 10. 2 & 3 W. 4. c. 75.
* Enlarged to £300 by 33 Geo. 3. c. 5.	Prisoner charged in execution for any debt or damages not exceeding the sum of £100,* besides costs of suit, neglecting or refusing to deliver in and subscribe a just and true account of his or her whole estate and effects as directed, and within the time limited by the 32 Geo. 2. c. 28 (an Act for relief of debtors with respect to the imprisonment of their persons; and to oblige debtors who shall continue in execution in prison beyond a certain time, and for sums not exceeding what are mentioned in the Act, to make discovery of and deliver upon oath their estates for their creditors' benefit), without offering or making appear some just excuse for every such neglect or refusal; or refusing to assign or convey his or her estate and effects according to the order of the court, &c.	32 Geo. 2. c. 28. s. 17. 33 Geo. 3. c. 5. 39 Geo. 3. c. 50.
	Cutting, damaging, or spoiling any cordage, cable, buoys, buoy-rope, headfast or other fast fixed to any anchor or moorings belonging to any ship or vessel at anchor or moorings in the river Thames, or any rope used for the purpose of mooring or rafting masts or timber; or aiding or assisting therein, with an intent to steal the same.	2 Geo. 3. c. 28. s. 13.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	Obstructing any person or persons acting in the execution of any of the powers granted by the 2 Geo. 3. c. 28 (an Act to prevent the committing of thefts and frauds by persons navigating bum-boats and other boats upon the river Thames); or acting in the assistance of any person so obstructing.	2 Geo. 3. c. 28. s 19.
See also the 11 Geo. 2. c. 22. s. 1 & 2, which appears to be still in existence: and by the 6th section of the 36 Geo. 3. c. 9, it is provided, that nothing in that Act contained shall be deemed to take away any provision already made by the law of this realm, for the punishment of any offence mentioned in that Act; but that no person who shall be punished by virtue of that Act, shall be punished for the same offence by virtue of any other law or statute. * The first offence is punishable, on summary conviction, with imprisonment and hard labour, for any term not exceeding three nor less than one month.	Unlawfully stopping or seizing any wheat, flour, meal, malt, or other grain, in or on the way to or from any city, market-town, or place in this kingdom; or wilfully and maliciously breaking, cutting, or destroying any waggon, cart, or other carriage wherein any such wheat, &c. shall be loaded, or the harness of any horse or horses drawing or carrying the same; or unlawfully taking off from any such carriage, or driving away, killing, or wounding any such horse or horses, with intent to stop such wheat, &c.; or by cutting of the sacks or otherwise scattering or throwing abroad any such wheat, &c., or taking or carrying away, destroying spoiling, or damaging the same or any part thereof, (for the second offence.)*	36 Geo. 3. c. 9. s. 1 & 2.
† Qy. The word "down," omitted. None of the offences here specified appear to be affected by the 7 & 8 Geo. 4. c. 30. s. 8. as the offences provided against by that enactment must be committed by persons "riotously and tumultuously assembled together to the disturbance of the public peace."	With intent to prevent or hinder any corn, meal, flour, malt, or grain from being lawfully carried or removed from any place whatsoever, wilfully and maliciously pulling,† throwing down or otherwise destroying, any storehouse or granary, or other place in which corn, &c. shall be then kept, or unlawfully entering any such storehouse, &c., and taking and carrying away any corn, &c. therefrom, or throwing abroad or spoiling the same or any part thereof; or unlawfully entering on board any ship, barge, boat, or vessel, and wilfully and maliciously taking and carrying away, casting or throwing out therefrom, or otherwise spoiling or damaging any corn, &c. therein.	36 Geo. 3. c. 9. s. 2.
The 38 Geo. 3. c. 69, only relates to gold plate of the standard of 18 carats of fine gold in every pound weight, troy; the mark to denote which standard is a crown and the figures 18. The standard of 22 carats of fine gold in every pound weight, troy, has a different mark from that of 18 carats: see 12 Geo. 2. c. 26. As to forging the ordinary assay marks on gold and silver plate, see 12 Geo. 2. c. 26; 31 Geo. 2. c. 32; & 13 Geo. 3. c. 59.	Forging, casting, or counterfeiting, or causing or procuring to be forged, &c. the mark or stamp used or directed to be used, in pursuance of the 38 Geo. 3. c. 69 (an Act for allowing gold wares to be manufactured at a standard lower than is now allowed by law), for the marking or stamping of gold plate by the Company of Goldsmiths in London or Edinburgh, or the Sheffield Company, or by the wardens or assayer or assayers at York, Exeter, Bristol, Chester, Norwich, or Newcastle-upon-Tyne, or any or either of them, or any mark, stamp, or impression in imitation of or to resemble any mark, &c. made with any mark or stamp used as aforesaid by the said Company of Goldsmiths in London, &c., or any or either of them; or marking or stamping, or causing or procuring to be marked, &c. any wrought plate of gold or any wares of silver, brass, or other metal gilt over and resembling plate of gold, with any mark or stamp which hath been forged or counterfeited at any time in imitation of or to resemble any mark or stamp used as aforesaid by the said Company of Goldsmiths in London, &c., or any or either of them; or transposing or removing or causing or procuring to be transposed, &c. from one piece of wrought plate to another, or to any vessel of silver, brass, or other metal as aforesaid, any mark, stamp, or impression made by or with any mark or stamp used as aforesaid by the said Company of Goldsmiths in London, &c., or any or either of them; or selling, exchanging, or exposing to sale, or exporting out of this kingdom any wrought	38 Geo. 3. c. 69. s. 7.

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OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	plate of gold or any vessel of silver &c., as aforesaid with any such forged, &c. mark, &c. thereon, or any mark, &c. which hath been transposed or removed from any other piece of plate, knowing such mark, &c. to be forged, counterfeited, or transposed or removed as aforesaid; or wilfully or knowingly having or being possessed of any mark or stamp which hath been forged or counterfeited in imitation of and to resemble any mark or stamp used as aforesaid by the said Company of Goldsmiths in London, &c., or any or either of them.	
The 54 Geo. 3. c. 133, is extended to Contracts of Insurance by the 54 Geo. 3. c. 144.	Forging or counterfeiting, or causing or procuring to be forged, &c., or willingly aiding or assisting in the forging, &c. of the name or handwriting of any underwriter on any policy of insurance, to any declaration of any return of the premium on such policy or any part thereof; or fraudulently altering, or causing or procuring to be altered, or aiding or assisting in altering any such declaration after the same shall have been signed by any underwriter; or uttering or making use of any such declaration, knowing the same to have been fraudulently altered, or the name or handwriting of any underwriter to have been forged, &c. thereon, for the purpose of obtaining any such allowance as aforesaid, and with intent to defraud His Majesty, his heirs or successors—(for the second and every other offence).	54 Geo. 3. c. 133. s. 10
	Being armed with a gun, pistol, sword, or pike, or in a violent manner with staves or stones rescuing any offender arrested or any goods or chattels seized under the 6 Geo. 4. c. 80 (an Act to repeal the duties payable in respect of spirits distilled in England, &c.), or preventing such arrest or seizure, or assaulting, beating, or wounding any officer or officers or other person or persons acting in his or their aid or assistance, or any person or persons who shall have given or be about to give any information against, or shall have discovered or given evidence against, or be about to discover or give evidence against, or shall seize or bring to justice any person or persons offending against that Act, or who shall have seized or be about to seize or examine any goods or chattels forfeited under that Act; or forcibly opposing the execution of any of the powers given by that Act, or being so armed or with such violence as aforesaid offering or threatening so to do, or aiding or abetting the commission of any of such offences.	6 Geo. 4. c. 80. s. 143.
	Being found in company with more than four other persons with any goods liable to forfeiture, under the 3 & 4 W. 4. c. 53 (an Act for the prevention of smuggling), or any other Act relating to the revenue of Customs or Excise, or in company with one other person, within five miles of the sea coast or any navigable river leading therefrom, with such goods, and carrying offensive arms or weapons, or disguised in any way.	3 & 4 W. 4. c. 53. s. 60.
As to the punishment of principals in the second degree, and of accessaries before and after the fact, see observation at p. 36.	Forging or counterfeiting the handwriting of any person in the superscription of a post-letter, or altering or changing upon a post-letter the superscription thereof, or writing or sending by the post, or causing to be written or sent by the post, a letter, the superscription whereof in whole or in part shall be forged or counterfeited or altered, knowing the same to be forged, counterfeited, or altered, with intent in either of those cases to avoid the payment of the duty of postage.	7 W. 4. & 1 Vic. c. 36. s. 34.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	Transportation for any term not exceeding Seven Years.	
	Forging or counterfeiting the seal of the British Society for extending the Fisheries and improving the sea coasts of the kingdom, or any deed or writing under the common seal, or demanding any money in pursuance of any such forged or counterfeited deed or writing either from the Society or any members or servants thereof, knowing such writing to be forged, with intent to defraud the said Society or any other persons whomsoever.	26 Geo. 3. c. 106. s. 26.
Any society or club, the members whereof are required or admitted to take any oath or engagement herein specified, is an unlawful combination and confederacy, within the meaning of the 39 Geo. 3. c. 79. See 57 Geo. 3. c. 19.	Administering or causing to be administered, or aiding, assisting, or being present at and consenting to the administering or taking in any manner or form whatsoever of any oath or engagement purporting or intended to bind the person taking the same to engage in any mutinous or seditious purpose, or to disturb the public peace, or to be of any association, society, or confederacy formed for any such purpose, or to obey the orders or commands of any committee or body of men not lawfully constituted, or of any leader or commander or other person not having authority by law for that purpose, or not to inform or give evidence against any associate, confederate, or other person, or not to reveal or discover any unlawful combination or confederacy, or not to reveal or discover any illegal act done or to be done, or not to reveal or discover any illegal oath or engagement which may have been administered or tendered to or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement, or taking any such oath or engagement not being compelled thereto.	37 Geo. 3. c. 123. s. 1.
	Making, coining or counterfeiting any kind of coin not the proper coin of this realm, nor permitted to be current within the same, but resembling, or made with intent to resemble or look like any gold or silver coin of any foreign prince, state or country, or to pass as such foreign coin.	37 Geo. 3. c. 126. s. 2.
	Bringing into this realm any such false or counterfeit coin as aforesaid, resembling, or made with intent to resemble or look like any gold or silver coin of any foreign prince, state or country, or to pass as such foreign coin, knowing the same to be false or counterfeit, to the intent to utter the same within this realm or within any dominions of the same.	37 Geo. 3. c. 126. s. 3.
	Any pilot, hoveller, boatman, or master of any small vessel conveying any anchor or cable which may have been weighed, swept for, or taken possession of by them, or which they may have purchased of other persons, knowing them to have been weighed, &c., without being reported as is mentioned in 1 & 2 Geo. 4. c. 75 (an Act to continue and amend certain Acts for preventing frauds and depredations committed on merchants, ship-owners, and underwriters by boatmen and others; and also for remedying certain defects relative to the adjustment of salvage in England, under an Act made in the 12th year of Queen Ann), to any foreign port, harbour, creek or bay, and there selling and disposing of the same.	1 & 2 Geo. 4. c. 75. s. 15.
	Transportation for the term of Seven Years, or Imprisonment at the discretion of the Court for any period not less than Two Years.	
	Making, causing, or procuring to be made, or aiding or assisting in the making, or know-	

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OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	ingly having in one's custody or possession, not being authorized by the Commissioners of Excise, and without lawful excuse, any mould or frame, or other instrument having therein the words "Excise Office," or any other words, figures, marks, or devices peculiar to and appearing in the substance of the paper used by the said Commissioners for permits, or with any or part of such words, figures, marks, or devices, or any of them, intended to imitate or pass for the same; and, except as before excepted, making, &c., any paper in the substance of which the words "Excise Office," or any other words, &c., peculiar to or appearing in the substance of the paper used by the said Commissioners for permits, or any part of such words, &c., or any of them, intended to imitate or pass for the same, shall be visible; and, except as before excepted, knowingly having in one's custody or possession, without lawful excuse, any paper whatever in the substance of which the words "Excise Office," or any other words, &c., or any part of such words, &c., or any of them, intended to imitate, &c. shall be visible; and, except as before excepted, by any art, mystery, or contrivance, causing or procuring, or aiding, or assisting in causing or procuring the words "Excise Office," or any other words, &c., or any part of such words, &c., or any of them, intended to imitate, &c., to appear visible in the substance of any paper whatever; and not being authorized or appointed as aforesaid, engraving, casting, cutting, or making, or causing, or procuring to be engraved, &c., or aiding or assisting in engraving, &c., any plate, type, or other thing in imitation of, or to resemble any plate or type made or used by the direction of the Commissioners of Excise for the purpose of marking or printing the paper to be used for permits; and, except as before excepted, knowingly having in one's custody or possession without lawful excuse any such plate or type.	2 W. 4. c. 16. s. 3.

Transportation for Seven Years, or Imprisonment for any term not exceeding Four Years, as the Court shall direct.

	Falsely making, forging, or counterfeiting, or causing or procuring to be falsely made, &c., or willingly acting or assisting in the false making, &c. of any authority, or certificate, or bill of exchange mentioned in the 2 & 3 W. 4. c. 106 (an Act to enable the officers in His Majesty's Army, and their representatives, and the widows of officers and persons on the compassionate list, and also civil officers on retired and superannuation allowances payable by the Paymaster-general of His Majesty's forces, to draw for and receive their half-pay and allowances); or uttering as true any such false, &c. authority or certificate or bill of exchange, knowing the same to be false, &c., with intent to defraud any person or persons, body or bodies politic or corporate.	2 & 3 W. 4. c. 106. s. 3.

Transportation beyond the Seas for the term of Seven Years, or Imprisonment with or without Hard Labour in the Common Gaol or House of Correction, for any term not exceeding Three Years, and the offender to be kept in Solitary Confinement for any portion of such Imprisonment, not exceeding One Month at a time, or Three Months in the space of One Year, as to the Court shall seem meet.

As to the punishment of principals in the second degree, and of accessaries before and after the fact, see observation at p. 36.	Any person employed under the Post-office stealing, or for any purpose whatever embezzling, secreting, or destroying a post-letter.	7 W. 4. & 1 Vic. c. 36. s. 26 & 42. 7 W. 4. & 1 Vic. c. 90. s. 5.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
TRANSPORTATION beyond the Seas for the term of SEVEN YEARS, or Imprisonment for any term not exceeding Two nor less than One Year, with or without Hard Labour, in the Common Gaol or House of Correction, and to be kept in Solitary Confinement for any portion or portions of such Imprisonment, not exceeding One Month at a time or Three Months in the space of One Year, as to the Court in its discretion shall seem meet.		
As to the punishment of principals in the second degree, and of accessaries before and after the fact to this and the following two offences, see observation at p. 17.	Forging the name or handwriting of any person as or purporting to be a witness, attesting the execution of any power of attorney or other authority to transfer any share or interest of or in any stock, annuity, or public fund which now is or hereafter may be transferable at the Bank of England, or at the South-Sea House, or of or in the capital stock of any body corporate, company, or society which now is or hereafter may be established by charter or Act of Parliament, or to receive any dividend payable in respect of any such share or interest; or uttering any such power of attorney or other authority, with the name or handwriting of any person forged thereon as an attesting witness, knowing the same to be forged.	11 Geo. 4. & 1 W. 4. c 66. s. 8 & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Any clerk, officer, or servant of, or other person employed or intrusted by, the Governor and Company of the Bank of England, or the Governor and Company of Merchants, commonly called the South-Sea Company, knowingly making out or delivering any dividend warrant for a greater or less amount than the person or persons on whose behalf such dividend warrant shall be made out is or are intitled to, with intent to defraud any person whatsoever.	11 Geo. 4. & 1 W. 4. c. 66. s. 9 & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.
See the 6 & 7 W. 4. c. 86. Qy. If it has not incidentally repealed this enactment.	Knowingly and wilfully inserting, or causing or permitting to be inserted in any copy of any register of baptisms, marriages, and burials, directed by law to be transmitted to the registrar of the diocese, within which any parish, district-parish, or chapelry in England, where the ceremonies of baptism, marriage, and burial may lawfully be performed, may be situated, any false entry of any matter relating to any baptism, marriage, or burial; or forging, or altering or uttering, knowing the same to be forged or altered, any copy of any register so directed to be transmitted as aforesaid; or knowingly and wilfully signing or verifying any copy of any register so directed to be transmitted as aforesaid, which copy shall be false in any part thereof, knowing the same to be false.	11 Geo. 4. & 1 W. 4. c. 66. s. 22 & 26 7 W. 4. & 1 Vic. c. 90. s. 5.
TRANSPORTATION beyond the Seas for the term of SEVEN Years, or Imprisonment for any term not exceeding Two Years, with or without Hard Labour, in the Common Gaol or House of Correction, and to be kept in Solitary Confinement for any portion or portions of such Imprisonment, or of such Imprisonment with Hard Labour, not exceeding One Month at a time, or Three Months in the space of One Year, as to the Court in its discretion shall seem meet; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such Imprisonment.		
As to punishments for first and second offences, see p. 85.	Counterfeiting or causing to be counterfeited any of the seals used by the corporation or congregation of the Dutch Bay-Hall in Colchester, or, not being the officer thereunto by the said corporation appointed and in the place by them thereunto appointed, affixing any such seal or seals to any Colchester Bays, whether counterfeited or not. (For the third offence.)	12 Car. 2. c. 22. 7 & 8 Geo. 4. c. 28. s. 8 & 9. 7 W. 4. & 1 Vic. c. 90. s. 5.

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OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	Counterfeiting or forging any stamp or seal to resemble any stamp or seal which, in pursuance of the 5 Geo. 1. c. 2, (An Act, amongst other things, for better securing the duties on hides and skins, vellum and parchment), shall be from time to time directed or ordered by the Commissioners for the receipt, government, and management of the duties, or additional duties, by the 9 Ann. c. 11, and the 10 Ann. c. 19, set and imposed upon hides and skins, and pieces of hides and skins, and upon vellum and parchment, tanned, tawed, dressed, or made in Great Britain, to be made and used for the marking and stamping of all such hides and skins, and of pieces of hides and skins, and of vellum and parchment; or counterfeiting or resembling the impression of any such stamp or stamps, seal or seals, so directed or ordered as aforesaid, on any hide or skin, or piece of any hide or skin, or on any vellum or parchment, whereby to defraud His Majesty, his heirs or successors, of any of the duties imposed or charged by the said acts, or either of them; or uttering, vending, or selling any hide or skin, or any piece of any hide or skin, or any vellum or parchment, with such counterfeit mark or impression thereupon, knowing such mark or impression to be counterfeited.	9 Ann. c. 11. 10 Ann. c. 19. 5 Geo. 1. c. 2. s. 9. 52 Geo. 3. c. 143. s. 1. 7 & 8 Geo. 4. c. 28. s. 8 & 9. 7 W. 4. and 1 Vic. c. 90. s. 5.
	Within the place commonly called Suffolk-place or the Mint, in the parish of St. George, in the county of Surrey, or within any the limits or pretended limits thereof, knowingly and wilfully obstructing or opposing any person or persons serving, or endeavouring, or attempting to serve or execute any writ or any rule or order of any court of law or equity, or other legal process whatsoever, or any escape warrant, or any warrant or warrants of any justice or justices of the peace, or assaulting or abusing any person or persons serving or executing any such writ, rule, order, process, or warrant, or for having so done, whereby any person or persons shall receive any damage or bodily hurt.	9 Geo. 1. c. 28. s. 1.; 7 & 8 Geo. 4. c. 28. s. 8 & 9. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Resisting or opposing any officer or officers of justice, or any person or persons who shall be aiding or assisting to such officer or officers in the execution of any writ, or any escape warrant, or any warrant or warrants of any justice or justices of the peace, or of any legal process, execution, or extent within the said place called Suffolk-place or the Mint, or within any the limits or pretended limits thereof; or making rescous of any prisoner taken upon any such writ, &c., within the place or limits aforesaid; or there knowingly harbouring or concealing any prisoner so taken, or any person or persons who rescued any such prisoner; or anyways contriving or knowingly and willingly abetting, aiding, or assisting in resisting any such officer or officers, or in rescuing any such prisoner or prisoners taken as aforesaid; or presuming to exercise any unlawful jurisdiction, or making or executing, or joining in making &c. any pretended rule, order, or ordinance for supporting any pretended privilege within the said place called Suffolk-place or the Mint, or any the limits or pretended limits thereof, contrary to law, or for opposing or hindering the due execution of any legal process, or any lawful warrant, or any rule, order, or decree of any court of law or equity.	9 Geo. 1. c. 28. s. 2. 7 & 8 Geo. 4. c. 28. s. 8 & 9. 7 W. 4. & 1 Vic. c. 90. s. 5.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	Forging or counterfeiting any stamp, mark, or seal, to resemble any stamp, &c. provided or used in pursuance of the 4 Geo. 3. c. 37 (an Act for the better establishing a manufactory of cambrics and lawns, or goods of the kind usually known under those denominations now carrying on at Winchelsea, in the county of Sussex, &c.); or forging, resembling, or counterfeiting the impression of any such mark, stamp, or seal upon any goods required by that Act to be stamped, &c., or importing or bringing into England any foreign cambrics or lawns or goods of the kind usually known by or under either of those denominations having any such counterfeit mark, seal, stamp, or impression thereon, or selling or exposing to sale any cambrics or lawns, &c., with such counterfeit mark, &c., knowing such stamp, mark, or seal to be counterfeited.	4 Geo. 3. c. 37. s. 26. 52 Geo. 3. c. 143. s. 1. 7 & 8 Geo. 4. c. 28. s. 8 & 9. 7 W. 4. & 1 Vic. c. 90. s. 5.
* The 13 Geo. 3. c. 56. s. 5. is incidentally repealed by the 1 W. 4. c. 17. s. 1. so far as relates to "calicoes, linens, and stuffs."	Counterfeiting or forging any stamp or seal provided by the Commissioners for managing the duties upon silks, &c., or which shall hereafter be by them provided, renewed, or altered, or counterfeiting or resembling the impression of the same, upon any of the commodities, (*i. e. silks, calicoes, linens, and stuffs,** printed, painted, stained, or dyed in Great Britain), chargeable by the 10 Ann, c. 19, (made perpetual by the 3 Geo. 1. c. 7.) and the 12 Ann, st. 2. c. 9. (made perpetual by the 6 Geo. 1. c. 4.). thereby to defraud His Majesty, his heirs or successors, of any of the duties thereby granted.	13 Geo. 3. c. 56. s. 5. 52 Geo. 3. c. 143. s. 1. 7 & 8 Geo. 4. c. 28. s. 8 & 9. 7 W. 4. & 1 Vic. c. 90. s. 5.
Although some of these instruments are probably orders for the payment of money, within the meaning of the 4 sec. of 11 Geo. 4. and 1 W. 4. c. 66, yet the forging them was not punishable under that Act, and consequently was not affected by the 2 & 3 W. 4. c. 123, and 3 & 4 W. 4. c. 44, and, therefore, is not now punishable under the 7 W. 4. & 1 Vic. c. 84. s. 2 & 3. *vide ante*, p. 18. By the 53 Geo. 3. c. 151, to forge any of the instruments therein mentioned was made *felony only*, without its being declared to be punishable with death, or to be without benefit of clergy, and all such felonies were by the 7 & 8 Geo. 4. c. 28, declared to be punishable by transportation for seven years, &c. The 4 sec. of 11 Geo. 4. & 1 W. 4. c. 66, only makes forging orders for the payment of money capital, where it was so before the passing of that Act; and the 2 and 3 W. 4. c. 123 and 3 & 4 W. 4. c. 44 only relate to the punishment of such forgeries as were capital under the 11 Geo. 4. & 1 W. 4. c. 66.	Forging or counterfeiting, or procuring to be forged or counterfeited, or wilfully acting or assisting in the forging, &c. the name or hand of the Registrar of the High Court of Admiralty, and High Court of Appeals for prizes, or his deputy, or any of the cashiers of the Governor and Company of the Bank of England, *to any certificate, entry, indorsement, declaration of trust, note, direction, authority, instrument, or writing whatsoever, for, or in order to the receiving or obtaining any of the money* or effects of any of the suitors of the said courts or either of them; or forging, &c., or procuring to be forged, &c., or willingly acting or assisting in forging, &c., any certificate, &c., made by such registrar or his deputy, or any of the cashiers of the said Governor and Company of the Bank of England; or uttering or publishing any such, knowing the same to be forged, &c., with intent to defraud any person whatsoever.	53 Geo. 3. c. 151. s. 12. 7 & 8 Geo. 4. c. 28. s. 8 & 9. 7 W. 4. & 1 Vic. c. 90. s. 5.
Vide post, p. 63.	Any person having the custody of any convict ordered to be confined within the Penitentiary at Millbank, or being employed by the person having such custody as a keeper, underkeeper, turnkey, assistant, or guard, voluntarily permitting such convict to escape; or any person whatsoever, by supplying arms, tools, or instruments of disguise, or otherwise in any manner aiding and assisting to any such con-	56 Geo. 3. c. 63. s. 44. 7 & 8 Geo. 4. c. 28. s. 8 &9 7 W. 4. & 1 Vic. c. 90 s. 5.

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OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	vict in any escape, or in any attempt to make an escape, though no escape be actually made, or attempting to rescue any such convict, or aiding and assisting in any such attempt, though no rescue be actually made.	
	Any person or persons who shall have preserved or taken possession of any merchandize or marine stores, whether belonging to His Majesty or any British subjects or foreigners, from any ship or vessel stranded, deserted by her crew, or wrecked, within the jurisdiction of the Cinque Ports, selling, disposing of, or otherwise making away with the same, or in any manner concealing, defacing, taking out or obliterating the marks or numbers thereon, or altering the same in any manner with intent thereby directly or indirectly to prevent the discovery and identity of such articles by the owner or owners thereof.	1 & 2 Geo. 4. c. 76. s. 8. 7 & 8 Geo. 4. c. 28 s. 8 & 9. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Casting, forging, or counterfeiting, or causing or procuring to be cast, &c., any mark or stamp used for marking gold or silver plate in pursuance of 5 Geo. 4. c. lii. (an Act for repealing so much of an Act of the 13th year of the reign of His late Majesty King George the Third, intituled an Act for appointing wardens and assay masters for assaying wrought plate in the towns of Sheffield and Birmingham, as relates to the town of Birmingham, and within twenty miles thereof; and for granting further and more effectual powers for assaying and marking gold and silver plate wrought or made within the said town of Birmingham, and within thirty miles thereof, and for other purposes relating thereto), or by any maker or worker of gold or silver plate, or any or either of them; or casting, &c., or causing or procuring to be cast, &c., any mark, stamp, or impression in imitation of or to resemble any mark, &c., made with any mark or stamp used as aforesaid by the Company called or known by the name of "the Guardians of the standard of wrought plate in Birmingham," or by any maker or worker of gold or silver plate, or any or either of them; or marking or stamping, or causing or procuring to be marked, &c., any gold wrought plate or silver wrought plate, with any mark or stamp which hath been or shall be forged or counterfeited in imitation of or to resemble any mark or stamp used as aforesaid by the said Company, or by any maker or worker of gold or silver plate, or any or either of them; or transposing or removing, or causing or procuring to be transposed, &c., from one piece of gold wrought plate or silver wrought plate to another, or to any gold or silver vessel, or to any vessel of base metal, any mark, &c. made by or with any mark or stamp used as aforesaid by the said Company, or by any maker or worker of gold or silver plate or any or either of them; or selling, exchanging, or exposing to sale, or exporting out of this kingdom any gold wrought plate or silver wrought plate, or any vessel of base metal with any such forged or counterfeited mark, &c. thereon, or any mark, &c., which hath been or shall be transposed or removed from any other piece of gold or silver plate, knowing such mark, &c., to be forged, &c., as aforesaid; or wilfully or knowingly having or being possessed of any mark or stamp which hath been or shall be forged or counterfeited in imitation of, or to resemble any mark or stamp used as aforesaid by the said Company, or by any maker or	5 Geo. 4. c. lii. s. 22. 7 & 8 Geo. 4. c. 28. s. 8 & 9. 7 W. 4. & 1 Vic. c. 90. s. 5.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	worker of gold or silver plate, or any or either of them.	
	Any officer of His Majesty's customs, or any other officer or person whatsoever to whom it shall appertain to execute any order or orders made or to be made concerning quarantine or the prevention of infection, and notified as mentioned in the 6 Geo. 4. c. 78 (an Act to repeal the several Laws relating to the performance of Quarantine, and to make other provisions in lieu thereof), or to see the same put in execution, deserting from his duty when employed as aforesaid, or knowingly and willingly permitting any person, vessel, goods or merchandize to depart or be conveyed out of the lazaret, vessel or other place, as in the Act mentioned, unless by permission under an order of His Majesty, by and with the advice of his Privy Council, or under an order of two or more of the Lords or others of his Privy Council; Or any person authorized and directed by the said Act to give a certificate of a vessel having duly performed quarantine or airing, knowingly giving a false certificate thereof.	6 Geo. 4. c. 78. s. 21. 7 & 8 Geo. 4. c. 28. s. 8 & 9. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Knowingly or wilfully forging or counterfeiting, interlining, erasing, or altering, or procuring to be forged, &c. any certificate directed or required to be granted by any order of His Majesty, his heirs or successors, in council, now in force or hereafter to be made touching quarantine; or publishing any such forged, &c. certificate, knowing the same to be forged, &c.; or knowingly and wilfully uttering and publishing any such certificate, with intent to obtain the effect of a true certificate to be given thereto, knowing the contents of such certificate to be false.	6 Geo. 4. c. 78. s. 25. 7 & 8 Geo. 4. c. 28. s. 8 & 9. 7 W. 4. & 1 Vic. c. 90. s. 5.
See observation on 53 Geo. 3. c. 151, *ante*, p. 55, which equally applies to the punishment of these offences.	Knowingly and wilfully forging or counterfeiting, or acting or assisting in forging, &c. the name or handwriting of the Commissioners for the time being of His Majesty's woods, forests, land revenues, works and buildings, or of any or either of them, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the Governor and Company of the Bank of England, or of the Bank of Ireland, or of any private banker, on account of the said Commissioners; or forging, &c., or causing or procuring to be forged, &c., or knowingly and wilfully acting or assisting in the forging, &c., any draft, &c., in form of a draft made by the said Commissioners or any or either of them; or uttering or publishing any such, knowing the same to be forged, &c., with an intent to defraud the said Governor and Company of the Bank of England, or of the Bank of Ireland, or any private banker, or any body corporate, or any person or persons whomsoever.	7 & 8 Geo. 4. c. 28. s. 8 & 9. 10 Geo. 4. c. 50. s. 124. 2 & 3 W. 4. c. 1. s. 1. 7 W. 4. & 1 Vic. c. 90. s. 5.
By the 41 sec. of the 6 & 7 W. 4. c. 85, every prosecution under that Act is to be commenced within three	Knowingly and wilfully (except in the case of a marriage between two of the Society of Friends, commonly called Quakers, according to the usages of the said Society, or between two persons professing the Jewish religion, according to the usages of the Jews) solemnizing any marriage in England, except by special licence, in any other place than a church or chapel in which marriages may be solemnized according to the rites of the Church of England, or than the registered building or office specified in the notice and certificate required by the 6 & 7 W. 4. c. 85 (an Act for marriages in England);	7 & 8 Geo. 4. c. 28. s. 8 & 9. 6 & 7 W. 4. c. 85. s. 39.

Appendix No. 5.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
years after the offence committed.	Or, in any such registered building or office, knowingly and wilfully solemnizing any marriage in the absence of a registrar of the district in which such registered building or office is situated; Or, knowingly and wilfully solemnizing any marriage in England (except by licence) within 21 days after the entry of the notice to the superintendent registrar as directed by the said Act; or if the marriage is by licence, within seven days after such entry, or after three calendar months after such entry.	7 W. 4. & 1 Vic. c. 90. s. 5.
See the last observation.	Any superintendent registrar knowingly and wilfully issuing any certificate for marriage after the expiration of three calendar months after the notice shall have been entered by him, as in the said Act of the 6 & 7 W. 4. c. 85, is mentioned, or any certificate for marriage by licence before the expiration of seven days after the entry of the notice, or any certificate for marriage without licence before the expiration of 21 days after the entry of the notice, or any certificate, the issue of which shall have been forbidden, as in the said Act mentioned, by any person authorized to forbid the issue of the registrar's certificate, or, knowingly and wilfully registering any marriage in the said Act declared to be null and void; Or, any registrar knowingly and wilfully issuing any licence for marriage after the expiration of three calendar months after the notice shall have been entered by the registrar as in the said Act mentioned, or knowingly and wilfully solemnizing in his office any marriage in the said Act declared to be null and void.	7 & 8 Geo. 4. c. 28. s. 8 & 9. 6 & 7 W. 4. c. 85. s. 40. 7 W. 4. & 1 Vic. c. 90. s. 5.
* The words of the Act are "in the *last-recited Act* declared to be null and void." The 6 & 7 W. 4. c. 86, is the last-recited Act; but, query if the *last-mentioned Act*, which is the 6 & 7 W. 4. c. 85 (an Act for Marriages in England), were not intended? See the offence immediately preceding.	Any superintendent registrar knowingly and wilfully issuing any licence for marriage after the expiration of three calendar months after the notice shall have been entered by the superintendent registrar, as provided by the said Act of the 6 & 7 Will. 4. c. 85; or knowingly and wilfully solemnizing or permitting to be solemnized in his office any marriage in the 6 & 7 Will. 4. c. 86 (an Act for registering Births, Deaths, and Marriages in England*), declared to be null and void.	7 & 8 Geo. 4. c. 28, s. 8 & 9. 6 & 7 W. 4, c. 85. 7 W. 4. & 1 Vic. c. 22, s. 3. 7 W. 4. & 1 Vic. c. 90, s. 5.
By sec. 44 it is provided, that no person charged with the duty of registering any birth, death, or marriage, who shall discover any error to have been committed in the form or substance of any such entry, shall be therefore liable to any of the penalties aforesaid, if within one calendar month next after the discovery of such error, in the presence of the parents of the child whose birth may have been so registered, or of the parties married, or of two persons attending upon any person in his or her last illness, whose death may have been so registered, or, in case of the death or absence of the respective parties aforesaid, then in the presence of the superintendent registrar and of two other credible witnesses, who shall respectively attest the same, he shall correct the erroneous entry according to the truth of the case, by entry in the margin, without any alteration of the original entry, and shall sign the mar-	Wilfully destroying, or injuring, or causing to be destroyed or injured, any register-book (to be provided in pursuance of the 6 & 7 W. 4. c. 86, an Act for registering births, deaths, and marriages in England), or any part or certified copy of any part thereof; or falsely making or counterfeiting, or causing to be falsely made, &c., any part of any such register-book or certified copy thereof; or wilfully inserting or causing to be inserted in any register-book or certified copy thereof, any false entry of any birth, death, or marriage, or wilfully giving any false certificate, or certifying any writing to be a copy or extract of any register-book, knowing the same register to be false in any part thereof, or forging or counterfeiting the seal of the Register Office.	7 & 8 Geo. 4. c. 28. s. 8 & 9. 6 & 7 W. 4. c. 86. s 43. 7 W. 4. & 1 Vic. c. 90. s. 5.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	ginal entry, and add thereunto the day of the month and year, when such correction shall be made: Provided also, that in the case of a marriage register, he shall make the like marginal entry, attested in like manner in the duplicate marriage register book, to be made by him, and in every case shall make the like alteration in the certified copy of the register book to be made by him, or in case such certified copy shall have been already made, provided he shall make and deliver in like manner a separate certified copy of the original erroneous entry, and of the marginal corrections therein made.	
	Clerk of the court, officer having the custody of the records of the court, or deputy of such clerk or officer, uttering a false certificate of any indictment and conviction of a previous felony; or any person other than such clerk, officer or deputy, signing any such certificate as such clerk, &c. or uttering any such certificate with a false or counterfeit signature thereto.	7 & 8 Geo. 4. c. 28. s. 10 & 11. 7 W. 4. & 1 Vic. c. 90. s. 5.
See 11 Geo. 3. c. 14. s. 26. 11 Geo. 3. c. 43. s. 52. As to the punishment of principals in the second degree, and of accessaries before and after the fact to this and the following 20 offences, see above, p. 33.	Simple larceny.	7 & 8 Geo. 4. c. 29. s. 3 & 4. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Unlawfully and wilfully coursing, hunting, snaring, or carrying away, or killing, or wounding, or attempting to kill or wound any deer kept, or being in the inclosed part of any forest, chase, or purlieu, or in any inclosed land wherein deer shall be usually kept.	7 & 8 Geo. 4. c. 29. s. 3, 4, & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.
The first offence is punishable by a pecuniary penalty.	Having been previously convicted of unlawfully and wilfully coursing, hunting, snaring, or carrying away, or killing, or wounding, or attempting to kill or wound any deer kept, or being in the uninclosed part of any forest, chase, or purlieu, or of any other offence relating to deer, for which a pecuniary penalty is imposed by the 7 & 8 Geo. 4. c. 29. offending a second time by committing any of the offences hereinbefore last enumerated, whether such second offence be of the same description as the first offence or not.	7 & 8 Geo. 4. c. 29. s. 3, 4, & 26. 7 W. 4. & 1 Vic. c. 90. s. 5.
By the 29 sec. of the 7 & 8 Geo. 4. c. 29, keepers, &c. are empowered to demand from offenders any guns, &c. in their possession, and, on not being immediately delivered up, to seize the same.	Having entered into any forest chase or purlieu (whether inclosed or not), or into any inclosed land where deer shall be usually kept, with intent unlawfully to hunt, course, wound, kill, snare, or carry away any deer, unlawfully beating or wounding any person intrusted with the care of the deer, or any of his assistants in the execution of any of the powers given by the 7 & 8 Geo. 4. c. 29 (an Act for consolidating and amending the laws in England relative to larceny and other offences connected therewith).	7 & 8 Geo. 4. c. 29. s. 3, 4, & 29. 7 W. 4. & 1 Vic. c. 90. s. 5.
This offence is declared to be larceny. See 7 & 8 Geo. 4. c. 29. s. 36.	Stealing any oysters or oyster brood from any oyster bed, laying, or fishery, being the property of any other person, and sufficiently marked out and known as such.	7 & 8 Geo. 4. c. 29. s. 3, 4, & 36. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Stealing or severing with intent to steal the ore of any metal, or any lapis calaminaris, manganese, or mundick, or any wad, black cawke, or black lead, or any coal or cannel coal, from any mine, bed, or vein thereof respectively.	7 & 8 Geo. 4. c. 29. s. 3, 4, & 37. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Stealing or cutting, breaking, rooting up, or otherwise destroying or damaging with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of £1);	7 & 8 Geo. 4. c. 29. s. 3, 4, & 38. 7 W. 4. & 1 Vic. c. 90. s. 5.

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OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	Or stealing, &c., any tree &c., respectively growing elsewhere than in any of the situations hereinbefore mentioned (in case the value of the article or articles stolen, or the amount of the injury done shall exceed the sum of £5) ;	
The first offence is punishable by a pecuniary penalty; the second by imprisonment with hard labour, and, if a male, whipping.	Or stealing, &c., any tree, &c., wheresoever the same may be respectively growing, (the stealing of such article or articles, or the injury done, being to the amount of 1*s.* at the least,) in case the offender shall have been twice previously convicted.	7 & 8 Geo. 4. c. 29. s. 3, 4, & 39. 7 W. 4. & 1 Vic. c. 90. s. 5.
The first offence is punishable by imprisonment, with or without hard labour, or by fine.	Stealing or destroying, or damaging with intent to steal, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery-ground, hothouse, greenhouse, or conservatory, having been previously convicted of any of the said offences.	7 & 8 Geo. 4. c. 29. s. 3, 4, & 42. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Stealing or ripping, cutting or breaking, with intent to steal, any glass or woodwork, belonging to any buildings whatsover, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, respectively fixed in or to any buildings whatsoever, or anything made of metal, fixed in any land, being private property, or for a fence to any dwelling-house, garden, or area, or in any square, street, or other place dedicated to public use or ornament.	7 & 8 Geo. 4. c. 29. s. 3, 4, & 44. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Any person stealing any chattel or fixture, let to be used by him or her, in or with any house or lodging (whether the contract shall have been entered into by him or her, or by her husband, or by any person on behalf of him or her, or her husband).	7 & 8 Geo. 4. c. 29. s. 3, 4, & 45. 7 W. 4. & 1 Vic. c. 90. s. 5.
* As to which, see p. 34.	Unlawfully and maliciously cutting, breaking, or destroying, or damaging with intent to destroy or render useless, any threshing machine, or any machine or engine, whether fixed or moveable, prepared for or employed in any manufacture whatsoever, (except the manufacture of silk, woollen, linen, or cotton goods, or goods of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace.*)	7 & 8 Geo. 4. c. 30 s. 4 & 27. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Unlawfully and maliciously causing any water to be conveyed into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof; or with the like intent wilfully and maliciously pulling down, filling up, or obstructing any airway, waterway, drain, pit, level, or shaft, of or belonging to any mine.	7 & 8 Geo. 4. c. 30. s. 6 & 27. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Unlawfully and maliciously pulling down or destroying, or damaging with intent to destroy or to render useless, any steam-engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, whether such building, &c., be completed or in an unfinished state.	7 & 8 Geo. 4. c. 30. s. 7 & 27. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Unlawfully and maliciously damaging, otherwise than by fire, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same, or to render the same useless.	7 & 8 Geo. 4. c. 30. s. 10 & 27. 7 W. 4. & 1 Vic. c. 90. s. 5.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	Unlawfully and maliciously cutting off, drawing up, or removing any piles, chalk, or other materials fixed in the ground, and used for securing any sea-bank or sea-wall, or the bank or wall of any river, canal, or marsh; or unlawfully and maliciously opening or drawing up any flood-gate, or doing any other injury or mischief to any navigable river or canal, with intent, and so as thereby to obstruct or prevent the carrying on, completing, or maintaining the navigation thereof.	7 & 8 Geo. 4. c. 30. s. 12 & 27. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Unlawfully and maliciously setting fire to any crop of corn, grain, or pulse, whether standing or cut down, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorze, furze, or fern, wheresoever the same may be growing.	7 & 8 Geo. 4. c. 30. s. 17 & 27. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Unlawfully and maliciously cutting, breaking, barking, rooting up, or otherwise destroying or damaging the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, (in case the amount of the injury done shall exceed the sum of £1).	7 & 8 Geo. 4. c. 30. s. 19 & 27. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Unlawfully and maliciously cutting, breaking, barking, rooting up, or otherwise destroying or damaging the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations hereinbefore mentioned, (in case the amount of the injury done shall exceed the sum of £5).	7 & 8 Geo. 4. c. 30. s. 19 & 27. 7 W. 4. & 1 Vic. c. 90. s. 5.
The first offence is punishable by a pecuniary penalty; the second by imprisonment and hard labour.	Having been twice convicted of unlawfully and maliciously cutting, breaking, barking, rooting up or otherwise destroying or damaging the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the injury done being to the amount of 1*s.* at the least, committing any of the said offences.	7 & 8 Geo. 4. c. 30. s. 20 & 27. 7 W. 4. & 1 Vic. c. 90. s. 5.
The first offence is punishable by fine or imprisonment, with or without hard labour.	Having been convicted of unlawfully and maliciously destroying, or damaging with intent to destroy, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery-ground, hot-house, green-house, or conservatory, afterwards committing any of the said offences.	7 & 8 Geo. 4. c. 30. s. 21 & 27. 7 W. 4. & 1 Vic. c. 90. s. 5.
* That is to say, if under sentence of imprisonment, by an addition not exceeding two years to the term for which he or she at the time of his or her breach of prison or escape was subject to be confined, and, if under sentence of transportation, in such manner as persons under sentence of transportation, escaping from or breaking out of any other prison or place of confinement, are liable to be punished. Also by the 12th sec. of the 1 & 2 Vic. c. 82. it is enacted, That if any offender who shall be ordered to be confined in the said prison shall, at any time during the term of such confinement, attempt to break prison or escape from the place of his or her confinement, or shall forcibly break out of his or her cell, or shall make any breach therein with intent to escape, he or she so offending, being convicted thereof, shall be punished by imprisonment, for a term not exceeding twelve calendar months, in addition to the punishment to which he or she at the time of committing any such offence was subject.	Offender, who, being ordered to be confined in Parkhurst prison, shall have at any time during the term of such confinement broken prison or escaped from the place of his or her confinement, or in his or her conveyance to such place of confinement, or from any lands belonging to the prison, or from the person or persons having the lawful custody of such offender, and shall have been punished for so doing, as in the 1 & 2 Vic. c. 82. s. 12. is mentioned,* being afterwards convicted of a second escape or breach of prison.	7 & 8 Geo. 4. c. 28. s. 8 & 9. 7 W. 4. & 1 Vic. c. 90. s. 5. 1 & 2 Vic. c. 82. s. 12.

Appendix No. 5.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	Rescuing any offender who shall be ordered to be confined within Parkhurst prison, either during the time of his or her conveyance to the said prison, or whilst such offender shall be in the custody of the person or persons under whose charge and care he or she shall be so confined, or aiding in any such rescue.	7 & 8 Geo. 4. c. 28. s. 8 & 9. 7 W. 4. & 1 Vic. c. 90. s. 5. 1 & 2 Vic. c. 82. s. 13.
	Person having the custody of any such offender, or employed by the person having such custody, as a keeper, under-keeper, turn-key, assistant, or guard, knowingly allowing such offender to escape.	7 & 8 Geo. 4. c. 28. s. 8 & 9. 7 W. 4. & 1 Vic. c. 90. s. 5. 1 & 2 Vic. c. 82. s. 13.
	By supplying arms, tools, or instruments of disguise, or otherwise, in any manner aiding any such offender in any escape, or in any attempt to make an escape, though no escape be actually made; or attempting to rescue any such offender, or aiding in any such attempt, though no rescue be actually made.	7 & 8 Geo. 4. c. 28. s. 8 & 9. 7 W. 4. & 1 Vic. c. 90. s. 5. 1 & 2 Vic. c. 82. s. 13.

TRANSPORTATION beyond the Seas for the term of SEVEN YEARS, or Imprisonment, with or without Hard Labour, in the Common Gaol or House of Correction, for any term not exceeding Two Years, and, if a male, the offender to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such Imprisonment.

This offence does not extend to fathers taking their illegitimate children. As to the punishment of accessaries after the fact, see observation at p. 37.	Maliciously, either by force or fraud, leading or taking away, or decoying or enticing away, or detaining any child under the age of 10 years, with intent to deprive the parent or parents, or any other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong; or with any such intent as aforesaid, receiving or harbouring any such child, knowing the same to have been by force or fraud led, taken, decoyed, enticed away, or detained as hereinbefore mentioned; or counselling, aiding, or abetting therein.	9 Geo. 4. c. 31. s. 21.

TRANSPORTATION beyond the Seas for the term of SEVEN YEARS, or Imprisonment, with or without Hard Labour, in the Common Gaol or House of Correction, for any term not exceeding Two Years.

This offence does not include the case of a person marrying a second time, whose husband or wife shall have been absent, and not known to be living, for seven years; or who shall have been divorced from the first marriage; or whose former marriage shall have been declared void by the sentence of any Court of competent jurisdiction; nor to any second marriage contracted out of England by any other than a subject of His Majesty. See sec. 22. As to the punishment of accessaries after the fact, see observation at p. 37.	Any person being married marrying any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or elsewhere; or any person counselling, aiding, or abetting such offender.	9 Geo. 4. c. 31. s. 22.

TRANSPORTATION for any term not exceeding SEVEN YEARS, or Imprisonment for any number of Years, at the discretion of the Court.

Similar provisions are made for the Cinque Ports by the 1 & 2 Geo. 4. c. 76. s. 6; but under the penalty of transportation for any period not exceeding 14 years.	Wilfully cutting away, casting adrift, removing, altering, defacing, sinking, or destroying, or doing or committing any act with intent and design to cut away, &c., or in any other way injure or conceal any buoy, buoy-rope or mark belonging to any vessel or ship, or which may be attached to any anchor or cable belonging to any ship or vessel whatever, whether in distress or otherwise.	1 & 2 Geo. 4. c. 75. s. 11.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.

TRANSPORTATION beyond the Seas for any term not exceeding SEVEN YEARS, or Imprisonment for any term not exceeding Two Years, with or without Hard Labour, in the Common Gaol or House of Correction, and to be kept in solitary confinement for any portion or portions of such Imprisonment, not exceeding One Month at a time, or Three Months in the space of One Year, as to the Court in its discretion shall seem meet.

As to the punishment of principals in the second degree, and of accessaries before and after the fact, see observation at p. 34.	Falsely making or counterfeiting any coin resembling or apparently intended to resemble or pass for any of the King's current copper coin; or knowingly and without lawful authority making or mending or beginning or proceeding to make or mend, or buying or selling, or knowingly and without lawful excuse having in one's custody or possession any instrument, tool, or engine adapted and intended for the counterfeiting any of the King's current copper coin; or buying or selling, receiving, paying or putting off, or offering to buy, &c. any false or counterfeit coin resembling, &c. any of the King's current copper coin at or for a lower rate or value than the same by its denomination imports or was coined or counterfeited for.	2 W. 4. c. 34. s. 12. 7 W. 4. & 1 Vic. c. 90. s. 5.

TRANSPORTATION beyond the Seas for any time not exceeding SEVEN YEARS, or Fine, Imprisonment, and such corporal punishment, by public or private whipping,* as the Court shall direct.

* By the 1 Geo. 4. c. 57. s. 3. it is enacted, "That in all cases where the punishment of whipping, either publicly or privately, on *female* offenders, has hitherto formed the whole or part of the judgment, or sentence to be pronounced, or has in any other case been inflicted, it shall and may be lawful for the Court or Justice of the Peace before whom any such offender shall be tried or convicted, to pass sentence of confinement to hard labour in the Common Gaol or House of Correction, for any space of time not exceeding six months, nor less than one month; or of solitary confinement therein for any space not exceeding the space of seven days at any one time, in lieu of the sentence of being publicly or privately whipped, as to the said Court or Justice shall seem most proper.	Any person or persons keeping or using any slaughtering-house or place, slaughtering any horse, mare, or gelding, foal or filly, ass or mule, or any bull, cow, heifer, ox, calf, sheep, hog, goat, or other cattle, for any other purpose than for butcher's meat, or flaying any horse, mare, gelding, &c. brought dead to such slaughtering-house or other place, without taking out such licence, or without giving such notice as required by the 26 Geo. 3. c. 71 (an Act for regulating houses and other places kept for the purpose of slaughtering horses), or slaughtering, killing, or flaying the same at any time or times other than and except within the hours in the said Act limited, or not delaying to slaughter or kill the same according to the direction of the Inspector authorized to prohibit the same.	26 Geo. 3. c. 71. s. 8.†
† See also the 5 & 6 W. 4. c. 59. s. 7 & 8.		

CONFINEMENT in the PENITENTIARY at MILLBANK for any term not exceeding FIVE, nor less than ONE YEAR.

Where a convict, ordered to be confined in the general Penitentiary at Millbank, at any time during the term of such confinement, breaks prison, or escapes from the place of his confinement, or in his conveyance to such place of confinement, or from the person or persons having the lawful custody of such convict, he is punishable by an addition not exceeding Three Years to the term for which he, at the time of his breach of prison or escape, was subject to be confined. And where he attempts to break prison or escape from the place of his confinement, or forcibly breaks out of his cell, or makes any breach therein with intent to escape therefrom, he is punishable by an addition not exceeding Six Calendar Months to the term for which he at the time of committing any such offence was subject to be confined. See 59 Geo. 3. c. 136.	Rescuing any convict who shall be ordered to be confined within the Penitentiary at Millbank, either during the time of his or her conveyance to the said Penitentiary, or whilst such convict shall be in the custody of the person or persons under whose care and charge he or she shall be so confined; or aiding or assisting in any such rescue.	56 Geo. 3. c. 63. s. 44.

Appendix No. 6.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
As to prison breach generally, see 1 Edw. 2. st. 2, which is as follows: "Concerning prisoners which break prison, our Lord the King willeth and commandeth that none from henceforth that breaketh prison shall have judgment of life or member for breaking of prison only, except the cause for which he was taken and imprisoned did require such judgment, if he had been convicted thereupon according to the law and custom of the realm, albeit in times past it hath been used otherwise." By the 7 & 8 Geo. 4. c. 33, it is enacted that "if any convict, in the general Penitentiary at Millbank, shall assault the governor thereof, or any officer or servant employed therein, upon conviction thereof, he shall be liable to be confined in the said Penitentiary for any term not exceeding Two Years in addition to the term for which, at the time of committing such offence, he or she was subject to be confined, and shall also be liable (if a male) to be publicly or privately whipped, if the court shall so think fit."—*Vide ante*, p. 55.		

Imprisonment, with or without Hard Labour, in the Common Gaol or House of Correction, for any term not exceeding Three Years, and the Offender to be kept in Solitary Confinement for any portion or portions of such Imprisonment, or of such Imprisonment with Hard Labour, not exceeding One Month at any one time, and not exceeding Three Months in any One Year, as to the Court in its discretion shall seem meet.

As to the punishment of principals in the second degree, and of accessaries before and after the fact to these offences, see observation at p. 10.	Assaulting any person with intent to rob (save and except in the cases where a greater punishment is provided by the 7 W. 4. & 1 Vic. c. 87), *vide ante*, p. 10 & 13.	7 W. 4. & 1 Vic. c. 87. s. 6 & 10.
	With menaces or by force demanding any property of any person with intent to steal the same.	7 W. 4. & 1 Vic. c. 87. s. 7 & 10.

Appendix No. 6.

LIST of INDICTABLE MISDEMEANORS* classed according to their Punishments under the present Law.

Transportation for Life.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	After being sentenced and ordered to be banished under the provisions of the 10 Geo. 4. c. 7, (an Act for the relief of His Majesty's Roman Catholic subjects,) being at large within any part of the United Kingdom, without some lawful excuse, after the end of three calendar months from the time such sentence and order hath been pronounced.	10 Geo. 4. c. 7. s. 36.

Banishment from the United Kingdom for Life.

	Jesuit or member of any religious order, community, or society of the Church of Rome, bound by monastic or religious vows, coming into this realm;	10 Geo. 4. c. 7. s. 29.
	Or, having obtained the Secretary of State's licence to remain therein, under the provisions of the 10 Geo. 4. c. 7, (an Act for the relief of His Majesty's Roman Catholic subjects,) not departing from the United Kingdom within twenty days after the expiration mentioned in such licence, or if such licence shall have been revoked, then within twenty days after notice of such revocation shall have been given to him.	10 Geo. 4. c. 7. s. 31.

* It should be observed that every infringement of a statute which either prohibits a matter of public grievance, or commands a matter of public convenience, is an indictable misdemeanor, but that only those misdemeanors which are expressly declared to be so, or which have their punishments assigned them by statute, have been included in this list.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	Within any part of the United Kingdom being admitted or becoming a jesuit, or brother, or member of any such religious order, community, or society as aforesaid.	10 Geo. 4. c. 7. s. 34.

TRANSPORTATION for the term of FOURTEEN YEARS.

	Casting, forging, or counterfeiting, or causing or procuring to be cast, &c., any mark or stamp, used for marking plate, in pursuance of the 13 Geo. 3. c. 52. (an Act for appointing wardens and assay-masters for assaying wrought plate, in the towns of Sheffield and Birmingham,) or by any maker or worker of silver plate, or any or either of them, or any mark, stamp, or impression in imitation of or to resemble any mark, &c., made with any mark or stamp used as aforesaid by the Sheffield Company, or by any maker or worker of silver plate, or any or either of them; or marking or stamping, or causing or procuring to be marked, &c., any silver wrought plate, with any mark or stamp which hath been forged or counterfeited in imitation of or to resemble any mark, &c., used as aforesaid by the said Company, &c.; or transposing or removing, or causing or procuring to be transposed, &c., from one piece of wrought plate to another, or to any plated vessel or to any vessel of base metal, any mark, stamp, or impression, made by or with any mark or stamp, used as aforesaid by the said Company, &c.; or selling, exchanging, or exposing to sale or exporting out of this kingdom any silver wrought plate, or any vessel of base metal, with any such forged, &c., mark, &c., thereon, or any mark, &c., which hath been transposed or removed from any other piece of plate, knowing such mark, &c., to be forged, counterfeited, or transposed or removed as aforesaid; or wilfully or knowingly having or being possessed of any mark or stamp which hath been forged or counterfeited in imitation of or to resemble any mark or stamp used as aforesaid by the said Company, &c.	13 Geo. 3. c. 52. s. 14. 5 Geo. 4. c. lii. s. 1.

TRANSPORTATION beyond the Seas for a term of FOURTEEN YEARS, or, in mitigation or commutation* of such punishment, to be publicly whipped,† fined, or imprisoned, or all or any one or more of them as the Court in its discretion shall think fit.‡

* In the case of a second offence, the Fourteen Years Transportation is absolute. † The punishment of whipping is abolished in the case of *female* offenders. *Vide ante*, p. 63. ‡ By the 39 & 40 Geo. 3. c. 89. s. 1. it is enacted that the persons committing the offences therein mentioned, shall be deemed *receivers of stolen goods*, knowing them to have been stolen, and shall, on being convicted thereof in due form of law, be transported beyond the seas for the term of 14 years, *in manner as other receivers of stolen goods are directed to be transported by the laws and statutes of this realm;* and then, by s. 7, empowers the court to mitigate or commute the punishment as above mentioned: Query,	Any person or persons, not being a contractor or employed as in the 9 & 10 W. 3. c. 41, (an Act for the better preventing the embezzlement of His Majesty's stores of war, and preventing cheats, frauds, and abuses, in paying seamen's wages,) is mentioned, willingly or knowingly selling or delivering, or causing or procuring to be sold, &c., to any person or persons whomsoever, or willingly or knowingly receiving, or having in his, her, or their custody, possession, or keeping, any stores of war, or naval, ordnance, or victualling stores, or any goods whatsoever, marked as in the said Act of the 9th & 10th year of W. 3. c. 41, and in an Act of the 9 Geo. 1. c. 8, (for continuing some laws and reviving others therein mentioned, for exempting apothecaries from serving parish and ward offices and upon juries, and relating to jurors and to the payment of seamen's wages, and the preservation of naval stores, and stores of war, &c., &c.,) are expressed, or any canvas, marked either with a blue streak in the middle, or with a blue streak in a serpentine form, or any bewper, otherwise called buntin, wrought with one or more streaks of raised tape, (the said stores of war, &c. above mentioned, or any of them, being in a raw or unconverted state,	9 & 10 W. 3. c. 41. 9 Geo. 1. c. 8. 39 & 40 Geo. 3. c. 89. s. 1 & 7. 56 Geo. 3. c. 138. s. 2.

Appendix No. 6.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
therefore, Is the punishment of these offences affected by s. 55 of the 7 & 8 Geo. 4. c. 29? See the same at p. 70 *post*. By the 54 Geo. 3. c. 60, these provisions are extended to His Majesty's cordage; and by the 55 Geo. 3. c. 127, are further extended to *all public stores* whatsoever under the care, superintendence or control of any officer or person in the service of His Majesty, or employed in any public department or office, either marked with the marks specified in the Acts in the margin, or with the broad arrow and the letters B. O., or with a crown and the broad arrow, or with His Majesty's arms, or with the letters G. R., to denote the property of His Majesty.	or being new or not more than one-third worn;) or concealing such stores or goods, or any of them, marked as aforesaid, unless such person or persons shall, upon his, her, or their trial, produce a certificate, under the hands of three or more of His Majesty's principal officers or commissioners of the navy, ordnance, or victualling, expressing the numbers, quantities, or weights of such stores or goods as he, she, or they shall then be indicted for, and the occasion and reason of such stores or goods coming to his, her, or their hands or possession.	
See 54 Geo. 3. c. 60, and 55 Geo. 3. c. 127.	Being guilty of a second offence, contrary to the said Acts of the 9 & 10 W. 3. c. 41, and 39 & 40 Geo. 3. c. 89, which would not otherwise, as the first offence, subject a person to transportation. (See such offences, p. 81 & 82.)	9 & 10 W. 3. c. 41. 39 & 40 Geo. 3. c. 89. s. 5 & 7. 56 Geo. 3. c. 138. s. 2.

TRANSPORTATION beyond the Seas for any term not exceeding FOURTEEN nor less than SEVEN YEARS, or Fine or Imprisonment, with or without Hard Labour, in the Common Gaol or House of Correction, or both, and to be kept in Solitary Confinement for any portion or portions of such Imprisonment, or of such Imprisonment with Hard Labour, not exceeding One Month at a time, or Three Months in the space of One Year, as to the Court in its discretion shall seem meet.

By sec. 61 of the 7 & 8 Geo. 4. c. 29, it is enacted, "That every person who shall aid, abet, counsel or procure the commission of any misdemeanor punishable under that Act, shall be liable to be indicted and punished as a principal offender.	Any money or security for the payment of money being intrusted to any banker, merchant, broker, attorney, or other agent, with any direction in writing to apply such money, or any part thereof, or the proceeds or any part of the proceeds of such security for any purpose specified in such direction, such banker, &c., in violation of good faith and contrary to the purpose so specified, in anywise converting to his own use or benefit such money, security, or proceeds, or any part thereof respectively.	7 & 8 Geo. 4. c. 29. s. 4 & 49. 7 W. 4. & 1 Vic. c. 90. s. 5.
This enactment does not affect trustees or mortgagees, nor bankers, &c., receiving money due on securities, or disposing of securities on which they have a lien. See s. 50.	Any chattel or valuable security, or any power of attorney, for the sale or transfer of any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, being intrusted to any banker, &c., for safe custody, or for any special purpose, without any authority to sell, negociate, transfer, or pledge, such banker, &c., in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been intrusted to him, selling, &c., or in any manner converting to his own use or benefit such chattel or security, or the proceeds of the same or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof.	7 & 8 Geo. 4. c. 29. s. 4 & 49. 7 W. 4. & 1 Vic. c 90. s. 5.
This offence does not extend to cases where the pledge does not exceed the amount of the factor or agent's lien. See sec. 51.	Any factor or agent intrusted, for the purpose of sale, with any goods or merchandize, or intrusted with any bill of lading, warehouse-keeper's, or wharfinger's certificate, or warrant or order for delivery of goods or merchandize, for his own benefit, and in violation of good faith depositing or pledging any such goods or merchandize, or any of the said documents, as a security for any money or negotiable instrument, borrowed or received by such factor or agent, at or before the time of making such deposit or pledge, or intended to be thereafter borrowed or received.	7 & 8 Geo. 4. c. 29. s. 4 & 51. 7 W. 4. & 1 Vic. c. 90. s. 5.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
TRANSPORTATION beyond the Seas for any term not exceeding FOURTEEN nor less than SEVEN YEARS or Imprisonment, and to be kept to Hard Labour, for any term not exceeding Three Years.		
* By sec. 12 it is provided that, for the purposes of this Act, the night shall be considered and is declared to commence at the first hour after sun-set, and to conclude at the beginning of the last hour before sun-rise.	Unlawfully entering or being in any land, whether open or inclosed, by night,* to the number of three or more together, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, cross-bow, fire-arms, bludgeon, or any other offensive weapon.	9 Geo. 4. c. 69. s. 9.
TRANSPORTATION for the term of SEVEN YEARS.		
* For the punishment of the first offence, *vide post*, p. 94.	Within any part of the United Kingdom making, coining or counterfeiting any kind of coin not the proper coin of this realm, nor ordered by the Royal Proclamation of His Majesty, his heirs or successors, to be deemed and taken as current money of this realm or any part thereof, but resembling or made with intent to resemble any copper coin or any other coin made of any metal or mixed metals of less value than the silver coin of such foreign Prince, state or country respectively, or to pass as such foreign coin (for the second offence*).	43 Geo. 3. c. 139. s. 3.
TRANSPORTATION beyond the Seas for the term of SEVEN YEARS, or Fine or Imprisonment, with or without Hard Labour, in the Common Gaol or House of Correction, or both, and to be kept in Solitary Confinement for any portion or portions of such Imprisonment, or of such Imprisonment with Hard Labour, not exceeding One Month at a time, or Three Months in the space of One Year, as to the Court in its discretion shall seem meet.		
As to the punishment of persons aiding, abetting, counselling or procuring the commission of this and the following three misdemeanors, see observation at p. 66.	Stealing, or for any fraudulent purpose taking from its place of deposit for the time being, or from any person having the lawful custody thereof, or unlawfully and maliciously obliterating, injuring, or destroying any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or any original document whatsoever, of or belonging to any Court of Record, or relating to any matter civil or criminal, begun, depending, or terminated in any such court; or any bill, answer, interrogatory, deposition, affidavit, order, or decree, or any original document whatsoever, of or belonging to any Court of Equity, or relating to any cause or matter begun, depending, or terminated in any such court.	7 & 8 Geo. 4. c. 29. s. 4 & 21. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Either during the life of the testator or testatrix, or, after his or her death, stealing, or for any fraudulent purpose destroying or concealing any will, codicil, or other testamentary instrument, whether the same shall relate to real or personal estate or both.	7 & 8 Geo. 4. c. 29. s. 4 & 22. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Stealing any paper or parchment, written or printed, or partly written and partly printed, being evidence of the title of or of any part of the title to any real estate.	7 & 8 Geo. 4. c. 29. s. 4 & 23. 7 W. 4. & 1 Vic. c. 90. s. 5.
* For definition of a *valuable security*, see p. 14. The offender cannot be acquitted of this offence on the ground that the case proved upon the trial amounts to larceny. See sec. 53.	By any false pretence, obtaining from any other person any chattel, money, or *valuable security*,* with intent to cheat or defraud any person of the same.	7 & 8 Geo. 4. c. 29. s. 4 & 53. 7 W. 4 & 1 Vic. c. 90. s. 5.

Appendix No. 6.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
TRANSPORTATION for the term of SEVEN YEARS, or Fine and Imprisonment, at the discretion of the Court.		
	Counterfeiting or forging, or causing or procuring to be counterfeited, &c., or assisting in counterfeiting, &c., any permit, or any part of any permit, or counterfeiting any impression, stamp or mark, figure or device, provided or appointed, or to be provided or appointed, by the Commissioners of Excise to be put on such permit, or uttering, giving, or making use of any permit, with any such counterfeited impression, &c., knowing the same to be counterfeited; or knowingly or willingly accepting or receiving any counterfeited, &c., permit, or any permit, with any such counterfeited impression, &c., thereon, knowing the same to be counterfeited.	2 W. 4. c. 16. s. 4.
The like punishment as for a Misdemeanor at Common Law, or TRANSPORTATION for SEVEN YEARS, at the discretion of the Court.		
This offence is declared to be the same as receiving stolen goods, knowing the same to have been stolen, and as if they had been stolen ashore: Query, therefore, Is the punishment altered by the 7 & 8 Geo. 4. c. 29. s. 54 or 55. Similar provisions are made for the Cinque Ports by the 1 & 2 Geo. 4. c. 76. s. 10.	Knowingly and wilfully, and with intent to defraud and injure the true owner or owners thereof, or any person interested therein, purchasing or receiving any anchors, cables, or goods, or merchandize, which may have been taken up, weighed, swept for or taken possession of, whether the same shall have belonged to any ship or vessel in distress or otherwise, or whether the same shall have been preserved from any wreck, if the directions contained in 1 & 2 Geo. 4. c. 75, (an Act to continue and amend certain Acts for preventing frauds and depredations committed on merchants, &c. &c.,) with regard to such articles, shall not have been previously complied with.	1 & 2 Geo. 4. c. 75. s. 12.
TRANSPORTATION beyond the Seas for the term of SEVEN YEARS, or Imprisonment, with or without Hard Labour, in the Common Gaol or House of Correction, for such term as the Court shall award.		
By the 31 sec. of the 9 Geo. 4. c. 31, it is enacted, "That every person who shall counsel, aid or abet the commission of any misdemeanor punishable under that Act, shall be liable to be proceeded against, and punished as a principal offender."	Assaulting and striking, or wounding any magistrate, officer, or other person whatsoever, lawfully authorized, on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water.	9 Geo. 4. c. 31. s. 24.
FINE of £40; [and, besides the said Punishment, the Court or Judge before whom the offender shall be convicted, may order him to be sent to some House of Correction within the same County, for a term not exceeding Seven Years, there to be kept to Hard Labour during all the said time, or, otherwise, to be transported beyond the Seas for a term not exceeding Seven Years, as the Court shall think most proper†]; [and further, the Court (if it shall think fit) may award and order sentence of Imprisonment, with Hard Labour, for any term not exceeding the term for which such Court may imprison as aforesaid, either in addition to or in lieu of the before-mentioned punishments‡]; and no person, being convicted of this Misdemeanor, can thenceforth be received as a witness in any Court of Record, unless the judgment given against him be reversed.		
See 12 Geo. 1. c. 29. s. 4. made perpetual by 21 Geo. 2. c. 3, as to persons convicted of perjury practising as attornies. The court, in such cases, has a summary power to transport for seven years: the offence does not appear to be indictable.	Unlawfully and corruptly procuring any witness or witnesses, by letters, rewards, promises, or by any other sinister and unlawful labour or means whatsoever, to commit any wilful and corrupt perjury, in any matter or cause whatsoever depending in suit and variance, by any writ, action, bill, complaint, or information, in anywise touching or concerning any lands, tenements, or hereditaments, or any goods, chattels, debts, or damages, in any of the King's Courts of Chancery or Courts of Record, or in any Leet, View of Frankpledge, or Law-day, ancient Demesne Court, Hundred Court, Court Baron, or in the Court or Courts of the Stannery, in the counties of Devon and Cornwall; or unlawfully and corruptly procuring or suborning any witness or witnesses, which shall be sworn to testify *in perpetuam rei memoriam.*	5 Eliz. c. 9. s. 3, 4, & 5. 29 Eliz. c. 5. 21 Jac. 1. c. 28. s. 8. 2 Geo. 2. c. 25. s. 2.† 3 Geo. 4. c. 114.‡ 7 W. 4. & 1 Vic. c. 23.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
FINE of £20, and Imprisonment for SIX MONTHS, [and, besides the said punishments, the Court or Judge before whom the offender shall be convicted, may order him to be sent to some House of Correction within the same County, for a term not exceeding Seven Years, there to be kept to Hard Labour during all the said time, or, otherwise, to be transported beyond the Seas for a term not exceeding Seven Years, as the Court shall think most proper*]; [and further, the Court (if it shall think fit) may award and order sentence of imprisonment, with Hard Labour, for any term not exceeding the term for which such Court may imprison as aforesaid, either in addition to, or in lieu of the before-mentioned punishments†]; and no person, being convicted of this Misdemeanor, can thenceforth be received as a witness in any Court of Record, unless the judgment given against him be reversed.		
‡ There are numerous other statutes, besides those included in this list, by which a great variety of cases of false swearing is declared to be perjury, or punishable as such.	Any person or persons, either by the subornation, unlawful procurement, sinister persuasion, or means of any others, or by their own act, consent, or agreement, wilfully and corruptly committing any manner of wilful perjury, by his or their deposition in any of the King's Courts of Chancery or Courts of Record, or in any Leet, View of Frankpledge, or Law-day, ancient Demesne Court, Hundred Court, Court Baron, or in any Court or Courts of the Stannary, in the counties of Devon and Cornwall, or being examined *ad perpetuam rei memoriam.*	5 Eliz. c. 9. s. 6 & 7. 29 Eliz. c. 5. 21 Jac. 1. c. 28. s. 8. 2 Geo. 2. c. 25. s. 2.* 3 Geo. 4. c. 114.†‡ 7 W. 4. & 1 Vic. c. 23.
	Any petty officer or seaman, non-commissioned officer of marines or marine, obtaining or attempting to obtain his pay, or any part thereof, upon or by means of any false or forged certificate, purporting to be a certificate of service in, or discharge from, any of His Majesty's ships, or from any hospital or sick quarters.	11 Geo. 4. c. 20. s. 89. 7 W. 4. & 1 Vic. c. 23.
	Forging or falsely making any certificate, to be given under the authority of the 2 W. 4. c. 40. (An Act to amend the Laws relating to the business of the Civil Department of the Navy, and to make other regulations for more effectually carrying on the duties of the said departments), by the Commissioners for executing the office of Lord High Admiral, or any of them, or by any superintendent, of the purchase or sale of any naval or victualling stores; or uttering or publishing any false or altered certificate of any such purchase or sale, knowing the same to be false.	2 W. 4. c. 40. s. 32. 7 W. 4. & 1 Vic. c. 23.
The prosecution for these offences must be within three years after the offences committed, see sec. 41 of the 6 & 7 W. 4. c. 85.	Knowingly and wilfully making any false declaration, or signing any false notice or certificate required by the 6 & 7 W. 4. c. 85. (An Act for Marriages in England), for the purpose of procuring any marriage; Or forbidding the issue of any superintendent registrar's certificate, by falsely representing oneself to be a person whose consent to such marriage is required by law, knowing such representation to be false.	6 & 7 W. 4. c. 85. s. 38. 7 W. 4. & 1 Vic. c. 23.
	Wilfully making or causing to be made, for the purpose of being inserted in any register of birth, death, or marrriage, any false statement touching any of the particulars required by the 6 & 7 W. 4. c. 86. (An Act for registering Births, Deaths, and Marriages in England), to be known and registered.	6 & 7 W. 4. c. 86. s. 41. 7 W. 4. & 1 Vic. c. 23.
TRANSPORTATION for SEVEN YEARS, or Imprisonment in any House of Correction or Common Gaol, and to be kept to Hard Labour, for any term not exceeding Three Years, at the discretion of the Court.		
	By force or violence, assaulting, resisting, opposing, molesting, hindering, or obstructing, any officer of the army, navy or marines, being duly employed for the prevention of smuggling, and on full pay, or any officer of Customs or Excise, or other person acting in his or their aid or assistance, or duly employed for the prevention of smuggling, in the due execution of his or their office or duty.	3 & 4 W. 4. c. 53. s. 61.

Appendix No. 6.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
TRANSPORTATION beyond the Seas for the term of SEVEN YEARS, or Imprisonment for any term not exceeding Two Years, with or without Hard Labour, in the Common Gaol or House of Correction, and the offender to be kept in solitary confinement for any portion or portions of such Imprisonment, or of such Imprisonment with Hard Labour, not exceeding One Month at a time, or Three Months in the space of One Year, as to the Court in its discretion shall seem meet: and the offender, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such Imprisonment.		
For the definition of a *valuable security*, see p. 14. As to the punishment of persons aiding, abetting, counselling, or procuring the commission of this misdemeanor, see observation at p. 66.	Receiving any chattel, money, *valuable security*, or other property whatsoever, the stealing, taking, obtaining, or converting whereof is made an indictable misdemeanor by the 7 & 8 Geo. 4. c. 29 (Larceny Act), knowing the same to have been unlawfully stolen, &c.	7 & 8 Geo. 4. c. 29. s. 4 & 55. 7 W. 4. & 1 Vic. c. 90, s. 5.
By the 26 sec. of the 7 & 8 Geo. 4. c. 30, it is enacted, "That every person who shall aid, abet, counsel or procure the commission of any misdemeanor punishable under that Act, shall be liable to be indicted and punished as a principal offender."	Unlawfully and maliciously breaking down or otherwise destroying the dam of any fishpond or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish; or unlawfully and maliciously putting any lime or other noxious material in any such pond or water, with intent thereby to destroy any of the fish therein; or unlawfully and maliciously breaking down or otherwise destroying the dam of any millpond.	7 & 8 Geo. 4. c. 30. s. 15 & 27. 7 W. 4. & 1 Vic. c. 90 s. 5.
TRANSPORTATION beyond the Seas for SEVEN YEARS, or Imprisonment, and to be kept to Hard Labour in the Common Gaol or House of Correction, for any term not exceeding Two Years, at the discretion of the Court.		
	Being convicted a third time of unlawfully taking or destroying, by night, any game or rabbits in any land, whether open or inclosed, or by night unlawfully entering or being in any land, whether open or inclosed, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game.	9 Geo. 4. c. 69. s. 1.
	Being found upon any land committing any such offence as aforesaid, and assaulting or offering any violence with any gun, cross-bow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatsoever, towards any person authorized to seize and apprehend such person so found.	9 Geo. 4. c. 69. s 2.
TRANSPORTATION for any term not exceeding SEVEN YEARS, or Imprisonment not exceeding Two Years, at the discretion of the Court.		
For the definition of this offence, see 39 Geo. 3. c. 79 and 57 Geo. 3. c. 19. Persons guilty of this offence may also be proceeded against in a summary way before one or more justice or justices of the peace. See sec. 8 of the 39 Geo. 3. c. 79.	Being guilty of an unlawful combination and confederacy.	37 Geo. 3. c. 123. 39 Geo. 3. c. 79. s. 8. 52 Geo. 3. c. 104. 57 Geo. 3. c. 19.
The prosecution for this offence must be commenced within six calendar months after the offence committed.	Being present at or attending any meeting or assembly for the purpose of training and drilling any other person or persons to the use of arms, or the practice of military exercise, movements, or evolutions, such meeting or assembly being without any lawful authority from His Majesty, or the lieutenant or two justices of the peace of any county or riding, or of any stewartry, by commission or otherwise, for so doing; or training or drilling any other person or persons to the use of arms, &c., or aiding or assisting therein.	60 Geo. 3. & 1 Geo. 4. c. 1. s. 1.
IMPRISONMENT for LIFE, and forfeiture of all goods and chattels, real and personal.		
This offence is not a felony: as to when forfeiture constitutes an offence a felony, *vide ante* Appendix No. 3, p. 4, in the note.	Having been convicted of publishing fantastical prophecies upon arms, &c., to the intent to make insurrection, &c., as is mentioned at p. 91, offending a second time.	5 Eliz. c. 15. s. 3.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	IMPRISONMENT FOR LIFE.	
See the 2 & 3 Edw. 6. c. 1.	Willingly and wittingly hearing and being present at any other manner or form of Common Prayer, of administration of the sacraments, of making of ministers in the churches, or of any other rites contained in one Book intituled "The Book of Common Prayer and Administration of Sacraments, and other rites and ceremonies in the Church of England," than is mentioned and set forth in the said Book, or that is contrary to the form of sundry provisions and exceptions contained in the 2 and 3 Edw. 6. c. 1 (An Act for uniformity of service and administration of sacraments throughout the realm), and being thereof lawfully convicted, having previously been twice convicted of the same.	5 & 6 Edw. 6. c. 1. s. 6. 13 & 14 Car. 2. c. 4. s. 24.
Besides being imprisoned for life, such parson, vicar, or minister shall be deprived, *ipso facto*, of all his spiritual promotions. See also the 2 & 3 Edw. 6. c. 1. The indictment for any of these offences must be at the next general Sessions or Assizes after the offence committed. See 1 Eliz. c. 2. s. 20. It is declared by the same Act that by open prayers is meant that prayer which is for others to come unto or hear, either in common churches or private chapels, or oratories, commonly called the service of the church.	Any manner of parson, vicar, or other whatsoever minister that ought or should sing or say common prayer mentioned in the said Book of Common Prayer, authorized by the said Act of the 5th and 6th years of King Edward the 6th intituled "An Act for the uniformity of Common Prayer and administration of the Sacraments," or that ought or should minister the sacraments, refusing to use the said common prayers or minister the sacraments in such cathedral or parish church or other places as he should use to minister the same, in such order and form as they be mentioned and set forth in the said Book; or wilfully or obstinately (standing in the same) using any other rite, ceremony, order, form, or manner of celebrating of the Lord's Supper openly or privily, or mattens, even-song, administration of the sacraments or other open prayers than is mentioned and set forth in the said Book; or preaching, declaring or speaking anything in the derogation or depraving of the said Book or anything therein contained or of any part thereof, and being lawfully convicted thereof, having been previously twice convicted of any offence concerning the premises.	1 Eliz. c. 2. s. 6. 13 & 14 Car. 2. c. 4. s. 24.
See also the 2 & 3 Edw. 6. c. 1. As to time within which the offender must be indicted, see above.	Any person, not having any spiritual promotion, after his first conviction eftsoons offending in anything concerning the premises, and being thereof lawfully convicted.	1 Eliz. c. 2. s. 8. 13 & 14 Car. 2. c. 4. s. 24.
See also the 2 & 3 Edw. 6. c. 1. As to the time within which an offender must be indicted, see above. Besides being imprisoned for life, the person committing any of these offences for the third time forfeits all his goods and chattels. These offences, however, do not, on that account, amount to felonies. See note at the bottom of p. 4, *ante*.	In any interludes, plays, songs, rhymes, or by other open words, declaring or speaking anything in the derogation, depraving, or despising of the same Book of Common Prayer, or of anything therein contained or any part thereof; or by open fact, deed, or by open threatenings, compelling or causing or otherwise procuring or maintaining any parson, vicar, or other minister in any cathedral or parish church, or in chapel, or in any other place, to sing or say any common or open prayer, or to minister any sacrament otherwise or in any other manner and form than is mentioned in the said Book; or by any of the said means unlawfully interrupting or letting any parson, vicar, or other minister, in any cathedral or parish church, chapel, or any other place, to sing or say common and open prayer, or to minister the sacraments, or any of them, in such manner and form as is mentioned in the said Book, and being thereof lawfully convicted, having previously been twice convicted of any offence concerning any of the last recited offences.	1 Eliz. c. 2. s. 11. 13 & 14 Car. 2. c. 4. s. 24.

Appendix No. 6.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
IMPRISONMENT for any time not exceeding TWELVE, nor less than SIX MONTHS, and to be liable to such other punishment as may by law be inflicted in cases of High Misdemeanors.*		
* As to the punishment for high misdemeanors, *vide infra* the observation on the 60 Geo. 3. & 1 Geo. 4. c. 8. s. 1 & 4.	Printing or publishing, or causing to be printed or published in any newspaper or other paper containing public news or intelligence, or serving the purpose of a newspaper, that shall be printed or published in that part of Great Britain called England, any matter or thing tending to excite hatred and contempt of the person of His Majesty and of the constitution and government established in these kingdoms, as having been previously printed or published in some foreign paper or print, which hath not been previously so printed or published.	38 Geo. 3. c. 78.
FINE and IMPRISONMENT, and also infamous Corporal Punishment, in the discretion of the Court.*		
* This offence is made punishable by the 60 Geo. 3. & 1 Geo. 4. c. 8, as in cases of high misdemeanor, (which was the quality of the offence of seditiously writing against the King or his government at common law, and was punishable as above, 1 Hawk. P. C. c. 5. s. 5, c. 73. s. 16—4 Black Comm. 122,) or by banishment from the United Kingdom for such term of years as the Court should award; but so much of the 60 Geo. 3. & 1 Geo. 4. c. 8, as relates to the sentence of banishment, has been repealed by the 11 Geo. 4. & 1 W. 4. c. 73.	After having been convicted of composing, printing or publishing any blasphemous libel or any seditious libel, tending to bring into hatred or contempt the person of His Majesty, his heirs or successors, or the Regent or the government and constitution of the United Kingdom as by law established, or either House of Parliament, or to excite His Majesty's subjects to attempt the alteration of any matter in church or state as by law established, otherwise than by lawful means, offending a second time and being thereof legally convicted before any commission of oyer and terminer or gaol delivery, or in His Majesty's Court of King's Bench.	60 Geo. 3. & 1 Geo. 4. c. 8. s. 1 & 4. 11 Geo. 4. & 1 W. 4. c. 73.
	(THE COMMON LAW PUNISHMENT).	
	Distraining a man by his beasts that gain his land, or by his sheep, for the King's debt, or the debt of any other man, or for any other cause, whilst another distress can be found, or chattels sufficient whereof the debt may be levied or that is sufficient for the demand, (except impounding of beasts that a man findeth in his ground *damage faisant*, after the use and custom of the realm).	51 Hen. 3. st. 4. 28 Edw. 1. st. 3. c. 12.
	Keeping fairs or markets in churchyards.	13 Edw. 1. st. 2. c. 6.
The party bargaining or selling, &c., any office, forfeits his interest in, and the party purchasing, &c., is disabled from holding the same, and the bargains, &c., are void immediately upon the committing of the offence.	Selling or bargaining for the sale of, or receiving, having or taking any money, fee, gratuity, loan of money, reward or profit, directly or indirectly, or any promise, agreement, covenant, contract, bond or assurance, or by any way, device, or means contracting or agreeing to receive or have any money, &c., directly or indirectly, or purchasing or bargaining for the purchase of, or giving or paying any money, &c., or making or entering into any promise, &c., to give or pay any money, &c., or by any way, means, or device contracting or agreeing to give or pay any money, &c., directly or indirectly, for any office, commission, place, or employment specified or described in the 5 & 6 Edw. 6. c. 16 (an Act against buying and selling of offices), and the 49 Geo. 3. c. 126 (an Act for the further prevention of the sale and brokerage of offices), or within the true intent and meaning of the said Acts, or for any deputation thereto, or for any part, parcel, or participation of the profits thereof, or for any appointment or nomination thereto, or resignation thereof, or for the consent or consents, or voice or voices of any person or persons to any such appointment, nomination or resignation; or wilfully and knowingly aiding, abetting, or assisting such person therein.	5 & 6 Edw. 6. c. 16. 49 Geo. 3. c. 126. s. 3. 6 Geo. 4. c. 105. s. 10.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	Receiving, having, or taking any money, fee, reward, or profit, directly or indirectly, or taking any promise, agreement, covenant, contract, bond or assurance, or by any way, means or device contracting or agreeing to receive or have any money, fee, gratuity, loan of money, reward or profit, directly or indirectly, for any interest, solicitation, petition, request, recommendation, or negotiation whatever, made or pretended to be made, or under any pretence of making or causing or procuring to be made any interest, &c., in or about or in anywise touching, concerning, or relating to any nomination, appointment, or deputation to, or resignation of, any such office, commission, place or employment as aforesaid, or under any pretence for using or having used any interest, &c., in or about any such nomination, &c., or for the obtaining or having obtained the consent or consents, or voice or voices of any person or persons as aforesaid, to such nomination, &c.; or giving or paying or causing or procuring to be given or paid any money, &c., or making or causing or procuring to be made any promise, &c., or by any way, &c., contracting or agreeing, or giving or paying, or causing or procuring to be given or paid any money, &c., for any petition, &c., whatever, that shall in anywise touch, concern, or relate to any nomination, appointment, or deputation to, or resignation of, any such office, &c., as aforesaid, or for the obtaining or having obtained the consent, &c., of any person or persons as aforesaid to any such nomination, &c.; or for or in expectation of gain, fee, &c., soliciting, recommending, or negotiating in any manner for any person or persons in any matter that shall in anywise touch, concern, or relate to any such nomination, &c., or for the obtaining, directly or indirectly, the consent, &c., of any person or persons to any such nomination, &c.; or wilfully and knowingly aiding, abetting, or assisting such person therein.	5 & 6 Edw. 6. c. 16. 49 Geo. 3. c. 126. s. 4. 6 Geo. 4. c. 105. s. 10.
	Opening or keeping any house, room, office, or place for the soliciting, transacting, or negotiating, in any manner whatever, any business relating to vacancies in, or the sale or purchase of, or appointment, nomination, or deputation to, or resignation, transfer, or exchange of any offices, commissions, places, or employments whatever in or under any public department; or wilfully and knowingly aiding, abetting, or assisting therein.	5 & 6 Edw. 6. c. 16. 49 Geo. 3. c. 126. s. 5. 6 Geo. 4. c. 105. s. 10.
Conviction of this offence renders the offender incapable of holding his office.	Any clerk of assize, clerk of the peace, clerk of the court, or their deputies or other officers, exacting fees from prisoners, against whom (being charged with or indicted for any felony, or as accessory thereto, or with or for any misdemeanor, before any court holding criminal jurisdiction in England) no bill of indictment shall be found by the grand jury, or who on his, her, or their trial shall be acquitted, or who shall be discharged by proclamation for want of prosecution, for or in respect of his, her, or their discharge.	55 Geo. 3. c. 50. s. 9.
	In case of any embezzlement, waste, spoil, or destruction being made of, or in, any goods or merchandize which shall be warehoused in warehouses under the authority of the 4 Geo. 4. c. 24 (an Act to make more effectual provision for permitting goods imported to be secured in warehouses or other places, without payment of duty on the first entry thereof), by or through any wilful misconduct of any officer or officers of Customs or Excise, such officer or officers shall be guilty of a misdemeanor.	4 Geo. 4. c. 24. s. 72.

Appendix No. 6.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
And, besides the usual punishment, to forfeit all claim and title whatsoever to pension or enrolment on account of service, wounds, or disability.	Obtaining or endeavouring to obtain for self or any other person from the Commissioners of the Royal Hospital at Chelsea, by the sending or production of any false certificate or any altered certificate or discharge, instructions or other document, knowing the same to have been fraudulently altered, or by making any false representation, any pension or increase of pension or other allowance of money, or any enrolment or other privilege or advantage.	7 Geo. 4. c. 16. s. 25.
By sec. 3 of the 7 & 8 Geo. 4. c. 18. it is enacted, "That if any person shall knowingly and wilfully permit any such spring-gun, &c. as aforesaid, which may have been set, fixed, or left in any place then being in, or afterwards coming into, his or her possession or occupation, by some other person or persons, to continue so set or fixed, the person so permitting the same to continue shall be deemed to have set and fixed such gun, &c., with such intent as aforesaid." And by sec. 2 & 3 it is provided that the Act shall not extend to make it illegal to set a gin or trap for destroying vermin, or to set from sunset to sunrise any spring-gun, &c., in a dwelling-house, for the protection thereof.	Setting or placing or causing to be set or placed any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith.	7 & 8 Geo. 4. c. 18. s. 1.
	Working or navigating any wherry, boat, or other vessel licensed to carry persons or passengers on the River Thames, in which any greater number of persons or passengers shall be taken and carried than are respectively allowed to be carried therein, in case any one or more of them shall by reason thereof be drowned.	7 & 8 Geo. 4. c. 75. s. 38.
	Jesuit or member of any religious order, community, or society of the Church of Rome, bound by monastic or religious vows, within any part of the United Kingdom, admitting any person to become a regular ecclesiastic or brother or member of any such religious order, community, or society, or aiding or consenting thereto, or administering or causing to be administered, or aiding or assisting in the administering or taking any oath, vow, or engagement purporting or intended to bind the person taking the same to the rules, ordinances, or ceremonies of such religious order, &c.	10 Geo. 4. c. 7. s. 33.
	Churchwarden, rate-collector, overseer, or other parish officer refusing to call meetings according to the provisions of 1 and 2 W. 4. c. 60 (an Act for the better regulation of vestries, &c.), or refusing or neglecting to make and give the declarations and notices directed to be made and given by that Act, or to receive the vote of any rate-payer as therein mentioned, or in any manner whatsoever altering, falsifying, concealing, or suppressing any vote or votes as therein mentioned.	1 & 2 W. 4. c. 60. s. 11.
	Any person wilfully making a false answer to any of the questions directed by the 2 and 3 W. 4. c. 45 (an Act to amend the representation of the people in England and Wales) to be put by the returning officer or his bailiff at elections of Members to serve in Parliament, if required on behalf of any candidate, to any voter at the time of his tendering his vote.	2 & 3 W. 4. c. 45. s. 58.
	Wilfully and with intention to deceive, not giving a full and complete plan of the whole of the house to be licensed under the 2 & 3 W. 4. c. 107, (an Act for regulating for Three Years, and from thence until the end of the then next Session of Parliament, the care and treatment	2 & 3 W. 4. c. 107. s. 17. 5 & 6 W. 4. c. 22.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	of insane persons in England,) or notice of any and all such additions and alterations as shall from time to time be made in any such house.	
	Keeping a house for the reception of two or more insane persons not duly licensed according to the said Act of the 2 & 3 W. 4.	2 & 3 W. 4. c. 107. s. 22. 5 & 6 W. 4. c. 22.
	Knowingly and wilfully receiving any insane person or persons represented or alleged to be insane, to be taken care of or confined in any house licensed under the said Act of the 2 & 3 W. 4., without such order and medical certificate as in the Act mentioned, and without making within three clear days after the reception of such patient, a minute or entry in writing in a book to be kept for that purpose, according to the form in the Act mentioned, of the true name of the patient, and also the christian and surname, occupation and place of abode of the person by whom such patient shall be brought.	2 & 3 W. 4. c. 107. s. 27. 5 & 6 W. 4. c. 22.
	Physician, surgeon, or apothecary, who is wholly or partly, or whose father, son, brother, or partner is wholly or partly proprietor or regular professional attendant of any licensed house, signing a certificate of admission of a patient to any such house.	2 & 3 W. 4. c. 107. s. 28. 5 & 6 W. 4. c. 22.
	Knowingly and with intention to deceive signing any medical certificate upon which any order shall be given for the confinement of any person (not a parish pauper) in a licensed house, untruly setting forth any of the particulars required by the said Act of the 2 & 3 W. 4.	2 & 3 W. 4. c. 107. s. 28. 5 & 6 W. 4. c. 22.
	Knowingly and wilfully receiving any parish pauper represented or alleged to be insane into any licensed house, without the order and medical certificate in the said Act of the 2 & 3 W. 4. mentioned.	2 & 3 W. 4. c. 107. s. 29. 5 & 6 W. 4. c. 22.
	The proprietor or resident superintendent of any licensed house, neglecting, within the time in the said Act of the 2 & 3 W. 4. mentioned, to transmit a copy of such order and medical certificate, with a notice according to the form in the said Act of the 2 & 3 W. 4. mentioned to the clerk of the Metropolitan Commissioners in lunacy; or, within the jurisdiction of the visitors, to transmit a duplicate copy thereof to the clerk of the peace.	2 & 3 W. 4. c. 107. s. 30. 5 & 6 W. 4. c. 22.
	The proprietor or resident superintendent of any such house, knowingly and wilfully neglecting, on the removal therefrom, or death of any patient confined therein, to transmit a written notice thereof (in the form and within the time in the said Act of the 2 & 3 W. 4. mentioned) to the clerk of the said Metropolitan Commissioners or the clerk of the peace.	2 & 3 W. 4. c. 107. s. 31. 5 & 6 W. 4. c. 22.
	The proprietor or resident superintendent of any licensed mad-house fraudulently concealing, or attempting to conceal any part of such house or premises, or any person detained therein as insane, from the said Metropolitan Commissioners or visitors, or from any medical or other person authorized under the provisions of the said Act of the 2 & 3 W. 4. to visit and inspect any such house and the patients confined therein.	2 & 3 W. 4. c. 107. s. 40. 5 & 6 W. 4. c. 22.
	Receiving to board or lodge in any house not licensed under the said Act of the 2 & 3 W. 4. or taking the care or charge of any insane person, without first having the like order and medical certificates as are required on the ad-	

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OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	mission of an insane person (not being a parish pauper patient) into a licensed house, (unless the person so receiving or taking care, &c., be a guardian or relative, who does not derive any profit from the charge, or a committee appointed by the Lord Chancellor or other the person or persons for the time being intrusted by the King's sign manual with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind).	2 & 3 W. 4. c. 107. s. 46. 5 & 6 W. 4. c. 22.
	Receiving to board or lodge in any house not licensed under the said Act of the 2 & 3 W. 4. or taking the care or charge of any insane person in any such house, (unless the person so doing be a guardian, &c. as aforesaid,) and omitting within 12 calendar months after, if such insane person shall not previously have returned to his or her own, or usual place of abode, to transmit to the Clerk of the Metropolitan Commissioners, a copy of such order and medical certificates, sealed and indorsed "private return," or on the 1st day of January in every succeeding year, or within 7 clear days after, to transmit to such clerk a certificate signed by two physicians, surgeons, or apothecaries, describing the then actual state of mind of such insane person, and to be indorsed "private return."	2 & 3 W. 4. c. 107. s. 47. 5 & 6 W. 4. c. 22.
	The proprietor and resident superintendent of any house licensed for the reception of insane persons, knowingly and wilfully neglecting to transmit any notice, copy of order, medical certificate or statement by 3 & 4 W. 4. c. 64 (an Act to amend an Act of the 2 & 3 W. 4. for regulating the care and treatment of insane persons in England), required to be transmitted.	3 & 4 W. 4. c. 64. s. 7. 5 & 6 W. 4. c. 22.
	Requiring or compelling any apprentice or person of any description to ascend a chimney-flue for the purpose of extinguishing fire therein.	4 & 5 W. 4. c. 35. s. 8.
	Wilfully refusing to attend in obedience to summons of any Poor Law Commissioner or Assistant Commissioner, or to give evidence, or wilfully altering, suppressing, concealing, destroying, or refusing to produce any books, contracts, agreements, accounts, and writings, or copies of the same, which may be so required to be produced before the said Commissioners or Assistant Commissioners.	4 & 5 W. 4. c. 76. s. 13.
	Forging or counterfeiting any certificate of service in His Majesty's Navy, or any instrument purporting to be a protection from such service; or fraudulently uttering or publishing any forged certificate of such service, or any forged instrument purporting, &c., knowing the same to be forged; or fraudulently altering any certificate or protection which shall have been duly granted or issued; Or forging or fraudulently altering any extract from a baptismal register; or knowingly uttering any false or fraudulently altered extract from a baptismal register, or any false affidavit, certificate, or other document, in order to obtain from the Admiralty Office a protection from His Majesty's naval service for oneself or any other person; Or, being in possession of a protection, lending, selling, or disposing thereof to any other person, in order fraudulently to enable such	5 & 6 W. 4. c. 24. s. 3.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	other person to make an unlawful use of the same; or producing, uttering, or making use of as a protection for oneself any protection which shall have been made out or issued for any other individual.	
See the Act.	In any case where a declaration is substituted for an oath under the authority of the 5 & 6 W. 4. c. 62. (An Act to repeal an Act of the present session of Parliament, intituled "An Act for the more effectual Abolition of Oaths and Affirmations taken and made in various departments of the State, and to substitute Declarations in lieu thereof, and for the more entire suppression of Voluntary and Extra-judicial Oaths and Affidavits;" and to make other provisions for the Abolition of unnecessary Oaths), or by virtue of any power or authority thereby given, or in any case where a declaration is directed and authorised to be made and subscribed under the authority of that Act, or by virtue of any power thereby given, wilfully and corruptly making and subscribing any such declaration, knowing the same to be untrue in any material particular.	5 & 6 W. 4. c. 62. s. 21.
	Wilfully and corruptly making and subscribing any declaration authorized by the 6 & 7 W. 4. c. 5 (an Act for carrying into farther execution two Acts of His present Majesty, relating to the compensation for slaves upon the abolition of slavery, and for facilitating the distribution and payment of such compensation), to be taken and received by the Comptroller-general, or Assistant Comptroller-general, or other officer appointed by and acting under the Commissioners for the reduction of the National Debt, or the Accountant-general of the Court of Chancery, or the Accountant-general of the Court of Exchequer, in case they shall deem it necessary, and require that some evidence should be given of the identity of the party named in any letter of attorney, or as to the truth of any matter contained in or necessary for the explanation of such letter of attorney, knowing the same declaration to be untrue in any material particular.	6 & 7 W. 4. c. 5. s. 8.
Besides being punished for the misdemeanor, the person so offending shall forfeit and pay to any person suing for the same the full sum of £500, or, at the option of such person, Five Years' improved annual value of the hereditaments comprised in such lease. See sec. 3.	Executing any renewed lease of any house, land, &c., under the provisions of the 6 & 7 W. 4. c. 20 (an Act for imposing certain restrictions on the renewal of leases by ecclesiastical persons), or any counterpart thereof, knowing the recital or statement required by the said Act to be contained in such lease (and which recital in the case of a lease for lives is to set forth the names of the several persons named as *cestui que vie* in the then last preceding lease of the same premises, and to state which of such persons, if any, is or are then dead, or for whose life that of some other person has been exchanged by virtue of the proviso thereinafter contained, and in case of a lease for years is to set forth for what term of years the last preceding lease of the same premises was granted, and how much of such term has then expired, and how much remains to come and unexpired, and every such rental or statement, so far as relates to the validity of the lease so to be granted as aforesaid, is to be deemed and taken to be conclusive evidence of the truth of the matter so recited or stated), or any part thereof, to be false; or wilfully introducing or causing to be introduced, or aiding or assisting in introducing any such recital or statement into any such lease, knowing the same or any part thereof to be false, or preparing or engrossing any lease or counterpart of a lease containing any such false recital or statement as aforesaid, knowing the same, or any part thereof, to be false.	6 & 7 W. 4. c. 20. s. 3.

Appendix No. 3.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	Wilfully refusing to attend in obedience to any lawful summons of any Commissioner or Assistant-Commissioner for carrying into effect the 6 & 7 W. 4. c. 71 (an Act for the commutation of Tithes in England and Wales), or to give evidence; or wilfully altering, withholding, destroying, or refusing to produce any book, deed, contract, agreement, account, or writing, terrier, map, plan, or survey, or any copy of the same which may be lawfully required to be produced before the said Commissioner or Assistant-Commissioner.	6 & 7 W. 4. c. 71, s. 93.
	Knowingly and wilfully signing and making any declaration (required by the 6 & 7 W. 4. c. 76 [an Act to reduce the duties on newspapers, &c.] to be delivered to the Commissioners of Stamps and Taxes, &c., before any person shall print or publish, or cause to be printed, &c. any newspaper) in which shall be inserted or set forth the name, addition, or place of abode of any person as a proprietor, publisher, printer, or conductor of the actual printing of any newspaper to which such declaration shall relate, who shall not be a proprietor, printer, or publisher thereof, or from which shall be omitted the name, addition, or place of abode of any proprietor, publisher, printer, or conductor of the actual printing of such newspaper, contrary to the true meaning of the said Act, or in which any matter or thing by the said Act required to be set forth shall be set forth otherwise than according to the truth, or from which any matter or thing required by the said Act to be truly set forth shall be entirely omitted.	6 & 7 W. 4. c 76. s. 6.
	Making and subscribing any declaration of being duly qualified to be elected a Member of the House of Commons, according to the true intent and meaning of the Act passed in the 2d year of the reign of Queen Victoria, intituled, "An Act to amend the Laws relating to the Qualification of Members to serve in Parliament," or signing and delivering in to the clerk of the said House, at the table of the said House, and while the House of Commons is there sitting, with their Speaker in the Chair, any paper making out such qualification, knowing the same respectively to be untrue in any material particular.	1 & 2 Vict. c. 48. s. 7.

Fine and Imprisonment, with or without Hard Labour, in the Common Gaol or House of Correction, and to be kept in solitary confinement for any portion or portions of such Imprisonment, or of such Imprisonment with Hard Labour, not exceeding One Month at a time or Three Months in the space of One Year, as to the Court in its discretion shall seem meet.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
As to the punishment of abettors in these misdemeanors, see observation at p. 66.	Unlawfully and wilfully in the night-time taking or killing any hare or coney in any warren or ground lawfully used for the breeding or keeping of hares or conies (whether the same be inclosed or not).	7 & 8 Geo. 4. c. 29. s. 4 & 30. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Unlawfully and wilfully taking or destroying any fish in any water which shall run through or be in any land adjoining or belonging to the dwelling-house of any person being the owner of such water, or having a right of fishery therein.	7 & 8 Geo. 4. c. 29. s. 4 & 34. 7 W. 4. & 1 Vic. c. 90. s. 5.
	Unlawfully and maliciously throwing down, levelling, or otherwise destroying, in whole or in part, any turnpike-gate, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike-gate, or set up or erected to prevent	

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
As to the punishment of abettors, see observation at p. 70.	passengers passing by without paying any toll directed to be paid by any Act or Acts of Parliament relating thereto, or any house, building, or weighing-engine erected for the better collection, ascertainment, or security of any such toll.	7 & 8 Geo. 4. c. 30. s. 14 & 27. 7 W. 4. & 1 Vic. c. 90. s. 5.
By sec. 35 it is enacted, "That every person who shall aid, abet, counsel or procure the commission of any misdemeanor punishable under the Post-office Acts shall be liable to be indicted and punished as a principal offender."	Fraudulently retaining, or wilfully secreting or keeping or detaining, or, being required to deliver up by an officer of the Post-office, neglecting or refusing to deliver up a post-letter which ought to have been delivered to any other person, or a post-letter-bag or post-letter which shall have been sent, whether the same shall have been found by the person secreting, keeping or detaining, or neglecting or refusing to deliver up the same, or by any other person.	7 W. 4. & 1 Vic. c. 36. s. 31 & 42. 7 W. 4. & 1 Vic. c. 90. s. 5.

FINE and IMPRISONMENT, and such Corporal Punishment by Public or Private Whipping* as the Court shall direct.

* The punishment of whipping is abolished in the case of *female* offenders. *Vide ante*, p. 63.	Any person or persons keeping or using any slaughtering-house or place, throwing into any lime-pit or lime-pits or otherwise immersing in lime or any preparation thereof, or rubbing therewith or with any other corrosive matter, or destroying or burying, the hide or hides, skin or skins, of any horse, mare, gelding, colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, goat, or other cattle, by him, her, or them slaughtered, killed, or flayed.	26 Geo. 3. c. 71. s. 9.
	Being guilty of any offence against the 26 Geo. 3. c. 71 (an Act for regulating houses and other places kept for the purpose of slaughtering horses), for which no punishment or penalty is expressly provided or declared.	26 Geo. 3. c. 71. s. 9.

FINE, IMPRISONMENT, or other Corporal Punishment, as the Court shall think fit to award.

	Either in person, by agent, letter, or otherwise howsoever, procuring, engaging, soliciting, or asking any person being under the age of 21 years to grant or attempt to grant any annuity or rent-charge, or to execute any bond, deed, or other instrument for securing the same; or advancing or procuring or treating for any money to be advanced to any person under the age of 21 years, upon consideration of any annuity or rent-charge to be secured or granted by such infant after he or she shall have attained his or her age of 21 years; or inducing, soliciting, or procuring any infant, upon any treaty or transaction for money advanced or to be advanced, to make oath or to give his or her word of honour or solemn promise, that he or she shall not plead infancy or make any other defence against the demand of any such annuity or rent-charge, or the repayment of the money advanced to him or her when under age, or that when he or she comes of age, he or she will confirm or ratify, or in any way substantiate such annuity or rent-charge.	53 Geo. 3. c. 141. s. 8.

IMPRISONMENT, and FINE and RANSOM to the KING.*

* There is no difference between a fine and *ransom* in a legal understanding; for a fine makes an end of the business, and so does a *ransom*, because it redeems from imprisonment; and if they were different things, it would follow, that where	Any persons being sufficient to travel in the county where routs, assemblies, or riots against the law be, not being assistant to the justices, commissioners, sheriff, or under-sheriff of the same county, when they shall be reasonably warned to ride with the said justices, commissioners, and sheriff or under-sheriff, in aid to resist such riots, routs, and assemblies.	2 Hen. 5. St. 1. c. 8.

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OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
the books say that a man shall make a fine and ransom, they must be taken to intend, that he ought to pay two different sums, of which there is no precedent, Co. Litt. 127 a.; but in Dyer, 232, pl. 5, it hath been adjudged, that where a man is to make fine and *ransom*, the ransom must be treble the fine at least. Bac. Abrid. Title, "Fines and Amercements."		
See the 2 H. 5. St. 1. c. 8.		
See 1 Jac. 1. c. 25. s. 48.	Depraving, despising, or contemning the sacrament of the Lord's Supper, in contempt thereof, by any contemptuous words, or by any words of depraving, despising, or reviling; or advisedly in any otherwise contemning, despising, or reviling the said most blessed sacrament, contrary to the effects and declaration set forth in the 1 Edw. 6. c. 1 (an Act against such as shall unreverently speak against the Sacrament of the Altar, and of the receiving thereof under both kinds).	1 Edw. 6. c. 1. s. 1. 1 Eliz. c. 1. s. 14.

Imprisonment and Ransom† at the King's Will.‡

See also 4 Hen. 4. c. 8. 8 Hen. 6. c. 9. 31 Eliz. c. 11. 21 Jac. 1. c. 15. † As to the meaning of Ransom, see above.	Making entry into any lands and tenements, but in case where entry is given by the law; or in such case entering with strong hand, or with multitude of people, and not in peaceable and easy manner.	5 R. 2. St. 1. c. 8. 15 R. 2. c. 2.
‡ Which will of the King, it must be observed, does not signify any extra-judicial will of the Sovereign, but such as is declared by his representatives the judges, in his courts of justice; "*voluntas regis in curiâ, non in camerâ.*"—1 Hale, P. C. 375; 4 Black. Com. 121.		

Imprisonment and Fine at the King's Will.

Besides the above punishment, the offender is to yield damages.	Where a man, a dog, or a cat, escape quick out of the ship, (in which case such ship or barge, or anything within them, is not to be adjudged wreck,) not delivering the goods into the hands of such as are of the town where the goods were found, so that if any sue for those goods and after prove that they were his or perished in his keeping, within a year and a day, they shall be restored to him without delay; or otherwise doing contrary to the 3 Edw. 1. c. 4 (an Act declaring what shall be adjudged wreck and what not).	3 Edw. 1. c. 4.
	Any of the clergy presuming to attempt, allege, claim, or put in use any constitutions or ordinances, provincial or synodal, or any other canons; or enacting, promulgating, or executing any such canons, constitutions, or ordinances provincial, by whatsoever name or names they may be called in their convocations, unless the same clergy may have the King's Most Royal Assent and Licence to make, promulge, and execute such canons, constitutions, and ordinances, provincial or synodal.	25 Hen. 8. c. 19. s. 1. 1 Eliz. c. 1. s. 6.

Imprisonment, as best shall seem to the King or to his Council, or Imprisonment with Hard Labour, for any term not exceeding the term for which the Court may now imprison, either in lieu of, or in addition to the first named punishment.

See also 13 Hen. 4. c. 7. 1 Geo. 1. St. 2. c. 5.	Rioters being attainted of petty riots.	17 Rich. 2. c. 8. 2 Hen. 5. St. 1. c. 8. 3 Geo. 4. c. 114.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
FINE and IMPRISONMENT at the discretion of the Court, and Offender upon conviction to be incapable of holding or enjoying any office under the Crown.		
	Collector, receiver, or other person intrusted with the collection, receipt, custody, or management of any part of the revenue of Excise neglecting or omitting to keep and render such separate and distinct accounts, and in such manner and form as shall from time to time be directed by the Commissioners of Excise, of all duties, penalties, and sums of money collected, had, or received by him or intrusted to his care or custody, and all balances of money in his hands or under his control and management, or knowingly rendering or furnishing false accounts of, or relating to, any duty, &c., collected, &c., or to be collected, &c., or intrusted, &c., or of any balance of money, &c.	7 & 8 Geo. 4. c. 53. s. 44.
FINE and IMPRISONMENT.		
	Not being attendant upon the justices of the peace to go and assist the same justices to arrest any that hold any lands or tenements, or other possessions whatsoever, forcibly, after forcible entry made.	15 R. 2. c. 2.
On conviction of this offence, the offender is rendered for ever incapable of holding or enjoying any office under the Crown.	Any officer, collector, or receiver, intrusted with the receipt, custody, or management of any part of the public revenues, knowingly furnishing false statements or returns of the sums of money collected by him or intrusted to his care, or of the balances of money in his hands or under his control.	50 Geo. 3. c. 59. s. 2.
	Any person concerned in the transmitting or delivery of writs for the election of Members to serve in Parliament, wilfully neglecting or delaying to deliver or transmit any such writ, or accepting any fee, or doing any other matter or thing in violation of the 53 Geo. 3. c. 89 (an Act for the more regular conveyance of writs for the election of Members to serve in Parliament).	53 Geo. 3. c. 89. s. 6.
Conviction of this offence renders the offender incapable of holding his office. The 55 Geo. 3. c. 50. does not extend to the King's Bench prison, His Majesty's Prison of the Fleet, the Marshalsea and Palace Courts.	Any gaoler exacting from any prisoner any fee or gratuity for or on account of the entrance, commitment, or discharge of such prisoner, or detaining any prisoner in custody for non-payment of any fee or gratuity.	55 Geo. 3. c. 50. s. 13.
The Act does not extend to hackney-coaches, drawn by two horses only, and not plying for hire as stage-coaches.	The wanton and furious driving, or racing, or wilful misconduct of any coachman or other person having the charge of any stage coach or public carriage, whereby any person whatever shall be maimed or otherwise injured.	1 Geo. 4. c. 4.
FORFEITURE, FINE, not exceeding £200, and Costs of Suit, and also by such further Fine, and by Whipping* and Imprisonment, or any or either of them, in such manner and for such space of time as to the Judge or Justices before whom the Offender shall be convicted shall seem meet.		
* The punishment of whipping is abolished in the case of *female* offenders. *Vide ante*, p. 63.	Having in one's custody any timber, thick stuff, or plank, marked with the broad arrow, by stamp, brand, or otherwise, or concealing any timber, &c., so marked.	9 & 10 W. 3. c. 41. 9 Geo. 1. c. 8. 17 Geo. 2. c. 40. 39 & 40 Geo. 3. c. 89. s. 2. 56 Geo. 3. c. 138. s. 2.
	Making, having in custody, possession, or keeping, or concealing, (not being a contractor with His Majesty's Principal Officers or Commissioners of the Navy, Ordnance, or Victualling Office for His Majesty's use, or employed by such contractor for that purpose,) any stores of war or	

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OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
This provision is extended by 54 Geo. 3. c. 60, to cordage wrought with one or more worsted threads; and by 55 Geo. 3. c. 127, to *all public stores* marked as in that Act mentioned. See the observation, *ante* p. 66.	naval stores whatsoever, with the marks usually used to and marked upon His Majesty's said warlike and naval or ordnance stores, that is to say, any cordage of three inches and upwards, wrought with a white thread laid the contrary way, or any smaller cordage, to wit, from three inches downwards, with a twine in lieu of a white thread laid to the contrary way as aforesaid, or any canvas wrought or unwrought with a blue streak in the middle, or any other stores with the broad arrow, by stamp, brand, or otherwise.	9 & 10 W. 3. c. 41. 17 Geo. 2. c. 40. 39 & 40 Geo. 3. c. 89. s. 2. 56 Geo. 3. c. 138. s. 2.
	Having in one's custody, possession, or keeping, (not being a contractor or employed as aforesaid,) any of His Majesty's stores, called canvas, marked with a blue streak in a serpentine form, or bewper, otherwise called buntin, wrought with one or more streaks of raised tape (such canvas or bewper, otherwise called buntin, not being charged to be new, or not more than one-third worn).	39 & 40 Geo. 3. c. 89. s. 2. 56 Geo. 3. c. 138. s. 2.

FINE not exceeding £500, or Imprisonment for any term not exceeding Two Years, or both, at the discretion of the Court.

	In any manner contriving, aiding, abetting, or assisting in the escape or intended escape from any part of New South Wales or Van Diemen's Land, or the dependencies thereof, of any person or persons there being under or by virtue of any judgment or sentence of transportation for any term not then expired, or of any judgment or sentence pronounced in any court of competent jurisdiction in the said colony or its dependencies.	9 Geo. 4. c. 83. s. 34.

IMPRISONMENT, with or without Hard Labour, in the Common Gaol or House of Correction, for such term as the Court shall award.

As to the punishment of abettors in this misdemeanor, see observation at p. 68.	Unlawfully and carnally knowing and abusing any girl, being above the age of ten years, and under the age of twelve years.	9 Geo. 4. c. 31. s. 17.

IMPRISONMENT for such term as the Court shall award.

See last observation.	Any master of a merchant vessel, during his being abroad, forcing any man on shore; or wilfully leaving him behind in any of His Majesty's Colonies, or elsewhere; or refusing to bring home with him again all such of the men whom he carried out with him as are in a condition to return when he shall be ready to proceed on his homeward-bound voyage.	9 Geo. 4. c. 31. s. 30.

IMPRISONMENT at the King's pleasure.*

The offender also forfeits his armour to the King. * This punishment is in effect the same as the last, as the pleasure intended is the pleasure of the King as declared by the judges. See the observation on the 5 Rich. 2. st. 1. c. 8. *ante* p. 80.	Any man great or small, of what condition soever he be, except the King's servants in his presence, and his Ministers in executing of the King's precepts, or of their office, and such as be in their company assisting them, and also upon a cry made for arms to keep the peace and the same in such places where such acts happen, being so hardy to come before the King's justices or other of the King's Ministers doing their office, with force and arms; or bringing a force in affray of the peace; or going or riding armed by night or by day, in fairs, markets, or in the presence of the justices or other ministers, or in any part elsewhere.	2 Edw. 3. c. 3.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
FINE or IMPRISONMENT, or both, such Imprisonment to be with or without Hard Labour in the Common Gaol or House of Correction, and the Offender to be kept in Solitary Confinement for any portion of such Imprisonment not exceeding One Month at a time, or Three Months in the space of One Year, as to the Court shall seem meet.		
It is provided by the 25 sec. that nothing therein contained shall extend to the opening or detaining or delaying of a post-letter returned for want of a due direction, or of a post-letter returned by reason that the person to whom the same shall be directed is dead, or cannot be found, or shall have refused the same, or shall have refused or neglected to pay the postage thereof; nor to the opening or detaining or delaying of a post-letter in obedience to an express warrant in writing under the hand of one of the principal Secretaries of State.	Any person employed by or under the Post-office, contrary to his duty, opening or procuring or suffering to be opened a post-letter, or wilfully detaining or delaying a post-letter.	7 W. 4. & 1 Vic. c. 36. s. 25 & 42. 7 W. 4. & 1 Vic. c. 90. s. 5.
As to the punishment of abettors in this and the next misdemeanor, see observation at p. 79.		
	Any person employed in the Post-office stealing, or, for any purpose, embezzling, secreting or destroying, or wilfully detaining or delaying in course of conveyance or delivery thereof by the post, any printed votes or proceedings in Parliament, or any printed newspaper, or any other printed paper whatever sent by the post without covers, or in covers open at the sides.	7 W. 4. & 1 Vic. c. 36. s. 32 & 42. 7 W. 4. & 1 Vic. c. 90. s. 5.
FINE or IMPRISONMENT, or both, such Imprisonment to be in the Common Gaol or House of Correction, and either with or without Hard Labour, as the Court shall think fit.		
	Forging or counterfeiting, or causing or procuring to be forged, counterfeited, or resembled, the stamp-office plate by 1 & 2 W. 4. c. 22 (an Act to amend the laws relating to hackney carriages, &c.), directed to be provided for the purpose of being fixed upon every hackney carriage; or wilfully fixing or placing, or causing or permitting or suffering to be fixed or placed upon any hackney carriage or other carriage, any such forged or counterfeited plate as aforesaid; or selling or exposing to sale or uttering any such forged or counterfeited plate, or knowingly and without lawful excuse (the proof whereof shall lie on the person accused,) having or being possessed of any such forged or counterfeited plate, knowing such plate to be forged or counterfeited, or knowingly and wilfully aiding, abetting, or assisting any person in committing any such offence as aforesaid.	1 & 2 W. 4. c. 22. s. 25.
	In applying for or procuring, or attempting to procure, any licence, under any of the provisions of the 1 & 2 W. 4. c. 22, to use or employ any false or fictitious name or place of abode, or other false or fictitious description of any person or supposed person; or to wilfully or knowingly insert or cause to be inserted in any requisition for any such licence, or in any such licence, any false or fictitious name or place of abode, or other false or fictitious description of any person or supposed person; or to wilfully or knowingly insert or cause to be inserted in any such requisition or licence, as aforesaid, the name of any person as being a proprietor or part proprietor of any hackney carriage, who shall not at the time of the application for such licence be so.	1 & 2 W. 4. c. 22. s. 33.
	On application for, or in procuring or attempting to procure any licence under the 2 & 3 W. 4. c. 120. (An Act to Repeal the Duties under the management of the Commissioners of Stamps on Stage Carriages, and on Horses let for hire in Great Britain, and to grant other duties in lieu thereof; and also to	

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OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	Consolidate and Amend the Laws relating thereto), for or in respect of any stage carriage, using or employing any false or fictitious name or place of abode, or other false, &c. description of any person or supposed person; or inserting or causing to be inserted in any requisition for any such licence, any false, &c., name, &c., or other false, &c., description of any person, &c., as being the proprietor or part proprietor of the stage-carriage for or in respect of which such licence shall be applied for or procured; or wilfully or knowingly inserting or causing to be inserted in any such requisition, or in any such licence as aforesaid, the name of any person as being a proprietor or part proprietor of such carriage, who shall not, at the time of the application for such licence, be, in fact, a proprietor, &c., of such carriage.	2 & 3 W. 4. c. 120. s. 10.
	Forging or counterfeiting, or causing or procuring to be forged, counterfeited, or resembled, any numbered plate directed to be provided, or which shall have been provided, made, or used, in pursuance of the said Act of the 2 & 3. W. 4. or of any former Act relating to the duties payable in respect of stage-carriages; or wilfully fixing or placing, or causing, or permitting, or suffering to be fixed or placed, upon any stage-carriage, or other carriage, any such forged or counterfeited plate; or selling or exchanging, or exposing to sale or uttering any such forged or counterfeited plate; or knowingly, an d without lawful excuse, (the proof whereof shall lie on the person accused,) having or being possessed of any such forged or counterfeited plate, knowing such plate to be forged or counterfeited; or knowingly and wilfully aiding, abetting, or assisting any person in committing any such offence as aforesaid.	2 & 3 W. 4. c. 120. s. 32.
It is also by the 12 sec. of the 1 & 2 Vict. c. 79, made lawful for any person to detain any forged licence or ticket, or for any peace officer to seize and take away any such licence or ticket, in order that the same may be produced in evidence against the offender, or be disposed of as the registrar of metropolitan public carriages shall think proper.	Forging or counterfeiting, or causing or procuring to be forged, counterfeited, or resembled, any licence or ticket, by the 1 & 2 Vict. c. 79. (An Act for the better regulation of Hackney Carriages, and of Metropolitan Stage Carriages, and of Waggons, Carts, and Drays, used in and near the Metropolis, and of the drivers and attendants thereof,) directed to be provided for the driver of a hackney carriage, or for the driver or the conductor of a metropolitan stage carriage, or for any waterman; or selling or exchanging, or exposing to sale, or uttering any such forged or counterfeited licence or ticket, knowing such licence, &c., to be forged, &c.; or knowingly and without lawful excuse (the proof whereof shall lie on the party accused), having or being possessed of such forged, &c., licence, &c., knowing such licence, &c., to be forged, &c., or knowingly and wilfully aiding, abetting, or assisting any person in committing any such offence as aforesaid.	1 & 2 Vic. c. 79. s. 12.

Fine or Imprisonment, or both, as to the Court shall seem meet.

* By sec. 3 of the 18 Eliz. c. 5, it is enacted, "That no informer or plaintiff shall or may compound or agree with any person or persons that shall offend or shall be surmised to offend against any penal statute, for such offence committed or pretended to be committed, but after answer made in court unto the information	Offending (except in the case of the clerks of the Court only, for making out of process otherwise than is appointed by the 18 Eliz. c. 5 (an Act to redress disorders in common Informers),) in suing out of process, making of composition or other misdemeanor, contrary to the true intent and meaning of the said statute,* or by colour or pretence of process, or without process, upon colour or pretence of any matter of offence against any penal law, making any composition or taking any money, reward or promise of reward for oneself or to the use of	18 Eliz. c. 5. s. 4. 27 Eliz. c. 10. 56 Geo. 3. c. 138. s. 2.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
or suit in that behalf exhibited or prosecuted; nor after answer, but by the order or consent of the court in which the same information or suit shall be depending, upon the pains and penalties hereinafter in this present Act set down and declared." † Besides the punishment specified above, the person committing any of these offences shall from and after conviction be for ever disabled to pursue, or be plaintiff or informer in any suit or information upon any statute popular or penal; and shall for every such offence forfeit £10, to be recovered by action of debt or information.—See sec. 4.	any other, without order or consent of some of Her Majesty's Courts at Westminster.†	
The first offence is punishable by a Fine of £20.	Counterfeiting or causing to be counterfeited any of the seals used by the corporation or congregation of the Dutch-Bay-Hall, in Colchester; or, not being the officer thereunto by the said corporation appointed, and in the place thereunto by them appointed, affixing any such seal or seals to any Colchester Bays, whether counterfeited or not (for the second offence).	12 Car. 2. c. 22. s. 4. 56 Geo. 3. c. 138. s. 2.
The person committing this offence also forfeits the sum of £50. Such forfeiture, however, does not appear to form any part of the punishment of the indictable offence, but it is presumed must be recovered in a civil action. See the Act 8 & 9 W. 3. c. 27. As to the offence of rescuing any prisoner taken upon legal process within any of the pretended privileged places here mentioned, see sec. 15 of the 8 & 9 W. 3. c. 27, by which it is made punishable by *order* of court (in the event of the offender not paying £500 to the plaintiff in the action upon which process has been taken out, as aforesaid), with transportation for Seven Years. It does not appear to be an indictable offence.	Opposing or resisting the sheriffs of London and Middlesex, head bailiff of the Liberty of the Duchy of Lancaster, high sheriff of the county of Surry, bailiff of the Liberty of the Borough of Southwark, for the time being, or their respective deputy or deputies, officer or officers, or any of them, or any who shall be aiding or assisting to them, or any of them, in the executing of any legal process, execution, or extent taken out by any person having any debt or debts, sum or sums of money, due or owing to him from any person residing within the Whitefriars, Savoy, Salisbury Court, Ram Alley, Mitre Court, Fuller's Rents, Baldwin's Gardens, Montague Close, or the Minories, Mint, Clink, or Deadman's Place.	8 & 9 W. 3. c. 27. s. 15. 56 Geo. 3. c. 138. s. 2.
	Asking, demanding, accepting, or receiving, directly or indirectly, any sum or sums of money, or any other kind of gratuity or reward, for the soliciting or procuring the loan, and for the brokerage of any money that shall be actually and *bonâ fide* advanced and paid as and for the price or consideration of any annuity or rent-charge, granted for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, over and above the sum of 10*s.* for every £100 so actually and *bonâ fide* advanced and paid.	53 Geo. 3. c. 141. s. 9.
The Committee for the superintendence of the Penitentiary have the option of preferring Indictments against offenders, or of merely dismissing them and appointing others in their stead.	The governor of the General Penitentiary, at Millbank, or other officer or servant belonging to such Penitentiary, being guilty of knowingly or wilfully making any false entry or any fraudulent omission in the accounts, or of any other fraud whatsoever, or of any collusion with any other officer or servant belonging to such Penitentiary, or with any other person or persons in any matter relative thereto.	56 Geo. 3. c. 63. s. 12.
	Any person having the custody of any convict ordered to be confined within the Penitentiary, at Millbank, or being employed by the person having such custody as a keeper, underkeeper, turnkey, assistant, or guard, negligently permitting any such convict to escape.	56 Geo. 3. c. 63. s. 44.
	Any natural born subject of His Majesty, his heirs or successors, without the leave or licence of His Majesty, his heirs or successors, for that purpose first had and obtained under the sign-manual of His Majesty, his heirs or successors, or signified by Order in Council or	

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OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	by Proclamation of His Majesty, his heirs or successors, taking or accepting, or agreeing to take, &c., any military commission, or otherwise entering into the military service as a commissioned or non-commissioned officer, or enlisting or entering himself to enlist, or agreeing to enlist, or enter himself to serve as a soldier, or to be employed or serving in any warlike or military operation in the service of, or for or under or in aid of, any Foreign Prince, State, Potentate, Colony, Province, or part of any Province or People, or any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, &c., either as an officer or soldier, or in any other military capacity; Or accepting or agreeing to take or accept any commission, warrant, or appointment as an officer, or enlisting or entering himself to serve as a sailor or marine, or to be employed or engaged, or serving in and on board any ship or vessel of war, or in or on board any ship or vessel, used or fitted out, or equipped or intended to be used, for any warlike purpose in the service of or for or under or in aid of any foreign power, prince, &c.; Or engaging, contracting, or agreeing to go or going to any foreign state, country, &c., or to any place beyond the seas, with an intent or in order to enlist or enter himself to serve, or with intent to serve, in any warlike or military operation whatever, whether by land or by sea, or in the service of or for or under or in aid of any person or persons exercising or assuming to exercise the powers of Government in or over any foreign country, &c., either as an officer or soldier, or in any other military capacity, or as any officer or sailor or marine, in any such ship or vessel as aforesaid, although no enlisting money or pay or reward shall have been or shall be in any or either of the cases aforesaid actually paid to or received by him, or by any person to or for his use or benefit; Or any person whatever, within the United Kingdom of Great Britain and Ireland, or in any part of His Majesty's dominions elsewhere, or in any country, colony, settlement, island, or place belonging to or subject to His Majesty, hiring, retaining, engaging, or procuring, or attempting or endeavouring to hire, &c., any person or persons whatever to enlist or to serve, or to be employed in any such service or employment as aforesaid, as an officer, soldier, sailor, or marine, either in land or sea service, for or under or in aid of any foreign prince, &c.; or to go, to agree to go, or embark from any part of His Majesty's dominions, for the purpose or with intent to be so enlisted, entered, engaged, or employed, as aforesaid, whether any enlisting money, pay, or reward shall have been or shall be actually given or received or not.	59 Geo. 3 c 69. s. 2.
On conviction of this offence, the ship, &c., are also forfeited.	Any person within any part of the United Kingdom, or in any part of His Majesty's dominions beyond the seas, without the leave and licence of His Majesty for that purpose first had and obtained as aforesaid, equipping, furnishing, fitting out, or arming, or attempting or endeavouring to equip, &c., or procuring to be equipped, &c., or knowingly aiding, assisting, or being concerned in the equipping, &c., of any ship or vessel, with intent or in order that such ship or vessel shall be employed in the service of any foreign prince, &c., as a transport or store ship, or with intent to cruise or commit hostilities against any prince, state, or potentate, or against the subjects or citizens	59 Geo. 3. c. 69. s. 7.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	of any prince, &c., or against the persons exercising or assuming to exercise the powers of government in any colony, &c., or against the inhabitants of any foreign colony, &c., with whom His Majesty shall not then be at war; Or issuing or delivering any commission for any ship or vessel, to the intent that such ship or vessel shall be employed as aforesaid.	
	Any person in any part of the United Kingdom, or of His Majesty's dominions beyond the seas, without the leave and licence of His Majesty, as aforesaid, by adding to the number of the guns of such vessel, or by changing those on board for other guns, or by the addition of any equipment for war, increasing or augmenting, or procuring to be increased, &c., or knowingly being concerned in increasing, &c., the warlike force of any ship or vessel of war, or cruizer, or other armed vessel, which at the time of her arrival in any part of the United Kingdom, or any of His Majesty's dominions, was a ship of war, cruizer, or armed vessel in the service of any foreign prince, &c.	59 Geo. 3. c. 69. s. 8.
As to the punishment of abettors in these misdemeanors, see observation at p. 68.	Unlawfully taking or causing to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her.	9 Geo. 4. c. 31. s. 20.
	Arresting any clergyman upon any civil process, while he shall be performing Divine service, or shall, with the knowledge of the persons so arresting, be going to perform the same, or returning from the performance thereof.	9 Geo. 4. c. 31. s. 23.
Officer so convicted is thenceforth rendered incapable of holding any office or place in or relating to any of the Revenues of the United Kingdom.	Officer of Excise delivering out or suffering to be delivered out any paper prepared or provided or appointed by the Commissioners of Excise to be used for permits in blank, or before such permit shall be filled up and issued, agreeable to and in conformity with a request note, or knowingly giving or granting any permit to any person not intitled to receive the same, or knowingly giving or granting any false or untrue permit, or making any false or untrue entry in the counterpart of any permit given or granted by him, or knowingly or willingly receiving or taking any goods or commodities into the stock of any person or persons brought in with any false or untrue or fraudulent permit, or knowingly or willingly granting any permit for the removal of any goods or commodities out of or from the stock of any person or persons who shall have received or retained such goods or commodities, or any of them, under or by virtue or pretext of any false, untrue, forged, or fraudulent permit, or knowingly or willingly giving any false credit, so as to enable such person or persons falsely and fraudulently to obtain a permit or permits; or knowingly or willingly suffering the same to be done directly or indirectly.	2 W. 4. c. 16. s. 15.
	Master of a ship belonging to any subject of the United Kingdom, forcing on shore, and leaving behind, or otherwise wilfully and wrongfully leaving behind on shore or at sea, in any place in or out of His Majesty's dominions, any person belonging to his crew, before the return to or arrival of such ship in the United Kingdom, or before the completion of the voyage or voyages for which such person shall have been engaged, whether such person shall have formed part of the original crew or not.	5 & 6 W. 4. c. 19. s. 40.

Appendix No. 6.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	Person having the custody of any offender who shall be ordered to be confined within Parkhurst prison, or employed by the person having such custody, as a keeper, underkeeper, turnkey, assistant, or guard, carelessly allowing any such offender to escape.	1 & 2 Vic. c. 82. s. 13.
	IMPRISONMENT for THREE YEARS, and FINE at the King's PLEASURE.*	
* This punishment is taken from the 33 Edw. 1. st. 3. (Stat. of Champ). See however the several Acts referred to in the margin.	Champerty (as well those who shall be attainted thereof as those who consent thereunto).	3 Edw. 1. c. 25. 13 Edw. 1. St. 1. c. 49. 28 Edw. 1. St. 3. c. 11. 33 Edw. 1. St. 2. ——— St. 3. 4 Edw. 3. c. 11. 20 Edw. 3. c. 4. ——— c. 5. 7 Rich. 2. c. 15. 32 Hen. 8. c. 9.
	Maintenance (as well those who shall be attainted thereof as those consenting thereunto).	3 Edw. 1. c. 28. ——— c. 33. 33 Edw. 1. St. 3. 1 Edw. 3. St. 2. c. 14 4 Edw. 3. c. 11. 20 Edw. 3. c. 4. ——— c. 5. 1 Rich. 2. c. 4 & 7. 7 Rich. 2. c. 15. 32 Hen. 8. c. 9.
	GREAT FORFEITURE.	
	By force of arms, or by malice or menacing, disturbing any to make free election.	3 Edw. 1. c. 5.
To be adjudged incapable and disabled in Law, to all intents and purposes whatsoever, to have or enjoy any office or offices, employment or employments, Ecclesiastical, Civil, or Military, or any part in them, or any profit or advantage appertaining to them, or any of them.†		
† If the offender is possessed of any office, &c. at the time of his conviction, the same is made void. There must be *two* or more credible witnesses to convict of this offence, and the prosecution must be within Three Months after information upon oath before a Justice of the Peace, and which must be given within Four Days after words spoken.	Any person having been educated in, or at any time having made profession of, the Christian religion within this realm, asserting or maintaining by writing, printing, teaching, or advised speaking there are more gods than one, or denying the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of Divine authority.	9 & 10 W. 3. c. 32. s. 1. 53 Geo. 3. c. 160. s. 2.
IMPRISONMENT for the space of THREE YEARS, without bail or mainprize, and the Offender to be disabled to sue, prosecute, plead, or use any action or information in any Court of Law or Equity, or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed of gift, or to bear any office, Civil or Military, or Benefice Ecclesiastical, for ever, within this Realm.		
	Any person being a second time lawfully convicted of all or any of the crime or crimes lastly hereinbefore mentioned.	9 & 10 W. 3. c. 32. s. 1. 53 Geo. 3. c. 160. s. 2.
	IMPRISONMENT and Hard Labour, for any period of time not exceeding THREE YEARS.	
	Prisoner, whose estate shall by an order under the 1 & 2 Vic. c. 110. (An Act for abolishing arrest on mesne process in civil actions, except in certain cases; for extending the remedies of creditors against the property of debtors; and for amending the laws for the relief of insolvent debtors in England,) have been vested in the provisional assignee for the time being, of the estates and effects of insolvent debtors in England, with intent to defraud the creditors or creditor of such prisoner, wilfully and fraudulently omitting in his or her schedule, sworn to as directed by that Act, any effects or property whatsoever, or retaining or excepting out of such schedule, as wearing apparel, bedding, working tools and implements, or other necessaries, property of greater value than £20; or aiding or assisting him to do the same.	1 & 2 Vic. c. 110. s. 99.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
IMPRISONMENT for any term not exceeding THREE YEARS, with or without Hard Labour, in the Common Gaol or House of Correction, and to be kept in solitary confinement for any portion or portions of such Imprisonment not exceeding One Month at a time or Three Months in the space of One Year, as to the Court in its discretion shall seem meet.		
	Having in one's custody or possession three or more pieces of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same.	2 W. 4. c. 34. s. 8. 7 W. 4. & 1 Vic. c. 90. s. 5.
IMPRISONMENT, with Hard Labour, for any term not exceeding THREE YEARS, either in addition to, or in lieu of, any other punishment or penalty which may by Law be inflicted or imposed upon the Offender, as the Court shall think fit.		
	With force or violence assaulting or resisting (being armed with any offensive weapon whatsoever) any officer of Excise or any person employed in the revenue of Excise, or any person acting in the aid or assistance of such officer or person so employed, who in the execution of his office or duty shall search for, take, or seize, or shall endeavour or offer to search for, &c., any goods or commodities forfeited under or by virtue of any Act or Acts of Parliament relating to the revenue of Excise or Customs, or who shall search for, &c., or shall endeavour, &c., to search for, &c., any vessel, boat, cart, carriage, or other conveyance, or any horse, cattle, or other thing used in the removal of any such goods, &c., or who shall arrest or endeavour, &c., to arrest any person carrying, removing, or concealing the same, or employed or concerned therein, and liable to such arrest.	7 & 8 Geo. 4. c. 53. s. 40 & 43.
ONE YEAR'S IMPRISONMENT, and the Offender after to make a grievous Fine at the King's pleasure, if he have wherewith; and if he have not whereof, to have Imprisonment of Three Years.		
	Sheriff, coroner or any other bailiff, within franchise or without, for reward or for prayer, or for fear or for any manner of affinity, concealing, consenting, or procuring to conceal the felonies done in their liberties. or otherwise not attaching or arresting such felons there as they may, or otherwise not doing their office for favour borne to such misdoers.	3 Edw. 1. c. 9.
ONE YEAR'S IMPRISONMENT, and the Offender after to make a grievous Fine; and if he have not whereof, to have Imprisonment of Two Years.		
	Bailiff not being ready and apparelled at the commandment and summons of sheriffs and the cry of the country, to sue and arrest felons, when any need is, as well within franchise as without.	3 Edw. 1. c. 9.
FINE and IMPRISONMENT, with or without Hard Labour, not exceeding Two YEARS, and Sureties, if required, to keep the Peace.		
As to the punishment of abettors in this misdemeanor, see observation at p. 68.	Assaulting with intent to commit felony; or assaulting any peace officer or revenue officer, in the due execution of his duty, or any person acting in aid of such officer; or assaulting any person with intent to resist or prevent the lawful apprehension or detainer of the party so assaulting, or of any other person for any offence for which he may be liable by law to be apprehended or detained; or committing any assault in pursuance of any conspiracy to raise the rate of wages.	9 Geo. 4. c. 31. s. 25.

Appendix No. 6.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
This offence is either punishable on summary conviction before two Justices of the Peace, or on indictment or information, in which latter cases the offender is punishable in the same manner as persons are by law punishable for assaulting any constable in the execution of the duties of his office: see section 11 of the 1 & 2 W. 4. c. 41; and as to the punishment of persons assaulting constables in the execution of their duty, see 9 Geo. 4. c. 31. s. 25.	Assaulting or resisting any constable appointed by virtue of 1 and 2 W. 4. c. 41 (an Act for amending the laws relative to the appointment of special constables, &c.), whilst in the execution of his office, or promoting or encouraging any other person so to do.	9 Geo. 4. c. 31. s. 25. 1 & 2 W. 4. c. 41. s. 11.

FINE and IMPRISONMENT not exceeding TWO YEARS, at the discretion of the Court.

This offence must be prosecuted within Six Calendar Months after committed.	Attending or being present at any meeting or assembly for the purpose of being, or at any meeting or assembly being, trained or drilled to the use of arms or the practice of military exercise, movements, or evolutions, such meeting or assembly being without any lawful authority of His Majesty, or the lieutenant, or two justices of the peace of any county or riding, or of any stewartry, by commission or otherwise, for so doing.	60 Geo. 3. & 1 Geo. 4. c. 1. s. 1.

IMPRISONMENT for TWO YEARS, and the Offender to find Sureties for his or her good behaviour for two Years more, to be computed from the end of the said two Years.

	Being convicted a second time of the offence of uttering or tendering in payment, or giving in exchange, or paying or putting off to any person or persons any false or counterfeit coin, not the proper coin of this realm nor permitted to be current within the same, resembling or made with intent to resemble or look like any gold or silver coin of any foreign Prince, state or country, or to pass as such foreign coin, knowing the same to be false or counterfeit.	37 Geo. 3. c. 126. s. 4.

IMPRISONMENT for TWO YEARS.

	The defendant or defendants in any action popular, pleading any manner of recovery of action popular, in bar of the said action, when the said recovery was had by covin, or else that he or they before that time barred the plaintiff or plaintiffs in any such action popular, the said plaintiff or plaintiffs having been barred in the said action popular by covin.	4 Hen. 7. c. 20.

IMPRISONMENT in the Common Gaol or House of Correction for any time not exceeding TWO YEARS, nor less than Six Calendar Months, in the discretion of the Court.

	Knowingly and wilfully certifying or declaring any matter or thing which shall be false or untrue in any certificate or declaration which the committee for the time being of the corporation of the president, vice-presidents, treasurer, and guardians of the Asylum for the reception of Orphan Girls, the settlements of whose parents cannot be found, or any three or more of them present at their weekly or other meetings, shall or may require to be made and subscribed previous to and for the purpose of the admission of any orphan girl into the said asylum, according to the rules of the said charity.	39 & 40 Geo. 3. c. lx. s. 14.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
IMPRISONMENT for any term not exceeding TWO YEARS, with or without Hard Labour, in the Common Gaol or House of Correction, and to be kept in solitary confinement for any portion or portions of such Imprisonment not exceeding One Month at a time, or Three months in the space of One Year, as to the Court in its discretion shall seem meet.		
	Tendering, uttering, or putting off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin, knowing the same to be false, &c., and at the time of such tendering, &c., having in his possession, besides the false, &c., coin so tendered, &c., one or more piece or pieces of false, &c., coin resembling, &c., any of the King's current gold or silver coin, or, either on the day of such tendering, &c., or within the space of ten days then next ensuing, tendering, &c., any more or other false or counterfeit coin resembling any of the King's current gold or silver coin, knowing the same to be false or counterfeit.	2 W. 4. c. 34. s. 7. 7 W. 4. & 1 Vic. c. 90. s. 5.
As to the punishment of abettors in this misdemeanor, see observation at p. 79.	Soliciting or endeavouring to procure any other person to commit a felony or misdemeanor punishable by the Post-office Acts.	7 W. 4. & 1 Vic. c. 36. s. 36 & 42. 7 W. 4. & 1 Vic. c. 90. s. 5.
IMPRISONMENT, with or without Hard Labour, in the Common Gaol or House of Correction, for any term not exceeding TWO YEARS.		
Where a woman tried for the murder of her child is acquitted thereof, the Jury, in case it shall so appear in evidence, may find for this offence. See sec. 14. As to the punishment of abettors in this misdemeanor, see observation at p. 68.	Any woman being delivered of a child, by secret burying or otherwise disposing of the dead body of the said child, endeavouring to conceal the birth thereof.	9 Geo. 4. c 31. s. 14.
IMPRISONMENT for a term not exceeding TWO YEARS.		
	Entering or embarking on board, or contracting for the entering, &c. (except in such special cases as are expressly permitted by 5 Geo. 4. c. 113, an Act to amend and consolidate the laws for the abolition of the Slave Trade), of any ship, vessel, or boat as petty officer, seaman, marine, or servant, or in any other capacity, knowing that such ship, &c., is actually employed, or is in the same voyage or upon the same occasion in respect of which they shall so enter or embark on board, or contract so to do as aforesaid, intended to be employed in accomplishing any of the objects, or contracts in relation to the objects, which are by the said Act declared unlawful.	5 Geo. 4. c. 113. s. 11.
IMPRISONMENT for the space of ONE whole YEAR, without bail or mainprize, and such further punishment by Fine or Imprisonment, or both, as to the Court shall seem most proper, and the Offender to be obliged to give Sureties for good behaviour in such sum, and for such time, as the Court shall judge proper according to the circumstances of the offence, and, in such case, to be further imprisoned until such sureties be given.		
	Pretending to exercise or use any kind of witchcraft, sorcery, enchantment, or conjuration, or undertaking to tell fortunes, or pretending from skill or knowledge in any occult or crafty science to discover where or in what manner any goods or chattels supposed to have been stolen or lost may be found.	9 Geo. 2. c. 5. s. 4. 56 Geo. 3. c. 138. s. 2.
IMPRISONMENT for ONE YEAR, and grievous Fine to the King.		
	By malice procuring any indictment against the judges of Holy Church for having cognizance in cases of Tithes, or other things which of right ought, and of old times were wont, to pertain to the Spiritual Court, or against any other persons thereof meddling according to the law.	13 Edw. 1. St. 1. c. 12. 1 Rich. 2. c. 13.

Appendix No. 6.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	GRIEVOUS AMERCEMENT.*	
* The distinction between a Fine and an Amercement is, that the former is only imposed in respect of the *crimina majora*, and is in the discretion of the judges, who proportion it to the enormity of the offence. The latter is only awarded in the case of the less offences, and must be *affeered*, i. e. assessed by certain officers called affeerors sworn for that purpose. A Fine also is levied by a *capiatur;* but in the case of an amercement, a distringas or action of debt only lies. See Bac. Abrid. Title "Fines and Amercements."—Qy. If offences, for which a person can be amerced only, are indictable.	Taking great and unreasonable distresses.	52 Hen. 3. c. 4.
The offender is also to yield full damage. See also the 6 Edw. 1. St. 1. c. 5, which gives treble damages. See also 13 Edw. 1. St. 1, c. 36 & 37.	Fermors, during their terms, making waste or exile of house, woods, and men, or of any thing belonging to the tenements that they have to farm, without special licence had by writing of covenant, making mention that they may do it.	52 Hen. 3. c. 23.
Besides the above punishment, the offender is to pay to him that shall be so attached, his damages double.	Great men, or their bailiffs, or others (except the King's officers), at the complaint of any, or by their own authority, attaching others passing through their jurisdiction with their goods, and compelling them to answer afore them upon contracts, covenants, and trespasses, done out of their power and their jurisdiction, where indeed they hold nothing, nor within the franchise where their power is.	3 Edw. 1. c. 35.
	FINE of £10, and Imprisonment for ONE YEAR.	
	Advisedly and directly advancing, publishing, and setting forth by writing, printing, signing, or any other open speech or deed, to any person or persons, any fond, fantastical, or false prophecy, upon or by the occasion of any arms, fields, beasts, badges, or such other like things accustomed in arms, cognizances, or signets, or upon or by reason of any time, year, or day, name, bloodshed, or war, to the intent thereby to make any rebellion, insurrection, dissension, loss of life, or other disturbance within this realm, and other the King's dominions.	5 Eliz. c. 15. s. 2.
	ONE YEAR'S IMPRISONMENT and Fine and Ransom* at the King's Pleasure.	
* As to the meaning of Ransom, see p. 79.	Any spiritual person, by the occasion of the fulminations of any interdictions, censures, inhibitions, excommunications, appeals, suspensions, summons, or other foreign citations for the causes mentioned in the 24 Henry 8. c. 12 (an Act for the Restraint of Appeals), or for any of them, refusing to minister or cause to be ministered the sacraments, sacramentals, and other Divine Services, as Catholic and Christian men owen to do.	24 Hen. 8. c. 12. s. 3. 1 Eliz. c. 1. s. 4.
	AMERCEMENT,† and the Offender to be otherwise punished, according as of old times hath been used to be done within the Realm of England in the like case.	
† As to the meaning of Amercement, see above.	Any person having the summons of Parliament (be he archbishop, bishop, duke, earl, baron, banneret, knight of the shire, citizen of city, burgess of borough, or other singular person or commonalty) absenting himself, and coming not at the said summons, (except he may reasonably and honestly excuse himself to our Lord the King).	5 Rich. 2. st. 2. c. 4.
	Any sheriff of the realm being negligent in making his returns of writs of the Parliament, or leaving out of the said returns any cities or boroughs which be bound to come to the Parliament.	5 Rich. 2. st. 2. c. 4.

OBSERVATIONS.	OFFENCE.	Act or Act of Parliament, by which the Offence is defined or made punishable.
IMPRISONMENT for a YEAR and a DAY, and, if the Trespass require greater punishment, at the King's Pleasure.		
Besides the above punishment, the offender, being a pleader, is not thenceforth to be heard to plead in that court for any man.	Any serjeant, pleader, or other, doing any manner of deceit or collusion in the King's court, or to beguile the court or the party.	3 Edw. 1. c. 29.
IMPRISONMENT for ONE YEAR at the least, or Imprisonment, with Hard Labour, for any term not exceeding One Year, either in lieu of, or in addition to, the first named punishment.		
See also 13 Hen. 4. c. 7. & 1 Geo. 1. St. 2. c. 5.	Rioters being attainted of great and heinous riots.	17 Rich. 2. c. 8. 2 Hen. 5. St. 1. c. 8. 3 Geo. 4. c. 114.
IMPRISONMENT for the space of ONE whole YEAR.		
* *Vide ante* p. 71.	Willingly and wittingly hearing, and being present at any other manner or form of common prayer, of administration of the sacraments, of making of ministers in the churches, or of any other rites contained in the Book of Common Prayer* than is meant and set forth in the said book, or that is contrary to the form of sundry provisions and exceptions contained in the 2 & 3 Edw. 6. c. 1 (An Act for Uniformity of Service and Administration of Sacraments throughout the Realm), and being thereof lawfully convicted—(for the second offence.)	5 & 6 Edw. 6. c. 1. s. 6. 13 & 14 Car. 2. c. 4. s. 24.
See also the 2 & 3 Edw. 6. c. 1. Besides being imprisoned for One Year, such parson, &c. shall be deprived, *ipso facto*, of all his spiritual promotions. The indictment for any of these offences must be at the next general Sessions or Assizes after the offence committed. See 1 Eliz. c. 2. s. 20.	Any manner of parson, vicar, or other whatsoever minister, that ought or should sing or say common prayer mentioned in the said Book of Common Prayer, or that ought or should minister the sacraments, committing any of the offences mentioned in the 4th sec. of the 1 Eliz. c. 2. and enumerated at p. 71 of this list, and and being thereof lawfully convicted—(for the second offence.)	1 Eliz. c. 2. s. 5. 13 & 14 Car. 2. c. 4. s. 24.
See also 2 & 3 Edw. 6. c. 1. As to the time within which an offender must be indicted, see above.	Any person not being beneficed, nor having any spiritual promotion, offending and being lawfully convicted concerning any of the premises—(for the first offence.)	1 Eliz. c. 2. s. 7. 13 & 14 Car. 2. c. 4. s. 24.
IMPRISONMENT, with Hard Labour, in the Common Gaol or House of Correction, for any term not exceeding Twelve nor less than Six Calendar Months.		
	Any seamen, keelmen, casters, ship-carpenters, or other persons riotously assembled together to the number of three or more, unlawfully and with force preventing, hindering, or obstructing the loading or unloading, or the sailing or navigating of any ship, keel, or other vessel, or unlawfully and with force boarding any ship, &c., with intent to prevent, &c., the loading, &c., of such ship, &c.	33 Geo. 3. c. 67. s. 1. 41 Geo. 3. (U. K.) c. 19. s. 4.
FORFEITURE of all the Offender's Goods and Chattels,* as well real as personal, and if he shall not have or be worth of his proper Goods and Chattels to the value of £20 at the time of his conviction or attainder, then, over and besides the Forfeiture of his Goods and Chattels, Imprisonment for the space of One whole Year, without bail or mainprize.†		
* This forfeiture does not constitute the offence a felony. *Vide ante* Appendix No. 3. p. 4 in the note. † Besides the punishment above mentioned, it is enacted, by 29 s. of the 1 Eliz.	By writing, printing, teaching, preaching, express words, deed or act, advisedly, maliciously, and directly affirming, holding, standing with, setting forth, maintaining, or defending the authority, pre-eminence, power, or jurisdiction spiritual or ecclesiastical, of any foreign prince, prelate, person, state, or poten-	

Appendix No. 6.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
c. 1., that, in the case of spiritual persons so offending, and being attainted, all their benefices, prebends, and other ecclesiastical promotions and dignities, shall immediately after such attainder be utterly void, as though the incumbents thereof were dead. ‡The second offence is Præmunire; the third, High Treason.	tate whatsoever, heretofore claimed, used or usurped within this realm, or any dominion or country being within or under the power, dominion, or obeysance of her Highness; or advisedly, maliciously, and directly putting in ure or executing any thing for the extolling, advancement, setting forth, maintenance, or defence of any such pretended or usurped jurisdiction, power, pre-eminence, and authority, or any part thereof; or abetting, aiding, procuring, or counselling therein—(for the first offence‡.)	1 Eliz. c. 1. s. 27 & 28.

IMPRISONMENT for any term not exceeding ONE YEAR, with or without Hard Labour, in the Common Gaol or House of Correction, and to be kept in solitary confinement for any portion or portions of such Imprisonment, not exceeding One Month at a time or Three Months in the space of one year, as to the Court in its discretion shall seem meet.

Tendering, uttering, or putting off any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the king's current gold or silver coin, knowing the same to be false or counterfeit.	2 W. 4. c. 34. s. 7. 7 W. 4. & 1 Vic. c. 90. s. 5.
Tendering, uttering, or putting off any false or counterfeit coin resembling, &c., any of the king's current copper coin, knowing the same to be false or counterfeit, or having in his custody or possession three or more pieces of false or counterfeit coin resembling, &c., any of the king's current copper coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same.	2 W. 4. c. 34. s. 12. 7 W. 4. & 1 Vic. c. 90. s. 5.

SOLITARY IMPRISONMENT in the Common Gaol or House of Correction, without bail or mainprize, for a space not less than Three, nor exceeding Twelve Calendar Months.

Having rented or taken to hire any stocking-frame, with or without the machine or engine thereto annexed or used therewith, selling or otherwise unlawfully disposing of any such stocking-frame, or the machine or engine therewith let (if any such there shall be), without the consent of the owner or owners thereof.	28 Geo. 3. c. 55. s. 2.
Wilfully and knowingly receiving or purchasing any such stocking-frame, machine or engine, so sold or unlawfully disposed of as aforesaid.	28 Geo. 3. c. 55. s. 3.

FINE of £100, or, at the discretion of the Court, commitment to the Common Gaol or House of Correction, there to be kept to Hard Labour, for any term not exceeding One Year.

After sunset and before sunrise between the 21st day of September and the 1st day of April, or after the hour of eight in the evening, and before the hour of six in the morning at any other time in the year, making or causing to be made, or aiding or assisting in making, any signal in or on board or from any vessel or boat, or on or from any part of the coast or shore, of the United Kingdom, or within six miles of any part of such coasts or shores, for the purpose of giving any notice to any person on board any smuggling vessel or boat, whether any person so on board of such vessel or boat be or be not within distance to notice any such signal.	3 & 4 W. 4. c. 53. s. 53.

IMPRISONMENT for any term not exceeding ONE YEAR.

See this offence fully described at p. 67, *ante*.	Counterfeiting foreign copper coin or any other coin made of any metal or mixed metals, of less value than foreign silver coin (for the first offence).	43 Geo. 3. c. 139. s. 3.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.

FINE of £20 and Imprisonment for SIX MONTHS, and if the offender have not goods or chattels to the value of £20, then such further Imprisonment* as to the Court shall seem proper; and the offender to be deemed infamous.†

* By the 9 Ann, c. 14, the offence of cheating, &c., at games was made punishable as in cases of wilful perjury, the punishment for which, at the time of passing that Act, was "Fine of £20 and imprisonment for six months; and if the offender had not goods or chattels to the value of £20, he was to be set on the pillory in some market-place within the shire, city, or borough where the offence was committed, and there to have both his ears nailed." By the 56 Geo. 3. c. 138, the punishment of the pillory was abolished in all cases except perjury and subornation of perjury, and in lieu thereof the court was authorized to pass such sentence of *fine or imprisonment, or both*, as should seem most proper.—It will be observed that the pillory was to form part of the punishment for this offence against the 9 Ann, c. 14, only in the event of the offender not having goods or chattels to the value of £20; with respect, therefore, to this crime, practically speaking, the only punishment substituted for the pillory, by 56 Geo. 3. c. 138, was *such further term of imprisonment as to the Court shall seem proper*. † Besides the above punishment, the offender is to forfeit five times the value of the money or other thing won. See sec. 5.	By any fraud or shift, cousenage, circumvention, deceit, or unlawful device, or ill practice whatsoever, in playing at or with cards, dice, tables, tennis, bowls, or other game or games whatsoever, or in or by bearing a share or part in the stakes, wagers, or adventures, or in or by betting on the sides or hands of such as do or shall play as aforesaid, winning, obtaining, or acquiring to oneself or to any other or others, any sum or sums of money, or other valuable thing or things whatsoever; or at any one time or sitting winning of any one or more person or persons whatsoever, above the sum or value of £10.	9 Ann. s. 14. s. 5.

PENALTY of £500, and removal from Office, and rendered incapable for ever after of holding any Office in same Court, or otherwise serving His Majesty, his Heirs or Successors.

	Judge, commissioner, registrar, deputy-registrar, clerk, messenger, assignee, or any other officer or person whatsoever, fraudulently and wilfully demanding, or taking, or appointing, or allowing any person whatever to take for him or on his account, or for or on account of any person by him named, or in trust for him or for any other person by him named, any fee, emolument, gratuity, sum of money, or anything of value whatsoever, for anything done or pretended to be done under the 1 & 2 W. 4. c. 56. (an Act to establish a Court in Bankruptcy), or any other Act relating to Bankruptcy, or under colour of doing anything under that Act, or any other such Acts, other than is allowed by that Act and any other such Act as aforesaid.	1 & 2 W.4. c. 56. s. 58.
	Master in Ordinary of the High Court of Chancery, or any person holding any office, situation, or employment in any office of the said court, or under any of the judges or officers thereof, wilfully taking, demanding, receiving or accepting, or appointing or allowing any person whatsoever to take for him or on his account, or for or on account of any person by him named, or in trust for him or for any other person by him named, any fee, gift, gratuity or emolument, or anything of value, other than what is allowed and directed to be taken by him, for anything done or pretended to be done relating to his office, situation, or employment, or under colour of doing anything relating to his office, &c.	3 & 4 W. 4. c. 94. s. 41.

IMPRISONMENT for SIX MONTHS, without bail or mainprize, and the Offender to be for ever disabled to take, hold or exercise any Office belonging to the City, Borough or Corporation.

	Any mayor, bailiff or other chief officer of any city, borough or town corporate, voluntarily absenting himself from, or knowingly and designedly preventing or hindering the election	

Appendix No. 6.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	of any other mayor, bailiff, or other chief officer in the same city, borough or town corporate, upon the day or within the time appointed by charter or other ancient usage for such election.	11 Geo. 1. c. 4. s. 6.
HALF-A-YEAR'S IMPRISONMENT and RANSOM* at the King's will.		
* As to the meaning of ransom, see p. 79. It is also enacted by the 5 Edw. 3. c. 8, that "in case that the marshals suffer by their assent such prisoners to escape, they shall be at the law, as before this time they have been."	Marshals of the King's Bench suffering prisoners indicted of felonies, robberies or theft, who have removed the same indictment before the King and there yielded themselves, to wander out of prison by bail or without bail.	5 Edw. 3. c. 8.
FORFEITURE of 400 marks, or, if the Offender do not pay the same within Six Weeks after his conviction, Twelve Months' Imprisonment instead.		
See also the 2 & 3 Edw. 6. c. 1. The indictment for any of these offences must be at the next general Sessions or Assizes after the offence committed. See 1 Eliz. c. 2. s. 20.	Committing any of the offences mentioned in sec. 9 of the 1 Eliz. c. 2. (an Act for the Uniformity of Common Prayer and Service in the Church and Administration of the Sacraments), and enumerated in the statement of the 11th sec. of that Act at p. 71 of this list, and being thereof lawfully convicted (for the second offence.)	1 Eliz. c. 2. s. 10. & 13. 13 & 14 Car. 2. c. 4. s. 24.
FORFEITURE of 100 marks, or, if the Offender do not pay the same within Six Weeks after his conviction, Six Months' Imprisonment instead.		
See also the 2 & 3 Edw. 6. c. 1. As to the time within which an offender must be indicted, see above.	Committing any of the offences mentioned in the said 9th sec. of the 1 Eliz. c. 2., and enumerated at p. 71, of this list and being thereof lawfully convicted (for the first offence.)	1 Eliz. c. 2. s. 9. & 12. 13 & 14 Car. 2. c. 4. s. 24.
IMPRISONMENT for SIX MONTHS, and the Offender to find Sureties for his or her good behaviour for six Months more, to be computed from the end of the said first six Months.		
	Uttering or tendering in payment or giving in exchange, or paying or putting off to any person or persons any false or counterfeit coin, not the proper coin of this realm nor permitted to be current within the same, resembling or made with intent to resemble or look like any gold or silver coin of any foreign prince, state or country, or to pass as such foreign coin, knowing the same to be false or counterfeit.	37 Geo. 3. c. 126. s. 4.
IMPRISONMENT for SIX MONTHS.		
* Vide ante p. 71. See the 2 & 3 Edw. 6. c. 1.	Willingly and wittingly hearing and being present at any other manner or form of common prayer, of administration of the sacraments, of making of ministers in the churches, or of any other rites contained in the Book of Common Prayer,* than is mentioned and set forth in the said book, or that is contrary to the form of sundry provisions and exceptions contained in the 2 & 3 Edw. 6. c. 1. (an Act for Uniformity of Service and Administration of Sacraments throughout the Realm), and being thereof lawfully convicted (for the first offence.)	5 & 6 Edw. 6. c. 1. s. 6. 13 & 14 Car. 2. c. 4. s. 24.
See also the 2 & 3 Edw. 6. c. 1. Besides being imprisoned Six Months, such parson, &c. shall forfeit the profits of all his spiritual benefices or promotions coming or arising in one whole year next after his conviction. The indictment for any of these offences must be at the next general Sessions or Assizes, after the offence committed. See 1 Eliz. c. 2. s. 20.	Any manner of parson, vicar, or other whatsoever minister, that ought or should sing or say common prayer mentioned in the said Book of Common Prayer, or that ought or should minister the sacraments, committing any of the offences mentioned in the 4th sec. of the 1 Eliz. c. 2, and enumerated at p. 71, of this list, and being thereof lawfully convicted (for the first offence.)	1 Eliz. c. 2. s. 4. 13 & 14 Car. 2. c. 4. s. 24.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
The offender is also to pay treble the costs, charges, damages, and expenses of the party arrested; and also £10 to the person, if known, in whose name the arrest was made, to be respectively recovered by action of debt, &c.	By any way or mean maliciously or for vexation and trouble causing or procuring any other person or persons to be arrested or attached to answer in the Court of the Marshalsea, or in any court within the City of London, or in any city, borough, town corporate, or other place or places where any liberty or privilege is used to hold plea in any action or actions personal, at the suit or in the name of any person or persons, where indeed there is no such person or persons known, or without the assent, consent, or agreement of such person or persons, at whose suit or in whose name such arrest or attachment is so had and procured.	8 Eliz. c. 2. s. 4.
	Broker, not being a trading goldsmith or refiner of silver, buying or selling any bullion or molten silver.	6 & 7 W. 3. c. 17. s. 7.
	Having unlawful bullion found in one's possession, and not proving upon one's trial on an indictment for melting the current silver coin of this realm, by the oath of one credible witness at the least, the bullion so found to be lawful silver, and that the same was not the current coin of this realm, nor clippings thereof.	6 & 7 W. 3 c. 17. s. 8.
IMPRISONMENT for any Space of Time not exceeding SIX CALENDAR MONTHS.		
Besides the punishment at the head of this class of offences, the offenders shall be fined in such sum not exceeding treble the amount of duty for which he shall have been charged, as the court shall think fit.	Wilfully and fraudulently declaring any matter or thing which shall be false or untrue in any declaration required by the 50 Geo. 3. c. 105 (an Act to regulate the manner of making surcharges of the duties of assessed taxes, &c.).	50 Geo. 3. c. 105. s. 9.
PENALTY not exceeding the sum of £100 in money, and THREE MONTHS' IMPRISONMENT.		
The 13 Car. 2. c. 5, is not to be construed to extend to debar or hinder any person or persons, not exceeding the number of 20, to present any public or private grievance or complaint to any Member of Parliament after his election, and during the continuance of the Parliament, or to the King's Majesty, for any remedy to be thereupon had; nor to extend to any address whatsoever to His Majesty, by all or any of the Members of both or either Houses of Parliament, during the sitting of Parliament, but that they may enjoy their freedom of access to His Majesty, as theretofore had been used.—See sec. 3.	Soliciting, labouring, or procuring the getting of hands or other consent, of any persons above the number of 20 or more, to any petition, complaint, remonstrance, declaration or other address to the King, or both or either Houses of Parliament, for alteration of matters established by law in church or state, unless the matter thereof have been first consented unto and ordered by three or more justices of that county, or by the major part of the grand jury of the county or division of the county where the same matter shall arise at their public Assizes or general Quarter Sessions; or if arising in London, by the Lord Mayor, Aldermen and Commons in Common Council assembled; or repairing to His Majesty or both or either of the Houses of Parliament, upon pretence of presenting or delivering any petition, complaint, remonstrance or declaration or other addresses, accompanied with excessive number of people, or at any one time with above the number of 10 persons.*	13 Car. 2. c. 5. s. 2.
* These offences must be prosecuted within six months after the offences committed, and proved by two or more credible witnesses.		
FINE not exceeding £20, or Imprisonment not exceeding Three Calendar Months, or both, such Imprisonment to be with or without Hard Labour in the Common Gaol or House of Correction, and the Offender to be kept in solitary confinement for any portion or portions of such Imprisonment, or of such Imprisonment with Hard Labour not exceeding One Month at a time or Three Months in the space of One Year, as to the Court in its discretion shall seem meet.		
As to the punishment of abettors in this misdemeanor, see observation at p. 66.	Unlawfully and wilfully using any dredge or any net, instrument, or engine whatsoever within the limits of any oyster fishery being the property of any other person and sufficiently marked out and known as such, for the purpose of taking oysters or oyster brood, although none shall be actually taken; or with any net, instrument, or engine, dragging upon the ground or soil of any such fishery.	7 & 8 Geo. 4. c. 29. s. 4. & 36. 7 W. 4. & 1 Vic. c. 90. s. 5.
IMPRISONMENT for a term not exceeding THREE MONTHS, or Fine not exceeding £50, at the discretion of the Court.		
	Offending against the provisions of the Act for regulating Schools of Anatomy.	2 & 3 W. 4. c. 75. s. 18.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
FINE not less than £20, and Imprisonment, with or without Hard Labour, as may be awarded against him by the Court.		
	Wilfully neglecting or disobeying any of the rules, orders, or regulations of the Poor Law Commissioners or Assistant Commissioners, or being guilty of any contempt of the Commissioners sitting as a Board—upon a third and every subsequent conviction.	4 & 5 W. 4. c. 76. s. 98.
ONE MONTH'S Imprisonment at the least, Fine and Forfeiture.		
	Willingly using or causing to be used any act or acts, mean or means, to, in, or with any kind of linen cloth, whereby the same shall be deceitful or worse to and for the good use thereof.	1 Eliz. c. 12. s. 1.
IMPRISONMENT until the Offender brings into Court him which was the first author of the tale (*vide infra*), and if he cannot find him, then the Offender to be punished by the advice of the Council.		
	Telling or publishing any false news or tales whereby discord or occasion of discord or slander may grow between the King and his people, or the great men of the realm.	3 Edw. 1. c. 34. 12 Rich. 2. c. 11.
	Devising, speaking, or telling any false news, lies, or other such false things, of prelates, dukes, earls, barons, and other nobles and great men of the realm, and also of the chancellor, treasurer, clerk of the privy seal, steward of the King's house, justices of the one bench or of the other, and of other great officers of the realm, whereof discord or any slander might arise within the same realm.	3 Edw. 1. c. 34. 2 Rich. 2. st. 1. c. 5. 12 Rich. 2. c. 11.
PENALTY of £20 to the use of the King's Majesty, his heirs and successors.		
Upon proof of this offence before any justice of the peace, the offender is to be bound by recognizance in the penal sum of £50, and in default of such sureties to be committed to prison, there to remain till the next General or Quarter Sessions, and upon conviction of the said offence at the said General or Quarter Sessions, is to suffer the pain and penalty above mentioned.	Willingly and of purpose, maliciously or contemptuously coming into any cathedral or parish-church, chapel or other congregation permitted by the 1 W. & M. c. 18, (an Act for exempting their Majesties' Protestant subjects, dissenting from the Church of England, from the Penalties of certain Laws,) or into any place of congregation or assembly of religious worship permitted by the 31 Geo. 3. c. 32, (an Act to relieve, upon conditions and under restrictions, the persons therein described from certain Penalties and Disabilities to which Papists or persons professing the Popish Religion are by law subject,) and disquieting and disturbing the same, or misusing any priest, minister, preacher or teacher therein.	1 W. & M. c. 18. s. 18. 31 Geo. 3. c. 32. s. 10.
PENALTY, by the advice and discretion of the Justices thereto assigned.*		
* Besides this penalty, the plaintiffs may recover treble damages against the Mayor, Sheriffs and Aldermen.	The Mayor, Sheriffs and Aldermen, which have the governance of the City of London, not causing to be redressed and corrected the defaults, errors and misprisions which be notoriously used in the same City, and the same not duly punishing from time to time.	28 Edw. 3. c. 10. s. 1. 1 Hen. 4. c. 15.
FINE or IMPRISONMENT.		
	Being guilty of the offence of embracery, or any juror wilfully or corruptly consenting thereto.	6 Geo. 4. c. 50. s. 61.
FINE, according to the Trespass.		
	Taking any revenge or distress of one's own authority without award of the King's court.	52 H. 3. c. 1.

OBSERVATIONS	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	Any person (of what estate soever he be) distraining any to come to his court, which is not of his fee, or upon whom he had a jurisdiction, by reason of hundred or bailiwick, or taking distresses out of the fee or place where he hath bailiwick or jurisdiction.	52 H. 3. c. 2.
It is also provided by the same chapter, that any person distraining his tenant for services and customs, &c. afterwards found not to be due, shall not be punished by *Fine*, if he suffer the distresses to be delivered according to law; but shall be *amerced* as hitherto hath been used, and the tenant shall have his damages. For the distinction between an amerciament and a fine, see p. 92.	Any person (of what estate soever he be) not suffering such distresses as he hath taken to be delivered by the King's officers after the law and custom of the realm, or not suffering summons, attachment, or executions of judgments given in the King's court, to be done according to the law and custom of the realm.	52 H. 3. c. 3.
By this chapter it is also enacted that, if the lord commit this offence against his tenant, he shall be grievously punished by *amerciament*.	One neighbour causing any distress that he hath taken of another to be driven out of the county where it was taken, of his own authority and without judgment.	52 H. 3. c. 4.
	Taking and causing to be taken the beasts of another, chasing them out of the shire where the beasts were taken.	52 H. 3. c. 4. 3 Edw. 1. c. 16.
And by 3 Edw. 1. c. 16 the offender is to be more grievously punished if the manner of the trespass do so require.	Any person taking beasts wrongfully and distraining out of his fee.	52 H. 3. c. 4. 3 Edw. 1. c. 16.

FINE and RANSOM* at the King's Will and Pleasure.

* As to the meaning of Ransom, see p. 79. Any officer so offending must also pay double damages to the party damnified.	Any officer of the forest taking or imprisoning any man without due indictment, or being taken with the mainour or trespassing in the forest; or constraining any man to make any obligation or ransom to him in any sort against his agreement and the assize of the forest.	7 Rich. 2. c. 4.
The prosecution for this offence must be within two years after the default made, if the party grieved be of age, otherwise within two years after he shall be so.	Any judge or clerk falsely entering pleas, rasing rolls, or changing verdicts (so that by such default there ensueth disherison of any of the parties).	8 Rich. 2. c. 4.
The offender also forfeits his office of deputation.	Any person or persons to whom any deputation shall be made by commission to compound and agree for the payment of first fruits, their heirs, executors or administrators, concealing or embezzling any specialties or bonds taken for the sure payment of the said first fruits, and not delivering them according to the tenor of the 26 Hen. 8. c. 3 (The Bill for the First Fruits, with the yearly pensions to the King).	26 Hen. 8. c. 3. s. 4. 1 Eliz. c. 4. s. 24.
Qy. If the 2 & 3 Edw. 6. c. 6, not wholly, or at least so far as relates to Ireland, obsolete. The offender also forfeits his office in the Admiralty for this offence.	The admiral, or any officer or minister, officers or ministers of the Admiralty for the time being, in anywise exacting, receiving, or taking by himself, his servant, deputy, servants, or deputies, of any merchant or fisherman using and practising the adventures and journeys into Iceland, Newfoundland, Ireland, and other places commodious for fishing and the getting of fish, in or upon the seas or otherwise, by way of merchandize in those parts, any sum or sums of money, doles or shares of fish, or any other reward, benefit, or advantage, whatsoever it be, for any licence to pass this realm to the said voyages or any of them; or upon any respect concerning the said voyages or any of them (for the second offence.)	2 & 3 Edw. 6. c. 6.

Appendix No. 6.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
	Grievous Fine to the King.	
And if default be found in the lord of the franchise, the King may take the same franchise to himself.	Not being ready and apparelled at the commandment and summons of sheriffs, and the cry of the country, to sue and arrest felons, when any need is, as well within franchise as without.	3 Edw. 1. c. 9.
	Fine of five times the value of the Sum won or lost (at play).	
See also 9 Ann. c. 14. s. 5, *ante*, p. 95. The person offending against the 18 Geo. 2. c. 34, must be indicted within six months after the offence committed; and by sec. 9 it is provided that if any person so offending shall discover any other person so offending, so that such person be thereupon convicted, the person so discovering shall be discharged and indemnified from all penalties by reason of any such offence, if such person so discovering hath not been before convicted thereof, and shall be admitted as an evidence to prove the same. By sec. 10, it is declared nothing in that Act shall repeal or invalidate the 9 Ann. c. 14.	Winning or losing at play or by betting, at any one time, the sum or value of £10, or within the space of 24 hours the sum or value of £20.	18 Geo. 2. c. 34. s. 8.
	Grievous Punishment.	
	In any city, borough, town, market, or fair, distraining any foreign person, (which is of this realm,) for any debt wherefore he is not debtor or pledge.	3 Edw. 1. c. 23.
See also 13 Edw. 1. st. 1. c. 44, for the punishment of officers of the courts taking more than their fees, but which offences appear to be punishable summarily by the justices. Besides this punishment, justices' marshals offending against the 3 Edw. 1. c. 30, "shall pay unto the complainants the treble value of that they have received in such manner."	Justices' marshals taking money wrongfully of such as recover seizin of land, or of them that obtain their suits, or of jurors, towns, prisoners, or of others attached upon pleas of the Crown, otherwise than they ought to do.	3 Edw. 1. c. 30.
Qy. If this offence not limited to the case of the King's debtor. See the Act.	When a debtor can find able and convenient surety until a day before the day limited to the sheriff, within which a man may purchase remedy or agree for the demand, not releasing the distress in the mean time.	28 Edw. 1. st. 3. c. 12.
	Amercement* at the King's Pleasure.	
* As to the meaning of Amercement, see p 92. The deforcers are also to yield damages to the same widows.	Deforcing widows of their dowers or quarantine of the lands whereof their husbands died seized, and the same widow, after, recovering by plea.	20 H. 3. c. 1.
	Punishment at the King's Will.	
	Any sheriff doing any extortion to the people, and being thereof attainted.	1 Hen. 4. c. 11.
The offender shall also "yield twice as much."	Any sheriff or other the King's officer taking any reward to do his office, beyond that which they take of the King.	3 Edw. 1. c. 26.
	Fine to the King.	
Sheriffs so offending must also pay to the plaintiff thrice as much as they have received.	Sheriffs not lawfully acquitting the King's debtors at the next account after they have received such debts, and being thereof attainted.	51 Hen. 3. st. 4. 3 Edw. 1. c. 19.
Sheriffs or their ministers offending against this statute, "shall also be charged to answer to the party which thereof will him complain his treble damages."—See also 3 Edw. 1. c. 19.	Sheriffs or other ministers not letting the party indebted see estreats sealed, and not totting that which is paid.	42 Edw. 3. c. 9.

OBSERVATIONS.	OFFENCE.	Act or Acts of Parliament, by which the Offence is defined or made punishable.
The offender also to lose and forfeit his office.	Any manner of officer of the King's Exchequer taking of any Archbishop or Bishop, or of any other having charge with the collection and payment of the pension or annual rent of one-tenth of spiritual livings, any manner reward or thing for making their account or *quietus est* in the same Exchequer, or for any manner of thing appertaining to the same, concerning the said pension and annual rent.	26 Hen. 8. c. 3. s. 20. 1 Eliz. c. 4. s. 24.
FINE at the discretion of the Court, so that the same do not in any case exceed £100.		
	Any employer of any artificer in any of the trades mentioned in the 1 & 2 W. 4. c. 37, (an Act to prohibit the payment, in certain trades, of wages in goods, or otherwise than in the current coin of the realm,) by himself, or by the agency of any other person or persons, directly or indirectly entering into any contract or making any payment declared illegal by the said Act (for the third offence).	1 2 W. 4. c. 37. s. 9.
To be disabled and made incapable *ipso facto* to bear office, and disabled to make any gift, grant, conveyance, or other disposition of any of one's Lands, Tenements, Hereditaments, Goods, or Chattels, or to take any benefit of any gift, conveyance, or legacy to one's own use.		
The 1st and 2nd offences are punishable by pecuniary penalties.	Any Lord Chancellor or Keeper of the Great Seal of England, Lord Treasurer, Keeper of the King's Privy Seal, President of the Council, Bishop, Temporal Lord, Privy Counsellor, Judge, or Justice whatsoever, offending or doing anything contrary to the purport, true intent, and meaning of the 16 Car. 1. c. 10 (an Act for the regulating of the Privy Council, and for taking away the Court commonly called the Star Chamber)—for the third offence.	16 Car. 1. c. 10. s. 6.
To be at the King's Will of Body, Lands and Goods, thereof to be done as shall please him.		
	Justices being found in default in any of the points contained in the oath required to be taken by them.	18 Edw. 3. st. 4. 20 Edw. 3. c. 1.

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FIFTH REPORT

OF

HER MAJESTY'S COMMISSIONERS

ON

CRIMINAL LAW.

DATED THE 22d DAY OF APRIL, 1840.

Presented to both Houses of Parliament by Command of Her Majesty.

LONDON:

PRINTED BY W. CLOWES AND SONS, STAMFORD STREET,
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1840.

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COMMISSION.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To Our trusty and well-beloved Thomas Starkie, Henry Bellenden Ker, William Wightman, Andrew Amos, and David Jardine, Esquires, greeting: Whereas his late Majesty King William the Fourth did, by his Letters Patent, bearing date the Twenty-first Day of October, in the Seventh Year of His Reign, appoint you, the said Thomas Starkie, Henry Bellenden Ker, William Wightman, Andrew Amos, and David Jardine, to be His Commissioners for the purpose of Digesting the several Statutes relating to the Criminal and other Law. Now know ye, that We have revoked and determined, and by these presents do revoke and determine, the said recited Letters Patent, and every Clause, Article, and Thing therein contained. And further know ye, that We, reposing great trust and confidence in your zeal and ability, and being graciously pleased to renew the said Commission, and to continue you in such employment, have authorized and appointed, and do by these presents authorize and appoint, you, the said Thomas Starkie, Henry Bellenden Ker, William Wightman, Andrew Amos, and David Jardine, or any three or more of you, to be Our Commissioners, for the purpose of digesting into one Statute all the Statutes and Enactments touching Crimes, and the Trial and Punishment thereof, and also for digesting into one other Statute all the Provisions of the Common or Unwritten Law touching the same; and for Inquiring and Reporting how far it might be expedient to combine both those Statutes into one body of the Criminal Law, repealing all other Statutory Provisions, or how far it may be expedient to pass into a Law the first-mentioned only of the said Statutes, and generally for Inquiring and Reporting how far it might be expedient to consolidate the other branches of the existing Statute Law, or any of them. And for the better effecting the purposes of this Our Commission, We do by these presents give and grant to you, or any three or more of you, full power and authority to call before you, or any three or more of you, such Persons as you shall judge necessary, by whom you may be the better informed on the subject of this Our Commission, and every matter connected therewith; and also to call for, have access to, and examine all such Official Books, Documents, Papers, and Records, as may afford the fullest information on the subject; and to inquire of and concerning the premises by all other lawful ways and means whatsoever. And We do hereby give and grant to you, or any three or more of you, full Power and Authority, when the same shall appear to be requisite, to administer an Oath or Oaths to any Person or Persons whatsoever to be examined before you, or any three or more of you, touching or concerning the Premises. And Our further Will and Pleasure is, that you, or any three or more of you, do and shall, within the space of One Year after the date of this Our Commission, or sooner if the same can reasonably be, certify to Us in Our Court of Chancery, on parchment, under your hands and seals respectively, your several proceedings in this matter, as the same shall be respectively completed and perfected. And We will and command, and by these presents ordain, that this Our Commission shall continue in full force and virtue; and that you Our said

Commissioners, or any three or more of you, may, from time to time, proceed in the execution thereof, and of every matter and thing therein contained, although the same be not continued from time to time by adjournment. And we hereby command all and singular Our Justices of the Peace, Sheriffs, Mayors, Bailiffs, Constables, Officers, Ministers, and all other Our loving subjects whatsoever, as well within liberties as without, that they be assistant to you and each of you in the execution of these presents. And for your assistance in the due execution of this Our Commission, We have made choice of Our trusty and well-beloved James John Lonsdale, Esquire, Barrister at Law, to be Secretary to this Our Commission, and to attend you, whose service and assistance We require you to use from time to time, as occasion may require. In witness whereof We have caused these Our Letters to be made Patent.

Witness Ourself, at Westminster, the Twenty-sixth Day of October,
in the First Year of Our Reign.

By Writ of Privy Seal.

EDMUNDS.

FIFTH REPORT.

TO THE QUEEN'S MOST EXCELLENT MAJESTY, IN HER HIGH COURT OF CHANCERY.

We, Your Majesty's Commissioners, whose hands are hereunto set, do humbly submit to Your Majesty, in our present Report, the Consolidation of the Law of England, respecting the following Offences:—

I. Burglary;
II. Offences against the Executive Power, including, under the branch which relates to the Administration of Justice, the crimes of Bribery, Perjury, Subornation of Perjury, and False Swearing, Embracery, Barretry, Maintenance, and Champerty;
III. Forgery;
IV. Offences against the Public Peace, including Riots, Unlawful Assemblies, Affrays, and Forcible Entries;

And we have prefixed to the several parts of the Digest such prefatory observations as have appeared to be necessary for the purpose of explaining the principles upon which the law is founded, and also the reasons for the course which we have adopted in its consolidation.

Before we proceed to state our remarks and suggestions upon the subjects mentioned, we think it proper to submit to Your Majesty an outline of the plan we have pursued, with a view to attain the object of Your Majesty's Commission,—the reducing the Criminal Law to a more compendious form, and rendering it more certain and accessible.

Having received Your Majesty's commands to report our proceedings from time to time, we have deemed it to be expedient, with a view to the effectual execution of our labours, to submit portions of our Digest in such a state as may afford the best means for enabling others to judge of the manner in which it has been executed, and more especially of the propriety of the alterations which we have suggested. We deem it, indeed, to be essentially requisite, in a matter of such great national importance as the Consolidation of the Criminal Law, that professional criticism should be freely invited by a full exposition of the principles by which we have been guided in discharging the duty assigned to us. With reference to this object, as well as the ultimate design of the Commission, the portion of our Digest submitted to Your Majesty in the present Report has been constructed. We have, with this view, frequently inserted not only articles corresponding with the present state of the Law, but also others more general and compendious, by which, if adopted, the former will be superseded; and, with respect to these, the extent of the Digest will hereafter be considerably reduced by the rejection either of the former or the latter. We have omitted no existing provision of the Statute Law without expressly referring to it or setting it forth either in the Prefatory Remarks or Notes, and stating our reasons for the proposed rejection.* Where any alteration has been made in the terms of an existing law, attention has been drawn to it, and our grounds for making it have been explained; and where any new enactment has been proposed, the like notice has been given, and the

* Reference to the existing Statutes is much facilitated by the Appendix to the Fourth Report on Criminal Law.

reason for its introduction has been stated. We trust that we have, by this course, afforded sufficient means, not only for forming a correct estimate of the suggestions which we have made, but also for determining what course may be the most convenient where we have not ventured to give any express opinion.

We have also to remark that several of the Articles, now included in the Digest as aggravations of general offences, may probably be considered unnecessary when the classes of penalties shall be completed, and each offence shall be referred to its proper class. Punishments cannot be conveniently and satisfactorily assigned to particular offences until such adaptation can be made generally and systematically; but, as a previous step, it is desirable to specify all such offences as may be properly marked by aggravations. Some of these may eventually turn out to be unnecessary; as an enlarged discretion in the judge as to the extent of punishment to be inflicted will supersede the necessity for defining particular aggravations of the offence.

It will be seen that in executing the portion of the Digest now submitted, and more especially that which includes offences against the administration of justice, we suggest the repeal of many ancient statutes, as being either obsolete or unnecessary. These have become so, as we shall hereafter have occasion more particularly to remark, in consequence of great improvements in the manners and habits of society, and of increased deference and obedience to the laws. Many of the ancient statutes, to which we shall hereafter advert, afford convincing proof of the necessity which existed in former times for laws to prevent gross oppressions, perpetrated under colour of justice. To such necessity the numerous provisions against maintenance, champerty, illegal arrests, attachments, and distresses by lords of franchises and others, are attributable;—these, if not wholly obsolete, seem, in consequence of a total change in the condition of society, to have become unnecessary. For similar reasons, several statutes, warranted, no doubt, by particular exigencies, for inflicting severe penalties on such as resisted the execution of legal process within particular local limits, seem at the present day to be no longer requisite. The abstraction of these and many other superfluous laws from the statutory criminal law, will effect a material reduction of its bulk.

Another and very considerable reduction of criminal enactments will be found to result from the consolidation of numerous statutes which have been gradually accumulating for more than six centuries. Many of these, particularly such as concern offences by ministerial officers of justice, escapes and rescues, contain much repetition; and many are merely of a local nature, containing provisions, some of which are capable of being formed into a general law, whilst others may properly be dispensed with altogether. In thus consolidating many of these provisions, and rejecting others, we have taken care to notify the changes which have been made.

It will be observed that the most ancient of the enactments given in the Digest are mere literal translations of the Norman-French originals. Some of these are highly important; and in those instances where decisions, founded on those statutes, have explained or qualified their meaning, we have preferred giving the effect of such decisions in distinct articles to making any change in the structure of the original.

Whilst we suggest that some of the Articles now inserted in the Digest may become unnecessary, we think it proper to notice an important principle, to which we have already alluded, viz., the policy of marking the *principal divisions of offences* as they are termed by Beccaria,* a rule which is expedient, not only lest "to crimes of the first degree be assigned punishments of the last," but also for the purpose of specially admonishing offenders of the higher degrees of criminality attached by the law to offences accompanied with peculiar aggravations. So far as regards legal certainty and precision, it may be unimportant whether a more general law comprehends a wide range of crimes without marking aggravations, the adequate punishment of which is left to the discretion of the court, or whether severer penalties are attached to such aggravations by specific rules; but with a view to the prevention of aggravated offences, the expediency of giving more explicit notice of the higher degree of criminality, and of the severer penalties attached to those offences, is sufficiently obvious.

We have frequently, as will be seen from the notes to the Digest, introduced Articles of a declaratory or explanatory nature which are not absolutely necessary; and in this respect we have preferred laying ourselves open to the charge of having

* Chap. 47. See Fourth Report of the Commissioners on Criminal Law, p. 3.

done too much to that of having done too little. As one principal object of a consolidation of the criminal law is to render it more accessible to all, it is not, we conceive, sufficient to lay down particular rules in which certain principles are embodied, leaving other practical rules to be deduced by a process of reasoning. To enable the great mass of society to obey the law, detailed practical rules are absolutely essential.

It may, perhaps, appear that we have omitted some rules which ought to have been inserted, particularly as regards aiders and abettors, principals in the first and second degree, and accessories. We propose hereafter to provide for these by general rules, applicable to the whole range of crimes; the interposition of provisions of this kind in digesting particular offences would occasion much unnecessary repetition.

Offences against the Executive Power constitute an extensive and important class; and, as respects these, it may be proper briefly to explain the course which we have taken. Such offences, considered in detail, comprehend many subordinate classes; for instance, offences against the public peace and safety, the public revenue, the administration of justice, and many others. Offences, therefore, against the executive power are either general offences, as consisting of omissions or neglects on the part of those on whom the execution of certain duties devolves, or of obstructions by wrong-doers, opposed to the execution of such authority in the abstract; or they consist of some particular and aggravated breaches of duty or resistance of official authority in particular instances. It is necessary, in digesting the Criminal Law, in the first instance to provide for the punishment of all official delinquencies, and all illegal obstructions of official duties *generally*, and then to prohibit specially offences against particular branches of the executive; and this is necessary, although such offences may be included in the more general law, either where more signal and exemplary punishment is required, or where offences are so entirely dependent on the particular branch of the executive power to which they relate, as to be incapable of any more general prohibition. For these reasons, we have, in the first place, digested the law as it concerns the executive power generally; and we have afterwards proceeded to digest offences against the particular branch of executive authority which concerns the administration of justice: and under this latter head we have included two classes; first, such as, being already punishable under the general branch of offences against the executive power, require further notice for the purpose of more exemplary punishment; secondly, such as are punishable only as offences in respect of the particular branch. Thus, the offence of rescuing a convicted murderer requires to be punished as an offence against the administration of justice, for the purpose of more exemplary punishment, although it be already punishable, under the more general law, as an obstruction of the exercise of an official duty. Compounding penal offences, on the other hand, is an instance of an offence which is peculiar to the administration of justice.

Before we conclude these general observations, and proceed to the more particular consideration of the subject of our present Report, we have to state that we are proceeding in the digest of the common and statute law relating to crimes, and that by much the greater part of this branch of our duty has now been accomplished. Of those offences as yet not included in the Digest, the principal class is that of Treason. As this is a crime depending principally on the statute law, our suggestions will necessarily be confined within a narrow compass as regards the offence itself.* It will, however, be our duty to suggest some material alterations in respect of the statute 7 of Queen Anne, c. 7, and the 6 of King Geo. IV. c. 50, as they relate to procedure.

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* Some observations on this subject are made in the course of our remarks upon Offences against the Public Peace, *post*, p. 90.

BURGLARY.

Prefatory Remarks.

We now proceed to the consideration and digest of the law of Burglary. The characteristic of this offence is the invasion by force or fraud of a man's habitation by night,—one of the two other circumstances, *viz.*, either the purpose of the offender, or the act which he afterwards commits, being essential to the completion of the crime. The breaking into the dwelling-house in the night-time, an injury usually accompanied with terror to the inmates, is one of such variety in point of circumstance and degree, as to require distinction from a bare but aggravated trespass, in order to subject the offender generally to that severity of punishment which, in numerous instances, such an offence demands. A distinction of this kind is naturally supplied by a consideration of the offender's motive and intention. Accordingly we find that, by the ancient common law of England, this distinction was made, and that a breaking into a mansion or dwelling-house by night has, from the earliest times, been deemed to be a capital offence, when such breaking has been perpetrated with the intent to commit a felony, or when the breaking has been followed by the actual commission of a felony within the dwelling-house,—a fact which was probably considered to be conclusive as to intention.

Burglary, as it was understood in remote times, was different in some material respects from the crime as it exists at the present day. Formerly a breaking attended with force and violence, and accompanied by an actual entry of the person of the offender within the dwelling-house, was probably deemed to be essential to the offence. In later times it was found necessary to punish with severity not only such invasions of the mansion as were effected by actual violence, but also such as were effected by stratagem or fraud, or by means of intimidation, or where the felonious purpose was accomplished by means of a hook or instrument, without any actual entry made by the offender in person. And where force was used, the slightest degree of force was held to be sufficient, such as the raising a window-sash, or lifting up an unfastened trap-door. Such a conclusion naturally resulted from the difficulty of fixing the minimum of violence which should be essential to the offence, and the expediency of extending the law to offenders whose guilt was great, although the force used for obtaining entrance might be inconsiderable.

Thus, the offence consists of three elements: 1st. an invasion of the dwelling-house, effected by force or fraud; 2dly. in the night-time; 3dly. accompanied with the actual commission of a felony, or made with intent to commit a felony. The crime, thus limited, embraces a very wide scope, comprehending offenders whose offences in point of atrocity bear no real resemblance to each other, but who were formerly without discrimination liable to capital punishment. The Legislature has lately thought fit to alter the law in this respect, and to define those aggravations of the offence which should constitute a crime still to be visited with capital punishment. It remains to us to point out some peculiarities in the existing law which seem to require consideration.

It seems in the first place to be doubtful whether the using a house for the mere purpose of lodging there at night without living there in the day-time is sufficient to constitute a dwelling-house.* A house so used appears to be fully within the mischief contemplated by the law. The offence is one which can be committed in the night-time only, and to which therefore the mode of occupation during the day is not really essential; and it is somewhat singular that the question, whether a man is to be protected in his house during the night should depend on the question, how his house may be occupied during the day. In some of the cases in which this point has been discussed,† the house was slept

* See Davis's Case; Jones's Case; East's P. C. 499.

† In several cases it has been questioned whether a house can be deemed to be the dwelling house of a person who had not inhabited the house by himself, or part of his family. (1 Hawk. P. C. c. 38, s. 11, 1

in, not by the owner, but by a person employed by him for a particular purpose, viz. for the protection of the goods; and it was held that, as neither the owner nor any of his family had slept there, the house could not be regarded as such a dwelling-house as could be made the subject of burglary. We do not conceive that these decisions are supported by just principles. It appears to us that every one who inhabits, lodges in, or uses a house as his dwelling in the night-time is entitled to the protection of the law, and that he is equally so entitled, although his object in being there may be solely to protect the property; and further, that such protection ought equally to be afforded, whether the owner or occupier himself lodge there or employ an agent or servant to do so for the same purpose. The fundamental principle of the law is, the protection of the dwelling-house; the proper and obvious tests for deciding whether a building be or be not a dwelling-house must consist in its having *been actually used* as such, and in the continuing intention *still* to use it as such. Upon the question, what kind of *use* ought to give the character of a dwelling-house to a building, we conceive the proper answer to be, as regards the crime of burglary, the protection of its inmates from violence during the season of natural repose.

Another question of considerable difficulty is to ascertain and define what buildings shall be considered as constituting a dwelling-house. This is a question, in the law of England, depending *partly* on mere division by walls and other like partitions, and partly on the mode of occupation, where there are several occupants of the same building. Upon both these points, and more especially the latter, a considerable conflict of authorities has existed. The term *dwelling-house* is not confined to the chamber actually slept in, but (subject to the distinctions founded on separate occupations) comprehends all parts of the building which communicate internally. Formerly the law was much more general; and all buildings which were under the same roof, or within the same outer fence or curtilage, and occupied together, were considered to constitute parcels of the dwelling-house, although not connected by any internal means of communication;* and so also were out-houses adjoining to a dwelling-house, if they were occupied as parcel thereof, although there was no internal communication.† The generality of this doctrine occasioned frequent difficulties.‡

The rule on this subject was made much more simple and certain by the statute 7 & 8 of King Geo. IV. c. 29, s. 13, which excluded all buildings from being regarded as parcel of the dwelling-house although occupied therewith, unless there was a communication between such buildings and the dwelling-house, either immediate or by a covered and inclosed way. By the joint operation of this statute and the rules of common law, every dwelling-house, constituted such by any part being inhabited, comprehended all parts internally connected either by any immediate communication or by means of covered and inclosed passages. But parts of the same building, whether originally or sub-

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Hale's, P. C. 556, East's P. C. 496. In Davis's Case, East's P. C. 499, the prosecutor having taken possession of a house on a tenant leaving it, and having purchased the furniture, placed a servant in it, who slept there for three weeks, in order to take care of the furniture, the prosecutor not intending to reside or carry on business there, it was held that this was not the dwelling-house of the prosecutor as *he* never intended to inhabit the house. In Thomson's Case, East's P. C. 498, the house which was a new one, being the property of Mr. Holland, had been finished all but the painting and glazing, and a workman slept there by the authority of Mr. Holland for the *purpose* of protection, but no part of Mr. Holland's family had taken possession of it, and it was ruled not to be the dwelling-house of Mr. Holland. This is said to have been determined on the authority of Lyon's Case, East's P. C. 497, but it appears that in Lyon's Case the house was *uninhabited* at the time of the offence. That case therefore was no authority for the decision in Thomson's Case. In Harris's Case, East's P. C. 498, the prosecutor having taken a house, procured two hairdressers to sleep there to take care of the goods and merchandise, but had not slept there, nor had any of his family, and it was held that the prisoners could not be found guilty of burglary. In the case of Jones and Longman, East's P. C. 499, A. having died in his house, B., his executor, put servants into it, who lodged in it, and were at board wages, but B. never lodged there himself, and the court inclined to think that the house might be called the mansion house of B. *because the servants lived there.* This opinion seems to be in opposition to the case of Davis, which is much more recent. It cannot, however, be doubted that to make the question of dwelling-house or no dwelling-house to depend upon the particular duties to be performed by a party sleeping in a house would be inconvenient, and that to deny protection because the agent employed was not a domestic servant, or because he was placed there to discharge a particular duty would be unreasonable, and we have therefore ventured to suggest a more certain rule.

* East's P. C. 492; 1 Hale's P. C. 558-9; Gibson's Case, 2 East's P. C. 508; Garland's Case, 2 East's P. C. 493.

† Brown's Case, 2 East's P. C. 493.

‡ See Gibson's Case, 2 East's P. C. 508; Eggington's Case, *ib.* 494.

sequently separated by any wall or partition cutting off communication between those parts and such as are inhabited, formed no part of the dwelling-house, although the ownership or occupation might be the same. In conformity with this state of the law the 17th Article of the Digest has been framed. So far, then, as the term dwelling-house depends on the purpose for which some part must be used, and as regards the utmost limit to which every such dwelling-house may extend, the definition is complete.

The law, however, makes other distinctions for the purpose of determining *whose* dwelling-house is burglariously invaded. These distinctions exist where a building, or portion of a building, all the parts of which are internally connected, is occupied by several persons inhabiting separate parts. Upon this subject we conceive that we have framed the 20th Article of the Digest in conformity with the existing law. The authorities, however, to be found in the books, are numerous and conflicting, and do not expressly warrant a rule so general as that we have proposed, although it seems to be sanctioned by the principles on which the decisions most to be relied on are founded.

According to the 1st branch of the 3rd rule contained in Article 20, although several persons shall inhabit several (but connected) parts of a house, there being a common entrance in the occupation of some inhabitant, it shall be deemed to be the dwelling-house of such inhabitant. This is a position which may, we think, be extracted from the existing law. For it is clear that if the owner let off parts of his dwelling-house, but continue to inhabit part, the whole is still *his* dwelling-house, although if he inhabit elsewhere it ceases to be *his* dwelling-house, and then the rooms or sets of rooms so let can only be regarded as the separate dwelling-houses of the tenants, and the breaking the outer door of the common entrance would not constitute a burglary. This distinction seems in principle to depend on the consideration that when the owner does so inhabit, the outer door and entrance being in his possession and parcel of the entire building, he is entitled to the protection afforded by it just as much as he was, before he let part to a tenant; for it would be most unreasonable that he should be deprived of that protection because it was required for the sake of his tenant as well as himself; and although the breaking be into a part occupied by a tenant, yet the owner himself is by such breaking as much exposed to danger as if the part inhabited by himself had been broken.

If therefore A., being the owner of a dwelling-house, let parts to B. and C. on lease, and inhabit part himself, a common outer door and entrance to the three parts still remaining in the possession of A., subject to the right of passage in B. and C., then, as the law stands, the whole would be the dwelling-house of A., although the parts let to B. and C. were broken into. Suppose that things being so situated, A. should release to B. and C. the several parts in their occupation, the dwelling-house would, it is presumed, be still (as regards burglary) the dwelling-house of A., for, as concerns occupation, the same state of things would remain precisely as before; and to make this question, as regards the crime of burglary, to depend, not on the state of occupation, but on a reversionary right, would be to introduce a novel principle. The question evidently depends on the mode of occupation, not on the extent of the interest of any occupier; a position strongly confirmed by the consideration, that were A., without having so released, to cease to inhabit, the dwelling-house would no longer be his, although his right as owner remained just as before. So again, which is to the same point, if A. were assignee for a term of the whole dwelling-house, and were then to assign parts to B. and C. for the remainder of the term, retaining and inhabiting a third portion himself, and retaining also the possession of the outer door and common entrance, subject to the rights of passage granted to B. and C, the dwelling-house in such case would still be the dwelling-house of A. Suppose further, that A., in either of the two cases above suggested, having no interest except in the part inhabited by himself and the outer door and common entrance, transferred that interest to D., and that D. inhabited the part before inhabited by A., it cannot be doubted that the dwelling-house would, under the circumstances, be the dwelling-house of D., whose occupation as well as legal interest would be precisely the same as A.'s was before. Or the position may be thus illustrated. Supposing, as before, that A., being the owner and occupier of a dwelling-house, lets parts severally to B. and C., the three occupiers having a common entrance and outer door, of which A. still remains possessed, the dwelling-house, under the circumstances, would be that of

A. whilst he inhabited part of the house. If A. were to cease to inhabit, the dwelling-house would no longer be his, but in case he caused an agent or servant to sleep in the part he before occupied the whole would, for the purpose of burglary, again become his dwelling-house, for, in point of law, he would then be inhabitant just as before. But if A. could thus constitute himself such owner for the purpose of protection to his agent, it would be singular that he should not be able to transfer that protection to a tenant or purchaser. If then the conclusion be attainable, that where one inhabits part of such a building or portion of a building, and is also in possession of the entrance and outer door, used by himself and other inhabitants, such building may be considered, for the purposes of burglary, to be the dwelling-house of that person, it follows that the same consequence must obtain without any regard to the particular circumstances from which such a state of things has arisen. The common law doctrine and distinctions on this subject seem to have turned on this single difficulty, viz. of considering that to be the outer door of a dwelling-house which was not in the occupation of an inhabitant; for in such case where there were several inhabitants the dwelling-house could not be considered to be the dwelling-house of any one rather than of any other of such inhabitants of distinct parts; neither could it properly be considered to be the joint dwelling-house of all, there being no joint occupancy. That difficulty is removed where an inhabitant is in possession of a common outer door and entrance. These observations and authorities will, we conceive, justify the first branch of the third rule above referred to.

The second branch of the third rule, viz., that if such outer door and common entrance be not in the occupation of any one inhabiting part of such building or portion, each inhabited room or set of rooms shall be deemed to be the dwelling-house of the person inhabiting it, depends upon the same principles, and seems to be fully warranted by the authorities. Within this description the ordinary cases fall of chambers, or rooms in the inns of court, which open into a common staircase. Although there should be an outer door to such common staircase, the breaking of such outer door would not be burglary, neither the staircase nor outer door being in the possession of any one inhabiting any of such rooms or chambers.*

We now advert to the last branch of the above-mentioned rule, viz., that if there be no common entrance to such building or portion of a building, then each inhabited room or connected set of rooms shall be deemed to be the separate dwelling-house of the person inhabiting the same. This seems to be warranted, as well by analogy to the general principles of the common law in respect of burglary as by direct authority. If the owner of a house, the parts of which were connected by internal communication, were to let parts to A., B., and C., each of whom had access to his own by a separate door, there being no common entrance, each part must be considered to be the dwelling-house of each separate inhabitant; for if the part inhabited by A. were to be burglariously entered, it could no more be regarded as the dwelling-house of B. than it could be considered to be that of C.; and unless it were to be deemed to be the dwelling-house of A. alone, it would be uncertain whose dwelling-house it was. And for want of any joint occupancy it could not be considered to be the dwelling-house of the three. And in such a case it makes no difference, although the owner himself occupy a portion, he and each of his lodgers or tenants having a separate outer door. This was expressly ruled by Holt, C. J., at the Old Bailey, in 1701.†

The observations which we have thus made, and the authorities to which we have referred, will serve to show the difficulties which have been experienced at common law in determining whose dwelling-house should be said to have been broken, in cases of distinct occupations of connected parts of a building. The knot might have been cut by restricting the definition of a dwelling-house to the terms of Articles 13 and 17, and by permitting all connected parts of the dwelling-house so defined to be described as the dwelling-house of any one of several distinct inhabitant occupiers. The objection to this as a general rule would be, that it would constitute a departure from the present rules of the common law, and would in some instances be too narrow to include that as a burglary which would be within the principle of the definition.

It may be observed that there is a case which may make it desirable to extend the limits of the law against burglary, viz., where the owner of a dwelling-house,

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* East's P. C. 492; 1 Hale's P. C. 556; 1 Hawk. P. C. c. 38; Cro. Car. 474.

† See 2 East's P. C. 505.

part of which is let to a lodger, breaks into the chamber of the latter in the night-time with a felonious intention. As against a stranger the whole dwelling-house would be the house of the landlord, and if in the case of such an offence against his tenant the whole were still to be considered to be his (the landlord's) dwelling-house, he would not be guilty of burglary by breaking into any part. This particular case may be provided for under the head of Procedure, where a rule may be laid down that in every case of such severed occupation the chamber, or set of connected rooms occupied by the tenant, may be described as his dwelling-house.

Although in construction of law there are many instances of a breaking unaccompanied by any force whatever, as in the case of an entry by fraud, yet it is singular that many nice distinctions should exist on the question, what shall be sufficient to constitute a breaking by force. It has been decided that the entering by a door by means of lifting a latch is a sufficient breaking. On the other hand, it has in several cases been questioned whether the raising of a trap-door, kept in its closed position by the mere force of gravity, was a sufficient breaking. In Callan's Case,* a heavy flat door of a cellar, which would keep closed by its own weight, and would require some degree of force to raise it, had been opened. The door had bolts on the inside by which it might have been fastened, but it did not appear that it was so fastened at the time of the imputed offence. The judges were divided in opinion whether the opening of this door was such a breaking of the house as constituted burglary. On the other hand, it was holden in Brown's Case,† that the opening of a similar trap-door was a sufficient breaking, and the only perceptible distinction between these cases is, that in Brown's case there were no interior fastenings at all, whereas in Callan's Case there were fastenings, though they were not used. In Russell's case, 1 Moody's Crown Cases, 377, in the discussion of which Callan's Case and Brown's Case were considered, an entry was made through a cellar, the entrance to which from the outside was by a flap which let down, and by raising which the prisoner had entered. The flap had been occasionally fastened with nails, but the jury found that on the night in question it had not been nailed down. In this case the judges held that the breaking was sufficient. The result, however, of those cases, and the impression of the profession are that the lifting up of a trap-door, although unfastened, is sufficient. If this be correct, it seems to follow that the mere opening of a door, although neither barred nor latched, would also constitute a breaking. For it is impossible, upon any intelligible principles, to distinguish between the degree of force used to raise a trap-door, and that sufficient to open the ordinary door of a dwelling-house.

By the statute 12 of Queen Anne, st. 1, c. 7, (repealed by the statute 7 and 8 of King Geo. IV. c. 27, and re-enacted by c. 29 of the same statute,) the crime of burglary was extended to the case of an offender who having committed a felony in a dwelling-house, or having entered therein with intent to commit a felony, afterwards *broke out* of such dwelling-house in the night-time. This extension does not, we think, rest upon any just principle. After a felony has been committed within the dwelling-house, the offence is not in reality aggravated by lifting the latch of a door or the sash of a window in the night-time, in order to enable the offender to escape. A breaking out may indeed be an innocent act, as it may be committed by one desirous of retiring from the further prosecution of a crime; and the extension of the law of burglary to such a case is not warranted by the principles on which the law is founded, inasmuch as a circumstance not essential to the guilt of the offender, or the mischief of the act, is made legally essential to the crime. It is ineffectual even with a view to the object proposed; the *pretext* for conviction fails in the absence of a breaking out, which is a casual and uncertain circumstance.

Whilst for these reasons we recommend the repeal of the statute 7 and 8 of King Geo. IV. c. 29, as regards this extension of the law of burglary, we think it politic that provision should be made for the punishment of offenders, who cannot be convicted of an aggravated offence merely because no breaking or burglarious entry can be proved.‡ And we have inserted a clause for this purpose.

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* Russell and Ryan's Crown Cases, 157. † 2 East's P. C. 487.

‡ In Smith's Case, Moody's C. C. p. 178, it was held that if the sash of a window be partly open, but not sufficiently so as to admit a person, the raising it so as to admit a person is not a breaking of the house. The prisoner was convicted on the authority of a former case where the same point had occurred. But the judges held that this could not be considered to be a breaking, there being no decided case to that effect.

In the arrangement of the rules respecting burglary in the Digest, we have adhered to the characteristics of the offence as contained in the existing law; treating the invasion of a dwelling-house in the night time as the *corpus delicti*, and the circumstances of violence and ill-usage to inmates as aggravations. In conformity also with the present law we have considered house-breaking with its several aggravations as a separate and distinct offence from burglary. If, however, the object had been to re-construct the law upon this subject, instead of merely digesting it with reference to existing rules and definitions, we are aware that a far simpler and more convenient method of arrangement might have been applied. In the French law, and in most of the modern codes of Europe, breaking an inhabited house is treated as an aggravation of theft.* This is an imperfect means of classification, for as the breaking may be attended with the commission or intention to commit other offences, we see no reason why it should be considered as an aggravation of theft alone. The proper course, as it appears to us, would be to consider breaking a dwelling-house as in all cases the simple offence; and then to classify the circumstances of stealing or committing any other offence therein, of night-time, and of alarm or injury to inmates, as so many aggravations, to each of which, when added to the crime of house-breaking, an appropriate place in the scale of punishments should be assigned. We apprehend that an arrangement of the law upon this principle would obviate many of the most embarrassing difficulties by which the subject is at present attended.

* Code Pénal, Art. 381. See also the Bavarian Code, Art. 221. Prussian Code, Art. 1163.

BURGLARY.

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ART. 1.

Burglary.

WHOSOEVER shall commit the crime of burglary shall incur the penalties of the class.

ART. 2.

What particulars essential to the crime of burglary.

It is essential to the crime of burglary:—

1st. That an entry *(a)* be made into a dwelling-house of another, or some inner part of a dwelling-house of another, by the means or in the manner hereinafter defined.

2dly. That such entry be made, either with intent to commit some felony in such dwelling-house, or inner part of a dwelling-house, or, that the offender, having made such entry, should commit some felony *(b)* in such dwelling-house, or inner part of a dwelling-house.

3dly. That such entry be made, and such felony, where the commission of a felony is essential to the offence, be committed in the night-time, as hereinafter defined.

(*a*) According to the common law definition of burglary, an *actual breaking*, as well as an entry, was essential to the offence; but, as shown in the Prefatory Remarks, when in later times it became expedient to punish such invasions of the dwelling-house as were effected by stratagem or fraud, or by means of intimidation, as well as those effected by force, it was found necessary, in order to bring such invasions within the meaning of burglary, to construe acts of this description to be sufficient *breakings* to satisfy the law. We have already in our Fourth Report (p. 8) pointed out the evil of thus employing terms which have an ordinary and well understood signification in a technical or constructive sense, differing from their popular meaning. In order to obviate this objection, we have so defined the crime of burglary, as to include all the essentials of the common law offence, but at the same time to get rid of the necessity of stretching the meaning of terms beyond their popular signification. Instead of defining the offence to be a breaking and entering, &c., we have described it as consisting in an entry by any of the means which either in popular language or by construction of law have been held to amount to a breaking.

(*b*) As this part of the definition of burglary is adopted by us in opposition to many authorities, some explanation of our motives in this respect is necessary. In almost all the text-books, ancient and modern, the offence is defined to be "a breaking and entering the dwelling-house of another in the night, with intent to commit some felony within the same, whether such felonious intent be executed or not." See 3 Inst. 63; 1 Hale's P. C. 549; 1 Hawkins's P. C. c. 38, s. 1; 4 Black. Com. 224; 2 East's P. C. 484; 2 Russell, 900. According to this definition, the actual commission of a felony in the dwelling-house is wholly immaterial, except as evidence of the intent with which the offender broke and entered. But in Vandercomb and Abbot's case, 2 East's P. C. 519, Mr. Justice Buller says, "burglary is of two sorts: first, breaking and entering a dwelling-house in the night-time, and stealing goods therein; secondly, breaking and entering a dwelling-house in the night-time, with intent to commit a felony, although the meditated felony be not committed. The circumstance of breaking and entering the house is common and essential to both species of this offence; but it does not of itself constitute the crime in either of them; for it is necessary to the completion of burglary, that there should not only be a breaking and entering, but the breaking and entering must be accompanied with a felony actually committed, or intended to be committed; and these two offences are so distinct in their nature, that evidence of the one will not support an indictment for the other." Mr. East, in observing upon this part of Mr. Justice Buller's judgment, expresses a doubt "whether the definition of the crime be not solely resolvable into the breaking, &c., with an intent to commit felony; of which the actual commission is such strong presumptive evidence, that the law has adopted it, and admits it to be equivalent to a charge of the intent in the indictment. And therefore an indictment charging the breaking, &c., to be *with intent* to steal, is said to be supported by proof of *actual stealing*, though certainly not vice versâ." It has been held repeatedly, that if an indictment charge a burglary with intent to commit a felony, it will be supported by evidence of a felony actually committed, Locost and Villars's Case, Kelyng 30; 1 Hale's P. C. 560; and consequently the report of the above judgment of Mr. Justice Buller states this point too largely according to the ancient definition of the offence, which considers the *corpus delicti* complete upon a breaking and entering with a felonious intent. But many nice questions have arisen, and may arise, in consequence of resting the substance of the offence altogether upon the intent. It is obvious that a man may break a house with intent to commit a trespass, and afterwards may commit a felony not contemplated by him at the time of the breaking, or he may break with intent to commit a felony of one kind, as a rape, and may afterwards commit another kind of felony, as a theft. If, in such cases, the indictment stated the breaking

to be with intent to commit the felony actually committed, the offender must be acquitted. But were the offence defined in the alternative, as suggested by Mr. Justice Buller in Vandercomb and Abbott's Case (though inaccurately according to the ordinary definitions) no difficulty of this kind could arise, as the indictment must then always charge either the intent or the actual commission of a felony according to the fact, and the proof of the former could not support the latter, and vice versâ. For this reason, though a definition resting wholly upon the intent has the advantage of simplicity, and is perhaps the proper statement of the existing law, we think that it would be more convenient, upon the whole, to adopt the alternative definition.

ART. 3.

An entry, so far as regards the means or manner of effecting it, shall be sufficient to constitute burglary, if it be effected by any of the means, or in the manner hereinafter specified. What entry sufficient as regards the means and manner of entering.

ART. 4.

1st. If it be effected by means of any force used to break, displace, or open any part of the walls, roof, ceiling or floor of a dwelling-house, or any door, window, or other impediment opposed to entrance into a dwelling-house; and, as regards an entry into the inner part of a dwelling-house, if it be effected by means of any force used to break, displace, or open any part of the walls, partitions, ceiling, or floor of such inner part, or any door or other impediment opposed to entrance into such inner part. (*c*) By breaking.

(*c*) See the Prefatory Remarks. Lord Hale says, "these acts amount to an actual breaking, viz., "opening the casement or breaking the glass window, picking open the lock of a door, or putting "back the lock or the leaf of a window, or unlatching the door that is only latched." 1 Hale's P. C., 552.

ART. 5.

2dly. If it be effected by means of any violence or threat of violence, either to the person or property of another, or by any other means of intimidation, direct or indirect. (*d*) By intimidation.

(*d*) There may also be a breaking in law, where, in consequence of violence commenced or threatened in order to obtain entrance, the owner, either from apprehension of the force, or with a view "more effectually to repel it, opens the door, through which the robbers enter." 2 East's P. C. 486. As a reason for this rule it is said by some of the authorities that the opening of the door by the owner in such a case, being occasioned by the felonious attempt of the offender, is as much imputable to him as if it had been done with his own hands. Hawkins's P. C., Book I., chap. 38, s. 7.

ART. 6.

3dly. If it be effected by means of any stratagem, trick, or device, fraudulently practised for the purpose of obtaining admission, or by collusion or conspiracy with any other person unlawfully affording or facilitating such entry. (*e*) By fraud.

(*e*) Thieves, having an intent to rob, raised the hue and cry, and brought the constable, to whom the owner opened the door, and when they came in, they bound the constable and robbed the owner; held burglary. So, if admission be gained under pretence of business, or if one take lodgings with a like felonious intent, and afterwards rob the landlord: for the entrance was gained by fraud, and the law will not endure to have its justice defrauded by such evasions. By the same reasoning, getting possession of a dwelling-house by a judgment against the casual ejector, obtained by false affidavits, without any colour of title, and then rifling the house, was ruled to be a breaking of the house, and consequently, if it had been done in the night-time, would have amounted to burglary. 2 East's P. C., 485. In Ann Hawkins's case, it appeared that the prisoner was acquainted with the house, and knew that the family were in the country. Meeting with the boy who kept the key, she desired him to go with her to the house, and to induce him promised him a pot of ale. The boy accordingly went with her, opened the door, and let her in. She then sent the boy for the pot of ale, robbed the house, and went off. This being in the night-time was adjudged to be clearly burglary in the woman, for she prevailed with the boy by fraud to open the door with intent that she might rob the house. 2 East's P. C., 485. "If A., the servant of B., conspires with C. to let him in to rob B., and, accordingly, A. in the night-time opens the door or window and lets him in, this is burglary in both; for "if it be burglary in C. it must needs be so in A., because he is present, and aiding to C. to commit "this burglary." 1 Hale's P. C., 553.

ART. 7.

4thly. If a party enter upon admission fraudulently given by a servant or other inmate. (*f*) By conspiracy with inmate.

(*f*) See note to Article 9.

ART. 8.

5thly. If a party enter into the chimney of a dwelling-house of another, although no room or apartment of such dwelling-house be entered. (*g*) Into the chimney of a dwelling-house.

(*g*) There is no doubt that by the law of the present day the entry described in this Article would be a *breaking;* it is, however, obviously a constructive breaking only. Lord Hale says, "There was one arraigned before me at Cambridge for burglary, and upon the evidence it appeared that he crept down a chimney. I was doubtful whether this were burglary, and so were some others; but upon examination it appeared, that in his creeping down some of the bricks of the chimney were loosened,

and fell down in the room, which put it out of question." 1 Hale's P. C. 552. In most of the text-books it has been laid down, notwithstanding the reasonable doubt expressed by Hale, that it was a breaking to creep down a chimney, because the house was as much shut as the nature of the thing would admit of: see 1 Hawkins's P. C. c. 38, s. 6; 2 East's P.C. 485. And at last, in Price's Case, Russell and Ryan's Crown Cases, p. 450, it was resolved, by a majority of the judges, that it was a sufficient breaking and entering of a house to constitute burglary if the offender got into the chimney, though he did not enter any of the rooms of the house.

ART. 9.

Entry by person on admission given by inmate, burglary in both.

Where an entry is effected upon admission fraudulently given by a servant or other inmate, such entry, so far as regards the fact of entry, shall constitute burglary as well in the servant or inmate as in the party so admitted. (*h*)

(*h*) Cornwall was indicted with another person for burglary. It appeared that he was a servant in the house, and in the night-time opened the street door and let in the other prisoner, who robbed the house. Cornwall then let him out at the door, but did not go out with him. It was doubted at first whether this was burglary in the servant, as he did not go out with the other prisoner; but at a meeting of all the judges, they were unanimously of opinion that it was burglary in both, and accordingly Cornwall was executed. 2 East's P. C., 486.

ART. 10.

What act of entry shall be sufficient.

As regards the act of entry, the partial (*i*) entry of any offender into a dwelling-house, or the inner part of a dwelling-house, or the introduction of any engine (*k*), or instrument, or any part of any engine or instrument, into a dwelling-house, or the inner part of a dwelling-house, or the discharge of any missile into a dwelling-house, or the inner part of a dwelling-house, shall be deemed to be an entry sufficient to constitute burglary, provided such partial entry by such offender be made, or such engine or instrument, or part thereof, be introduced, or such missile be discharged with intent to commit a felony in such dwelling-house, or inner part of a dwelling-house.

(*i*) It is deemed an entry where the "thief breaketh the house, and his body, or any part thereof, as his foot or his arm, is within any part of the house, or where he putteth a gun into a window which he hath broken, though his hand be not in," 3 Inst. 64. "Thieves came in the night to rob A, who, perceiving it, opens his door, and issues out and strikes one of the thieves with a staff. Another thief having a pistol in his hand, perceiving others in the entry ready to interrupt them, puts his pistol within the door over the threshold and shot, so that his hand was over the threshold, but neither his foot nor the rest of his body; and upon this evidence by great advice it was adjudged burglary, and the thief was hanged." 1 Hale's P. C. 553. In the case of R. *v.* Rust, 1 Moody's C. C., p. 183, it was held that the throwing up a window and introducing an instrument between such window and an inside shutter to *force open the shutter* is not sufficient to constitute burglary, if the hand, or some part of it, be not within the window. It should seem that even if the hand had been introduced this would not have been burglary, if done merely to facilitate entrance and not to commit a felony; if done for the former purpose only, there seems to be no distinction between the inserting the hand and the inserting any other instrument.

(*k*) This word is used by Lord Coke in describing a breaking and entry, 3 Inst. 64.

ART. 11.

Entry by person having authority to do so.

An entry into a dwelling-house, or any inner part of a dwelling-house, by any person having authority to enter therein, shall not be deemed to be an entry sufficient to constitute burglary, although he enter with intent to commit a felony, or having entered, commit a felony therein. (*l*)

(*l*) 1 Hale's P. C. 554, 555.

ART. 12.

Entry by inmate.

An entry by an inmate of a dwelling-house into any inner part thereof, and not made by virtue of any authority, trust, or employment, is a sufficient entry into such inner part to constitute burglary. (*m*)

(*m*) "The servant lies in one part of the house, the master in another, and the stair-foot door of the master's chamber is latched; the servant came in the night and unlatched the stair-foot door, and went up into his master's room with a hatchet intending to kill him and wounded him dangerously, but the master escaped. Upon this special matter found at the Winchester assizes, by the advice of the greater number of the judges, *exceptis paucis*, it was adjudged felony, and the offender was executed." 1 Hale's P. C. 555.

ART. 13.

Definition of dwelling-house.

A dwelling-house consists of any fixed and permanent building (*n*) which at the time of the offence had been or was used, and was intended to be used, either continuously or at intervals, for the purpose of lodging or dwelling therein by night. (*o*)

(*n*) See Hale's P. C. 557-59; 3 Inst. 64; 1 Hawk. P. C. c. 38, s. 35; East's P. C. 492; 2 Russell, 13. Although the authorities do not supply any precise description of the building which, if inhabited, may be the subject of burglary, they exclude by instances and illustrations inclosed grounds and all erections of a merely moveable and temporary nature, such as booths or tents.

(*o*) The principle upon which the above rule respecting *inhabitancy*, as constituting a dwelling-house, is founded, may be illustrated by the following cases:—A person possessed of a house in Westminster, wherein he dwelt, took a journey into Cornwall, intending to return, but sending his wife

and family out of town, and leaving no person living in the house during his absence. He left the key with a friend, who was to look after the house. After the prosecutor had been gone a month, no person being in the house, it was broken open in the night and goods were stolen. He returned a month afterwards with his family, and again inhabited the house. This house was holden, by Lord Holt and other very eminent judges, to have been a dwelling-house at the time it was broken open. Nicholls's Case, 2 East's P. C. 496. A person had a country house at Hackney, which he used in the summer, his chief residence being in London. At the latter end of the summer preceding the time of the commission of the offence, he removed with his whole family from Hackney to his house in London, taking with him a considerable part of his goods. In the November following, the house at Hackney was broken open and partially rifled; in consequence of which he removed the remainder of his furniture, except a clock and some lumber, to London, leaving no bed or kitchen furniture, or anything else fit for the accommodation of a family. In January following the house was again broken and robbed, and this was the transaction which formed the subject of the trial. The prosecutor was asked whether, at the time he disfurnished his house after the first robbery, he had any intention of returning to reside there; and he answered that he had not come to any settled resolution on the subject, but was rather inclined totally to quit the house and let it to a tenant. The court were of opinion that the prosecutor having left his house, and disfurnished it in the manner before mentioned, without any settled resolution of returning, but rather inclining to the contrary, it could not be deemed his dwelling-house at the time the fact was committed. Nutbrown's Case, Foster's Crown Law, p. 76. 2 East's P. C., 496.

Art. 14.

The motive or object for using such building for the purpose in the last preceding Article mentioned shall not be deemed to be material to the offence. (*p*)

(*p*) Article 13 seems to render this and the next Article unnecessary, but it is safer that the rules which they contain should be expressed than that they should be left to inference.

Art. 15.

And such building shall be deemed to be a dwelling-house, although it be not inhabited by living therein during any part of the day. (*q*)

(*q*) See the Prefatory Remarks, p. 4.

Art. 16.

Casual occupation.

The mere casual occupation of any such building, without the consent or licence of the owner or occupier thereof that such building should be used either continuously or at intervals for the purpose of dwelling or lodging therein by night, shall not constitute such building a dwelling-house. (*r*)

(*r*) See 3 Inst. 64. Thus the mere circumstance of a servant sleeping in a barn on the night on which it was broken open, and for several nights before, he being put there for the purpose of watching thieves, will not make the barn a dwelling-house. Brown's Case, 2 East's P. C. 497. Whether the barn is a dwelling-house in law will depend upon the application of the rules contained in Articles 17 and 18.

Art. 17.

Extent of dwelling-house

The whole of any fixed and permanent building, and the whole of any portion of any fixed and permanent building, the parts of which communicate either immediately or by means of any covered and inclosed passage, and any part of which has been or is used, and is intended to be used as mentioned in Article 13, shall be deemed to be a dwelling-house. (*s*)

(*s*) Where there is an actual severance in fact, by any wall or partition, all internal communication being cut off, and the parts being inhabited by several occupants, each part, according to the above Article, becomes a separate dwelling-house, see 2 East's P. C. 504; and this is so, although persons being joint owners of an entire house or building divide it by a partition cutting off all internal communication; Jones's Case, 2 East's P. C. 504.

Art. 18.

What buildings within the curtilage part of the dwelling-house.

Provided that no building, although it be within the same curtilage with the dwelling-house, and be occupied therewith, shall be deemed to be part of such dwelling-house for the purpose of burglary, unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered and inclosed passage leading from the one to the other. (*t*)

(*t*) 7 and 8 Geo. IV. c. 29, s. 13.

Art. 19.

Definition of inner part of a dwelling-house.

An inner part of a dwelling-house consists in any room, chamber, or compartment, being parcel of a dwelling-house as above defined; but no cupboard, press, locker, chest, or other receptacle or repository, whether attached to the freehold or otherwise, shall be deemed to be an inner part of a dwelling-house as regards the offence of burglary. (*u*)

(*u*) It is scarcely necessary to introduce an express exception on this subject, inasmuch as such a case could not be properly considered to fall within the description of burglary above given. As, however, this was formerly questioned, we have deemed it better to exclude all doubt. See 1 Hale's P. C. 527; 2 Hale's P. C. 358; Fost. 108.

ART. 20.

Ownership.

The ownership of a dwelling-house shall be ascertained by the following rules, in respect of the mode of occupation:—

Sole occupation.

1. Where such building or portion of a building, as is mentioned in Article 17, shall be in the occupation of one person, such building or portion shall be deemed to be his dwelling-house, whether he dwell therein himself, or whether the same be inhabited by any servant, agent, or other person whatsoever, by his authority or licence.

Joint occupation.

2. Where such building or portion of a building, as is mentioned in Article 17, shall be in the joint occupation of several persons, such building or portion shall be deemed to be the dwelling-house of such persons, whether they or any of them shall dwell therein, or whether the same be inhabited by any servant, agent, or other person whatsoever, by the authority or licence of them or any of them.

Severed occupation

3. Where such building or portion of a building, as is mentioned in Article 17, shall be occupied as to several parts by several persons, then in case such parts shall have an outer-door and entrance in common, which shall be in the occupation of any person inhabiting any of those parts, the dwelling-house shall be deemed to be the dwelling-house of that person. And in case such outer-door and entrance in common be not so occupied by any such inhabitant, or in case there be no such outer-door and entrance in common, each of the rooms or connected sets of rooms so severally inhabited shall be deemed to be the dwelling-house of the person so inhabiting the same. And in case two or more of such severally occupied parts shall have an outer-door and entrance in common, but other such parts shall have separate entrances only, then if such outer-door and entrance in common be occupied by any inhabitant of any of those parts having such entrance in common, such two or more parts shall be deemed to be the dwelling-house of that inhabitant; and any other part or parts so severally inhabited shall be deemed to be the dwelling-house or several dwelling-houses of the person or persons so inhabiting the same. (*v*)

(*v*) See Prefatory Remarks, p. 6. The rules stated in this Article appear to us to comprehend all the varieties of ownership which can occur. The law upon this subject is at present difficult and complicated, but we apprehend that a few simple rules may be laid down respecting procedure by which the embarrassment now experienced may be in great measure avoided.

ART. 21.

Definition of night.

So far as the same is essential to the offence of burglary, the night shall be considered to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day. (*w*)

(*w*) 7 Will. IV. and 1 Vic. c. 8. s. 4.

ART. 22.

Burglars beating, &c., inmates.

Whosoever shall burglariously enter into any dwelling-house, or any inner part of a dwelling-house, and shall assault with intent to murder, any person being therein or shall stab, cut, wound, beat, or strike any such person, shall suffer death. (*x*)

(*x*) 7 Will. IV. and 1 Vic. c. 86, s. 2.

ART. 23.

Entering dwelling-house by night with intent to commit felony &c.

Whosoever shall by any other means than those, or in any other manner than such as is hereinbefore defined, unlawfully enter into a dwelling-house, or the inner part of a dwelling-house of another, by night, with intent to commit some felony therein, or having so unlawfully entered into a dwelling-house or the inner part of a dwelling-house of another, shall, by night, commit any felony therein, shall incur the penalties of the . . class. (*y*)

(*y*) See the Prefatory Remarks, p. 8.

ART. 24.

Definition of a breaking.

Any entry into a church, chapel, dwelling-house, shop, warehouse, or counting-house, which shall be effected by any of the means specified in Article 4, shall be deemed to be a breaking thereof respectively, in respect of any provision which makes the breaking thereof criminal. (*z*)

(*z*) See the Fourth Report of the Commissioners on Criminal Law, p. 66, Art. 50, note (*e*).

OFFENCES AGAINST THE EXECUTIVE POWER.

Prefatory Remarks.

Offences against the due exercise of the executive power constitute an extensive, and very important class; and we now propose, according to the method previously adopted, to consider, in the first place, the general principles upon which such offences depend, and the distinctions which are peculiar to them; and then to notice so much of the law of England respecting such offences as appears to us to require observation.

As direct offences against the due administration of the executive power must consist principally in the omission to discharge a duty, or in the obstruction of some person in his discharge of a duty, such offences are naturally distinguishable,—

First. As omissions to discharge legal duties.

Secondly. Direct obstructions of the executive power.

Thirdly. Offences tending indirectly to obstruct the executive power.

Fourthly. Abuses of the executive power.

The principles on which this class of offences depends are obvious. For carrying into effect the scheme of the constitution, and in order to the due administration of the laws, various official agents are required invested with powers adapted to those purposes, and upon the faithful execution by such officers of the various powers intrusted to them must the due working of the state machine for all practical purposes depend. To this end it is necessary—first, to provide for the selection of officers duly qualified, and secondly, to compel the execution of public duties by those lawfully appointed for the purpose.

The selection of fit persons for the discharge of public functions is a duty so dependent on the exercise of a discretionary power of judging as to fitness and qualification for office, as in a great measure to exclude the possibility of restraining by penal laws any abuses of the confidence reposed in those who are by law invested with the power of selecting persons. In one important respect, however, the law interferes to prevent a practice fraught with temptation to the parties invested with patronage and with mischief to the public, viz., the sale of public offices, by punishing those who offend in this respect.

The dignity, patronage, and emolument which usually appertain to the higher executive offices render them objects of competition, and, in effect, supersede the necessity for coercive laws to compel individuals to take upon themselves the execution of such offices. In respect of offices of an inferior degree, it is requisite not only that the law should provide means for making a fit selection of persons for the discharge of those, but also should compel the individuals so appointed to perform their various duties. Hence the refusal to take and execute a public office necessarily constitutes an offence of a public nature, on the part of one who is bound by law to execute such office.

The same principle further requires that a party on whom the legal duty of discharging a particular office is cast should faithfully execute all the duties pertaining to it; and therefore the omission to perform any part of such duties properly constitutes an offence against the right of the public to have all functions of a public nature properly executed. The same considerations are applicable to the negligent or imperfect performance of any official duty: and it can make no difference whether the particular service neglected be one of a series belonging to a permanent continuing office, or whether, arising out of peculiar circumstances, it be by law required to be performed under some special exigency whenever it may occur.

It is obviously essential also to the due administration and operation of the executive power not only to compel every member of the community faithfully to render the official services assigned to him by law, but also to compel others to

obey all lawful orders and commands which emanate from competent authority. And as it is essential to compel the due execution of official authority by those to whom it is intrusted, so is it also necessary to render that execution effectual by prohibiting obstruction and resistance to such execution. The neglect to execute a public duty being criminal, the unlawful resistance to the execution of such a duty must also be an offence of a corresponding nature.

As *direct* obstructions of the exercise of the executive power are thus properly regarded as offences, so also are practices which tend *indirectly* to interfere with the administration of that power.

Offences of this class consist principally in the sale of offices, bribery, and other corrupt agreements or solicitations to violate official trusts.

The offence of bribery seems (as will afterwards be more particularly noticed) to have been regarded by some authorities as confined to the corruption of officers of justice; the evil, however, which results from so odious a practice knows no such limits, but may pervade and corrupt every branch of the executive power. Mr. Hume, in his Commentaries on the Criminal Law of Scotland, observes,* "And here let me take occasion to say in general on this head of "bribery, that as the turpitude is undeniable of seducing *any servant of the* "*public* to betray his trust, of what kind soever it be, so there can be no doubt "of the competency at common law of inflicting a suitable punishment on account "of any, even unsuccessful, if serious, endeavour which is made towards so foul "an end."

Another offence of this nature consists of an unlawful intrusion into office, or an unwarranted assumption of official power. Such conduct amounts to an indirect obstruction of the executive power, inasmuch as the offender excludes from the discharge of official duties some other person, who, being lawfully appointed and invested with proper authority, may be presumed to be better qualified to fill the office. The necessity for punishing offences of this nature with severity is, however, less urgent than in many other cases comprehended within the same class. Where a party wrongfully assumes such authority, he is in general liable either civilly or criminally for any wrong done, under colour of such authority, to the person or property of another, inasmuch as he cannot protect himself by showing a legal justification of what he did; besides, offences of this nature are usually and properly the subject of peculiar modes of proceeding before jurisdictions expressly constituted for the decision of such matters.

And, last of all, it is requisite to restrain by suitable penalties corrupt or oppressive abuses of power, especially such as may be perpetrated under colour of the administration of justice—such as exactions and extortions by ministerial officers.

Offences therefore against the executive power generally, consist—

1st. In any unlawful refusal to take and execute any public office.

2dly. In unlawful omissions by officers or others to execute or discharge any official or other public duty, or in the negligent and imperfect execution or discharge of any such office or duty.

3dly. In disobedience of an Act of Parliament, or of any lawful order or command, emanating from any competent official authority.

4thly. In unlawfully resisting and obstructing the administration of the executive power.

5thly. In unlawful practices, tending to obstruct or weaken the administration of the executive power, by the selling of offices, bribery and the like.

6thly. In abuses of official authority, by exercising it partially, corruptly, or oppressively, as by extortion committed *colore officii*, or by embezzlement or other fraudulent application of public funds, or by the betraying matter of confidence, or in the taking bribes or agreeing to any violation of public duty, or other misdemeanors by executive officers.

Having thus traced the outline of offences against the executive power generally, we may observe that as these, for the most part, constitute direct violations of public right, they admit of simple definition, their limits being usually commensurate with the plain principle on which they are founded, and subject to little restraint from conflicting considerations of extrinsic policy.

Thus the offence of unlawfully refusing to take and execute *any public office* must in general constitute a public offence. Every member of the community

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* Vol. i. p. 408.

sharing the benefits derived from the protection of the law, and the maintenance of public order, is bound to contribute towards those objects by discharging the burdens cast upon him; in refusing to do so he violates his duty to society, and for the purpose of prevention, punishment, in respect of every such violation, becomes necessary. In all such cases the offence of unlawfully refusing to execute an office, or discharge a public duty, is precisely co-extensive with the legal obligation to serve the office or render the duty. Every such office or duty ought by law to be executed with due diligence; here, again, the public offence is necessarily commensurate with the omission or neglect to execute the duty in the manner which the law requires. The same principle is also obviously applicable in the case of offences which consist in any obstruction offered to the lawful execution of public duties. By the law of Scotland, hindrance or resistance to the officers of the law constitutes a species of offence called a *deforcement*. "The "course of justice (observes Mr. Hume)* may be obstructed not only during "process by attempts to overreach the wisdom of the judges, but also extra-"judicially by hindrance or resistance to the officers of the law in the execution "of their duty. Our practice annexes the appellation of *deforcement* to this "offence, one in former times the most frequent of any in this ill-disciplined "country, but which cannot be considered by the law as a venial transgression. "The reprehension due to it is not only on account of the high damage which "may attend the hindrance in the particular instance, but also and more espe-"cially because it is a contempt of the authority of the King, as represented in "his courts of justice and in the course of legal process; and is thus a matter of "evil and very dangerous example, which tends to the unhinging of Govern-"ment, and to intercept the benefits of the state of civil union. The servants "and executors of the law, how low soever their degree, are part of the great "plan of judicial establishment, and are the necessary instruments of the courts "of justice, without whose assistance the orders of those tribunals would be "fruitless. And having for those important ends been regularly installed by "public authority, and under surety for their proper deportment, those officers "have a just claim to the obedience of all the lieges in their office, and to the "same inviolability of person as the magistrates in whose service they minister, "and indeed the magistrates are themselves insulted when their orders are "resisted in the hands of their servants, to whom they have been committed for "execution."

It is manifest that the general principles thus expounded are not confined to the hindrance and resistance of such officers only as execute some judicial mandate, but extend to the hindrance and resistance of any other officer required to execute a public duty under any branch whatsoever of the executive authority.

Offences against particular branches of the executive power.

Definitions of offences against particular branches of the executive power consist either in some descriptions of offences against that power more special than those which we have already generally described, as applied to the particular subject matter, or they are offences constituted *on grounds of policy* peculiar to the particular subject matter. Offences within the former class are such as, independently of the special provision, would be offences against the more general law, and are therefore unnecessary, except for the purpose of more signally marking the nature and degree of the offence, and inflicting on the offender a proportionate punishment. Those of the latter description are essential to the existence and nature of the offence. Thus wounding an officer with intent to prevent the lawful apprehension of an offender for any offence is a special law, for preventing resistance to a particular branch of the executive, viz., the administration of public justice; but independently of this special provision, the offender would be amenable to punishment in respect of the more general offence, viz., the obstruction of an officer of the executive in the discharge of his duty.

We make this remark with a view to the expediency of attentively considering to what length the maximum of punishment, for the inferior offence, may properly be extended, and to what limit the maximum of the more special and aggravated offence may be lowered, so as to dispense with the necessity for more special enactments, and by this means to render this branch of the criminal law more simple and compendious.

In such instances as those to which we have alluded, the more specific offence

* Commentaries on the Law of Scotland respecting Crimes, vol. i p. 186.

is so greatly enhanced by the two circumstances which distinguish it from the general one, viz., in being one directed against the administration of justice, and in being attended with the infliction of a wound, as to render a widely different punishment in respect of the aggravated offence indispensable. There are, however, instances in which the general offence may not be considered to be so far aggravated by its application to the more special subject, as to render any particular provision necessary, and, consequently, where simplicity and conciseness may be consulted without any violation of that wholesome and essential principle of criminal jurisprudence which requires offences to be distinctly marked by proportionate punishments. It is proper to observe, that whilst we have inserted in this part of the Digest some special offences which are also comprehended under more general definitions, it may appear in the result that several of such special provisions may be dispensed with, in case the general provision should be deemed sufficient for the purpose.

Offences constituted on grounds of policy *peculiar* to any particular branch of the executive power, or to any other public institution or law, do not admit of any very general definitions. As these do not constitute direct violations, or even any immediate attempts to violate the law, but rest in *tendency*, they usually require to be specifically described. There are, however, some instances of offences, properly constituted such by reason of their *tendency* to produce some violation of the law or evil consequence, but which cannot be otherwise than specifically described. Thus the advertising a reward for stolen goods is an act not amounting directly to an obstruction of the course of criminal justice, but tending incidentally to that consequence, and which ought therefore to be specifically described. A general prohibition against the doing of any act *tending* to obstruct the due action of the executive power, or the due course of justice, neither specifying any actual violation of any public right, nor any particular act or means intended to be made criminal, would be far too vague and indefinite to effect the legitimate objects of the Criminal Law.

We now proceed to submit a few preliminary remarks on offences against one of the most important branches of the executive power,—the administration of public justice. These admit of the general distinctions already noticed, as applicable to offences against the administration of the executive power. They are divisible into offences committed by officers of justice, judicial or ministerial, who neglect their duty, or abuse the authority with which they are invested; and those committed by private persons who in any way resist or obstruct the due course of justice.

Many of the offences against the administration of public justice, consist merely in aggravations of those of a more general nature against the executive power. The definition of these is essential only where it may be deemed expedient to visit the offence, by reason of its aggravation, with a more severe punishment.

Another branch of this class of offences consists of those which rest on considerations of policy peculiar to the exercise of this particular branch of the executive power. This includes all practices, such, for instance, as the taking reward for helping to stolen goods, which may be deemed *indirectly* to obstruct the course of justice, and thus to encourage malefactors.

The general principles and distinctions appertaining to offences committed by judicial and ministerial officers of justice, jurors, witnesses, and private persons, are, for the most part, too obvious to require at present more than a few brief remarks;—such other observations as may be deemed necessary will be made in adverting to the law of England on this subject, and in the notes to the digest of this portion of the law. Although no injuries can be more mischievous than such as are effected, under the colour of justice, by the pronouncing unjust judgments, or delivering false verdicts, considerations of policy show the expediency of making a distinction between judicial officers or jurors, and mere ministerial officers, in respect of alleged breach of duty. It is far more difficult as regards the former class than the latter to distinguish between mere error and a criminal intention to do wrong; and in respect of jurors, especially, it would be manifestly impolitic to discourage those whose duty it is to serve in that capacity, or to distract their attention by the apprehension of becoming liable to penalties as a consequence of their verdicts. Although every omission or neglect by a ministerial officer of justice, in the apprehension or custody of an offender or supposed offender, necessarily constitutes an offence against public justice, the degree and character of the offence are greatly varied by the consideration,

whether an escape from his custody was voluntary, or imputable to mere negligence; and also by the nature and degree of the offence supposed to have been committed by the party escaping.

Offences by private persons, against the ministerial branch of the administration of justice also consist in resistance to the execution of such official duties as are essential to the administration of justice, and particularly in resistance to ministers of justice acting in the discharge of such official duties; in escapes from lawful custody, and in aiding others to escape, or in rescuing them from such lawful custody.

Having thus noticed the general principles by which such offences are governed, we now proceed to state some of the provisions of the existing law of England, as it concerns offences against the executive power and the administration of justice.

Present state of the law.

By the common law most of, if not all the offences, which we have adverted to, are punishable either as felonies or misdemeanors. Besides this, in numerous instances particular offences of a more aggravated character form the subject of a multiplicity of statutes, many of which are merely local in their operation; many others are but repetitions of previous enactments, and the penalties which they inflict afford frequent instances of disparity and want of system. We shall also have occasion to notice some provisions of the common as well as of the statute law, which a consideration of the changes in our national circumstances and social habits since those provisions were made, may show to be at the present day unnecessary, if not impolitic.

Preserving the order of distributing offences against the executive power already marked out, we proceed to observe that the common law authorities seem to warrant a general inference which has the sanction of reason and policy—that the refusal by any party to execute any office or duty of a public nature which the law requires him to execute, is an offence of a public nature. It seems also to be a general rule of the common law that an officer or other person, to whom it may appertain, under special circumstances, to perform some duty to the public, as to render aid when called upon to assist the sheriff or any peace officer, on a sudden emergency, in the execution of his duty, is guilty of an indictable offence in omitting so to execute it. This, indeed, is a consequence resulting from the circumstance of the law having prescribed such duties; and the absence of any other mode of enforcing their performance than by an indictment. Negligence in the execution of a public office or duty, differs not in principle from an entire omission to perform it.* If a party be under a legal obligation to discharge an office or duty, he is under an obligation to discharge it faithfully and properly; to perform it negligently and insufficiently to the detriment of the public is, therefore, a violation of the right of the public, and is so regarded by the existing law. Neither in these cases, nor in any other, where the law requires a public duty to be performed, can there be any limit short of requiring such duty to be fully performed. Abuses of office, by the corrupt or oppressive exercise of public authority, by extortion as well as receiving bribes, or otherwise corruptly agreeing to do or to omit any act, in violation of public duty, are regarded as public offences at common law. By the statute law, provision is made for the punishment of such as are guilty of embezzlements of public property.† And the opinion seems to have prevailed that the embezzlement or fraudulent application of public money or other property is an offence at common law.

So far as to offences of omission or commission, by officers, and also by *quasi* officers, who, although not elected or appointed to a particular office for any period of time, may yet be bound by the occasion and circumstances to render particular services on behalf of the public, as for the preservation of the peace, the prevention of crime, or other objects of public importance, for the effecting of which the law requires and commands such aid. The authorities also warrant the general inference that disobedience of a public statute, or of any other lawful order or command by a public officer, is a criminal offence. Disobedience of lawful orders, made by justices of the peace, has in several instances been deemed to constitute an indictable offence; and so, *a fortiori*, must be any contempt or disobedience of a statute of the realm.

By the common law, as well as by many statutes, the obstruction of any legal

* See 4 Black. Comm. 140.

† See St. 2 Will. IV., c. 4, s. 1.

process, especially such as concerns the administration of justice, is regarded as a high offence.* The principle upon which this offence depends is very extensive, and comprehends many special cases, which, for particular reasons, require to be more strongly marked than others. The entire class is more distinctly expressed and defined by the law of Scotland than it is by the law of England. But there seems to be little difficulty in inferring, from decided cases, text-books, and other authorities, that the law to be extracted is commensurate with the principle of public right, respecting the due administration of the executive power already adverted to, and consequently comprehends all cases where the due operation of that power is unlawfully hindered or resisted.

The common law also justly considers bribery to be a heinous offence, as well on the part of any officer who takes a bribe as on the part of a person who offers one, although it be not taken. In the Commentaries, vol. 4, p. 140, Mr. Justice Blackstone observes,—"In judges, especially the superior ones, bribery "hath been always looked upon as so heinous an offence, that Chief Just. "Thorpe was hanged for it in the reign of Edward III."† This appears to have been a mistake, and we have been unable to discover any ancient authority, by which such an offence was ever punishable capitally by the law of England. It was, however, a misdemeanor at common law, punishable by fine and imprisonment. The offence is very obscurely defined by our law writers, and seems to have been originally considered merely as a contempt of the prerogative of the Crown. Sir Edward Coke says, that "Bribery, in a strict sense, is taken "for a great misprision of one in a judicial place taking any valuable thing what-"soever, except meat and drink of small value, of any one who has to do before "him any way, for doing his office, or by colour of his office, but of the King "only."‡ In a large sense, however, bribery is defined by Sir Edward Coke (and this definition is adopted by Mr. Serjeant Hawkins and modern writers) as "the "receiving or offering of any undue reward by or to any person whatsoever, "whose ordinary profession or business relates to the administration of public "justice, in order to incline him to do a thing against the known rules of "honesty and integrity.§ This description, however, does not limit the object to be effected by the bribe to official acts, and merely denotes those acts in general terms as "against the known rules of honesty and integrity." Thus the offer of a bribe to an officer to incline him to act dishonestly in some private and personal transaction of his own would fall within the words of the definition; and the inquiry, what rules of honesty and integrity are clearly known and ascertained might often resolve very nice and subtle questions in morals. It seems quite clear, however, from the few instances of prosecutions for bribery at common law which have occurred, that the essence of the offence has always been considered to be the corruption of an officer by taking or giving bribes to influence his conduct in his official capacity, and with reference to his official acts. The definition given by Mr. Serjeant Hawkins seems to limit the offence of bribery to the offer or acceptance of rewards by officers connected with the administration of justice; but in Vaughan's Case,‖ it was considered bribery at common law to promise money to a Cabinet Minister, as a consideration for

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* 4 Black. Comm. 129; Hawk. P. C., b. 2, c. 17; 1 Hale's P. C., 606.

† Other writers, besides Blackstone, have stated broadly that Thorpe was actually executed for this offence. This, however, is clearly not the fact. It appears from the Record, as published by Sir Edward Coke in the 3d Institute, p. 223, that the Chief Justice was immediately pardoned, and restored to all his lands; and the Year-book (28 Ass. pl. 20) shows that a few years afterwards he was reinstated in his office. The charge against Thorpe was, that, contrary to his judicial oath, he had received gifts of money from several great men indicted before him, as a consideration for his respiting a writ of exigent against them; and in so doing he was charged to have falsely, maliciously, and rebelliously broken the King's Coronation Oath. Lord Coke calls it a "strange judgment," and says that it was not warranted by law. 3 Inst. 223, 146. The case, therefore, is not so favourable an instance of the indignation with which judicial bribery was regarded in early times, as has been supposed. In truth the corruption of the judges for centuries after Thorpe's time was notorious and unquestionable. It is noticed by King Edward VI. in a discourse of his published by Bishop Burnet, as a complaint then commonly made against the lawyers of his time. (Burnet's History of the Reformation, vol. 2, App. p. 72.) Its prevalence at a still later period, in the reign of James I., may be inferred from the caution contained in Lord Chancellor Bacon's address to Serjeant Hutton, upon his becoming a judge, "that his hands, and the hands of those about him, should be clean, and uncorrupt from gifts, and from serving of turns, be they great or small ones." (Bacon's Works, vol. ii. p. 632.) From Lord Bacon's own confession of the charges of judicial bribery made against him in the House of Lords, he urges, by way of palliation, that the offence was *vitium temporis*. (Howell's State Trials, vol. ii. p. 1104.)

‡ 3 Inst. 145.

§ See Hawkins's P. C., book i. ch. 67; Russell on Crimes, tit. Bribery.

‖ 4 Burr. 2494.

giving an office in the Colonies. The offence, therefore, by the English law corresponds very nearly with the crime described in the Code Pénal under the title, "De la Corruption des Fonctionnaires Publics."

In addition to the common law punishment considerable penalties have been imposed by various statutes upon this offence, particularly by the statute 11 of King Hen. IV., which relates to judges and officers of the king, and which inflicts a forfeiture to the amount of treble the bribe, punishment at the king's will, and discharge from the king's service for ever. Bribery, in respect of the elective franchise, is also punishable by several statutes.*

Influencing any public officer in his official conduct, by violence or threat of violence, seems to be an offence undistinguishable in principle from effecting the same object by corrupt means.

Next, as to offences committed against the administration of justice. These may be considered as they concern,— Offences against the administration of justice.

I. Judges and other judicial officers.
II. Jurors.
III. Witnesses.
IV. Counsel, &c.
V. Ministerial officers.
VI. Obstructions, and other offences committed by private persons.
VII. Offences contrary to legal policy, and indirectly tending to obstruct the course of justice.
VIII. Abuses of authority.

I. The statute 18 of King Edw. III., St. 4, prescribes the oath to be taken by a judge, and then enacts that, in case he be found in default in any of the points contained in such oath, he shall be at the king's will of body, lands, and goods, thereof to be done as shall please him. Offences by judicial officers.

The following is the translation of the oath, which is given in Ruffhead's edition of the statutes, the original of which is in Norman French:—

"Ye shall swear, that well and lawfully ye shall serve our lord the king and "his people in the office of justice; and that lawfully ye shall counsel the king "in his business; and that ye shall not counsel nor assent to anything which "may turn him in damage or disherison by any manner, way, or colour; and "that ye shall not know the damage or disherison of him, whereof ye shall not "cause him to be warned by yourself, or by other; and that ye shall do equal "law and execution of right to all his subjects, rich and poor, without having "regard to any person; and that ye take not by yourself, or by other, privily "nor apertly, gift nor reward of gold nor silver, nor of any other thing which "may turn to your profit, unless it be meat or drink, and that of small value, of "any man that shall have any plea or process hanging before you, as long as the "same process shall be so hanging, nor after for the same cause; and that ye "take no fee, as long as ye shall be justice, nor robes of any man, great or small, "but of the king himself; and that ye give none advice or counsel to no man, "great nor small, *in no case where the king is party;* and in case that any, of "what estate or condition they be, come before you in your sessions with force "and arms, or otherwise against the peace, or against the form of the statute "thereof made, to disturb execution of the common law, or to menace the people "that they may not pursue the law, that ye shall cause their bodies to be arrested "and put in prison; and in case they be such that ye cannot arrest them, that ye "certify the king of their names, and of their misprision hastily, so that he may "thereof ordain a convenable remedy; and that ye, by yourself nor by other, "privily nor apertly, maintain any plea or quarrel hanging in the king's court, "or elsewhere in the country; and that ye deny to no man common right by the "king's letters, nor none other man's, nor for none other cause; and in case any "letters come to you contrary to the law, that ye do nothing by such letters, but "certify the king thereof, and proceed to execute the law, notwithstanding the "same letters; and that ye shall do and procure the profit of the king and of his "crown, with all things where ye may reasonably do the same."†

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* See the statute 7 and 8 Geo. IV., c. 37.

† "Vous jurez, que bien et loialment servires a nostre Seignur le Roy et son people en loffice de "Justice, et que loialment conseilleres nostre Seignur le Roy en sez besoignes. Et que vous ne "conseilleres ne assentires a chose que luy purra tourner en damage ou desheriteson per queconque "voye ou colour. Et que vous ne saveres le damage ou desheriteson de luy, que vous ne luy ferrez "garnir per vous ou per autre. Et que vous subgettez riches et povrez sauns auoir regard a qul-

Any misconduct by a judge, contrary to his oath of office, is by the above statute constituted a crime, the extent of the offence being thus made commensurate with the obligation by oath.

Mr. Barrington, in his observations on the words of the oath, "and ye give "none advice or counsel to no man, great nor small, in no case where the king is "party," remarks (page 262) as follows:—"I suspect that this should be where "the king is *not a party*; as, by the preceding part of the statute, the judges "are to give their advice to the king when he shall have occasion for it; and "which, in certain cases, they still continue to do." The meaning, however, seems to be that, where the king is party, no advice be given to any other. This seems to be quite clear from the statute 20 Edw. III., c. 1, which, reciting the former commands to the justices, has the following clause:—"And that they "shall give no counsel to great man or small, in case where we be party, or "which do or may touch us in any point."*

Oppression and partiality in judges and other judicial officers are punishable at common law as crimes (to use the language of Mr. Just. Blackstone) of deep malignity.

Whilst corruption in the exercise of a judicial office is by the common law regarded as a high misdemeanor, it is one which, in this country, as regards the higher Courts, may be said to exist in theory only, so exceedingly rare are the instances, in modern times, in which that high authority has been abused for unlawful purposes.

Offences by jurors.

II. In respect of jurors, an offence was recognized from the earliest times, at common law, termed *embracery*, which consisted in attempting to influence a jury corruptly on one side, by promises, persuasions, entreaties, money, entertainments, and the like.† And by several statutes, the provisions of which are expressly recognized by the statute 6 of King Geo. IV., c. 50, s. 61, (the Jury Act), the offence of embracery and that of jurors wilfully and corruptly consenting thereto, is a misdemeanor punishable by fine and imprisonment.

Formerly, a jury were liable to an attaint in respect of a false verdict. This was a law founded on a state of things totally different from that which exists at the present day; for, in ancient times, jurors were witnesses of the fact, who were to deliver their verdict upon what they knew; and therefore a false verdict involved the crime of perjury. When, from changes in the legal system, jurors became judges of the fact, on evidence offered to them, although they might still be guilty of a great offence in *foro conscientiæ*, by finding a verdict against evidence and their own conviction of the truth, yet their delinquency no longer admitted of the same means of proof; and it became impolitic to subject juries to the risk of an attaint, the effect of which might be to discourage persons from acting as jurors. From this consideration, and also from the difficulties attending the prosecution of a writ of attaint, the proceeding gradually fell into disuse, and was at last abolished by the legislature.‡ We refer to these circumstances because they tend to show that any further legislation on this subject is unnecessary.

"conque person. Et que vous ne prendrez per vous ne per autre en prive nen apert don ne reward "dor ne dargent ne dautre chose queconque, que a vostre profit pourra tournir, sil ne soit manger ou "boire et ceo de petit value, de nul home qui auera plee ou proces pendaunt devaunt vous, taunt "come cel proces serra issint pendant, ne apres pur cel cause. Et que vous ne prendres fee, tanque "come vous serres justice, ne robes de nul home graunde ne petit, si non de Roy mesmes. Et que "vous ne dirrez counseil ne avyz a nulle graunde ne petit, en nul cas ou le Roy est partie. Et en cas "que ascuns de quel estate ou condition quils soient, veignent devant vous en vous sessions a force "et armes ou autrement contre la peas, ou contre la forme del estatut ent fait, pur distourber execu-"tion del commune ley, ou pur manascer lez gentz que ils ne purroient pursuir la ley, qe vouz ferrez "arrester lour corps et mettre en prison. Et en cas quils soient tielx que vous ne lez poez arrester, "qe vous certifies le Roy de lour nouns et de lour misprision hastivement, issint qe il puisse ent "ordeigner remedie covenable. Et que vous ne maintiendres, per vous ne per autre en prive nen "apert, nul plee ne nul querele pendaunt en le court le Roy naillours en paiis. Et qe vous ne de-"clarez a nulle come droit per lettres du Roy ne de nully autre ne per autre cause queconque. Et "en cas que ascuns lettres vous veignent contrariez a la ley, que vous ne ferres riens per tielx lettres, "eyens certifies le Roy de ceo et irrez avaunt pur faire la ley, nient contresteantz mesmes les lettres. "Et que vous ferres et procures le profit du Roy et de sa corone ove toutes les choses ou vous le "purres faire resonablement. Et en cas qe vous soies trove en defaute desorenavant en nul des "pointes avantditz, vous serres en la volunte du Roy du corps terres et davoir, de faire ent que luy "plerra. Si Dieu vous eide et toutes seyntes."

* "Et qils ne dorront counseill a null graund ou petit en cas ou nous sumus partiez ou qe nous "touche ou purra toucher en nul manere"

† 1 Hawk. P. C., c. 85, s. 1.

‡ See the statute 5 Geo. IV., c. 50, s. 60.

It was anciently held that if one of the grand jury disclosed to any person indicted the evidence that appeared against him, he was thereby made accessory to the offence, if felony, and if treason a principal; and, in later times, it is stated by writers of authority that in so doing he is guilty of a high misprision, and liable to be fined and imprisoned.* Such an offence seems properly to be punishable as an endeavour to obstruct the course of justice by facilitating the escape of a suspected person from justice.

III. The offence of perjury, at the common law, is of a very peculiar description, and differs in some of its essential qualities from the crime of false testimony, or false swearing, as defined in all the modern codes of Europe. The definition of the word too, in its popular acceptation, by no means denotes its legal signification. Perjury, by the common law, is the assertion of a falsehood upon oath in a judicial proceeding respecting some fact material to the point to be decided in such proceeding; and the characteristic of the offence, is not the violation of the religious obligation of an oath, but the injury done to the administration of public justice, by false testimony. The history of the offence in the law of England is extremely obscure, and it is perhaps impossible to trace with precision the steps by which it arrived at the definite form in which it appears in the modern text books. Bracton, when describing perjury, and its punishment, only mentions the offence of jurors who give a false verdict; but in his time, and, indeed, long afterwards, the jury were, as above stated, to all intents and purposes, witnesses. Being summoned from the neighbourhood where the disputed fact happened, they were presumed to have certain knowledge respecting it; and therefore there seems to have been, at early periods of the history of our common law, no such thing as testimony or evidence in our modern sense of the terms. By degrees evidence was introduced to inform the jurors respecting facts; and as soon as this change in the character of the institution was effected, the term perjury began to denote exclusively the offence of witnesses and parties giving false testimony in a court of justice. At the time of Sir Edward Coke, this change had been completed, and the crime of perjury was then understood nearly as it is at the present day.† Perjury, &c.

Upon the constitution of the offences of perjury and subornation of perjury, at common law, we have no animadversions to make; and our digest of this subject is little more than an abstract of the definitions contained in the most approved text-books. We think that the distinction between the offences of false swearing in a judicial proceeding, and mere false swearing, is judicious and proper, as drawing a broad line of distinction between the grave and noxious crime of legal perjury and mere false swearing to facts for fiscal or other general purposes. It appears to us, however, that the embarrassing difficulties which exist in prosecuting persons guilty of perjury, greatly interfere with the effectual application of the criminal law for the prevention of this offence. These difficulties are occasioned by the technicalities required in the formal statement of the offence in the indictment, and especially by the rule requiring two witnesses to prove every assignment of perjury; a rule which is founded in fallacious reasoning, and is the most frequent cause of the failure of prosecutions for this offence. The former of these causes of difficulty it was attempted to remove by the provisions of the statute 23 of King Geo. II., c. 11. sec. 1, which declared that "in every information or in- "dictment to be prosecuted against any person for wilful and corrupt perjury, it "should be sufficient to set forth the substance of the offence charged upon the de- "fendant, and by what court, or before whom the oath was taken, (averring such "court or person to have a competent authority to administer the same,) together "with the proper averments to falsify the matters wherein the perjury is assigned, "without setting forth the bill, answer, information, indictment, declaration, or any "part of any record or proceeding, either in law or in equity, other than as in the "statute mentioned; and without setting forth the commission or authority of the "court, or person before whom the perjury was committed." Eminent judges have lamented that the provisions of this law were not more generally attended to in drawing indictments for perjury.‡ It has, however, been much disregarded in practice; and the principal reason of this neglect has probably been that, as the statute requires the substance of the offence to be set out, so much of the judicial proceedng must, at all events, be given as will show, upon the face of the indictment, that what was sworn by the defendant was material to the issue to be tried. This

* 4 Black. Comm., 126; 1 Hawk., P. C., 59; and see Barr. 212, 27 Ass. Pl. 44, s. 4, fol. 138.
† 3 Inst. 163. ‡ See Rex *v.* Dowlin, 5 Term Reports, 317.

would always be an operation of so much nicety and danger, that judicious pleaders have frequently thought it the safer course to continue the ancient mode of setting out the proceedings in detail. This subject, as well as the expediency of requiring two witnesses to prove each assignment of perjury, will be fully considered when we come to that part of the digest which relates to procedure.

Besides the offence of perjury at common law, this offence, as well as subornation of perjury, has been the subject of legislative enactment. The earliest statute upon this subject, which is still in force, is the stat. 5 of Queen Eliz. c. 9, (made perpetual by 29 of Queen Eliz. c. 5, s. 2, and 21 of King Jac. I. c. 28, s. 8.) The third section of this statute enacts, respecting subornation of perjury, "That all which shall unlaw- " fully and corruptly procure any witness by letters, rewards, promises, or by any " other sinister and unlawful labour or means whatsoever to commit any wilful and " corrupt perjury in any matter or cause whatsoever depending in suit and variance " by any writ, action, bill, complaint, or information, in anywise touching or concern- " ing any lands, tenements, or hereditaments, or any goods, chattels, debts, or damages, " in the courts of Chancery, the Star Chamber, the Whitehall, or elsewhere, within " the dominions of England or Wales, where any persons have authority by virtue " of the king's commission, patent, or writ, to hold plea of land, or to examine, " hear or determine any title of lands, or any matter or witnesses concerning the " title, right, or interest of any lands, tenements, or hereditaments, or in any of the " queen's majesty's courts of record, or any leet, view of frank pledge or law day, " ancient demean court, hundred court, court baron, or in the court or courts of the " Stannary in the counties of Devon and Cornwall; or shall likewise unlawfully and " corruptly procure or suborn any witness or witnesses which shall be sworn to testify " *in perpetuam rei memoriam;* that then every such offender shall, for his said " offence, being thereof lawfully convicted or attainted, lose and forfeit the sum of " forty pounds."

The fourth section then enacts, " That if it happen any such offender, so being " convicted or attainted as aforesaid, not to have any goods or chattels, lands or " tenements, to the value of £40, he shall, for his said offence, suffer imprisonment " by the space of one half-year, without bail or mainprize, and to stand upon the pil- " lory the space of one whole hour in some market town, next adjoining to the place " where the offence was committed, in open market there, or in the market-town " itself where the offence was committed."

The fifth section enacts, " That no person, being so convicted or attainted, be " from thenceforth received as a witness to be deposed and sworn in any court of " record, until the judgment given against him shall be reversed by attaint or " otherwise."

The sixth section of the statute of Queen Elizabeth relates to perjury, and enacts, " That if any person, either by the subornation, unlawful procurement, sinister persua- " sion or means of any other, or by his own act, consent or agreement, wilfully and cor- " ruptly commit any manner of wilful perjury by his deposition in any of the courts " before mentioned, or being examined *ad perpetuam rei memoriam*, that then " every person so offending, and being thereof duly convicted or attainted, shall, for " his said offence, lose and forfeit twenty pounds, and to have imprisonment by the " space of six months, without bail or mainprize; and the oath of such person so " offending from thenceforth not to be received in any court of record until such " time as the judgment given against him shall be reversed by attaint, or otherwise."

The seventh section enacts, " That if the said offender hath not any goods or " chattels to the value of twenty pounds, that then he is to be set on the pillory in " some market-place within the shire, city, or borough, where the said offence shall " be committed, and there to have both his ears nailed, and from thenceforth to be " discredited and disabled for ever to be sworn in any of the courts of record afore- " said, until such time as the judgment shall be reversed."

By the further provisions of the statute, it is enacted that the judges of the said courts where any such suit shall be, and whereupon any such perjury shall be committed, and also the justices of assize and gaol delivery, and justices of peace at their quarter sessions, may inquire of, hear and determine all offences against the said Act. And it is also provided, that the said statute shall not restrain the authority of any judge having absolute power to punish perjury before the making thereof; but that every such judge may proceed in the punishment of all offences punishable before the making of the said statute in such wise as they might have done and used to do to all purposes, so that they set not on the offender less punishment than is contained in the said Act.

The above statute is for the most part a re-enactment of the provisions of a still more ancient statute (32 of King Henry VIII. c. 9), with an increase of the punishment applicable to the offences of perjury and subornation of perjury.

It is obvious from its provisions, as above detailed, that they were intended for a state of society very different from the present, and are quite unsuitable to modern opinions respecting the administration of the criminal law. It appears probable that at the time this statute was passed it could not have been clearly ascertained that perjury in a witness, as a distinct offence from perjury in a juror, was punishable at common law; for the common law offence, as it is now understood, is more comprehensive in its range than the statute of Queen Elizabeth,—not only in the definition of the crime, but also in the punishment applicable to it. Perjury at common law may be committed in *any* judicial proceeding; whereas perjury under the statute of Queen Elizabeth can only be committed in certain specified courts or jurisdictions. Again, by the statute of Queen Elizabeth, the maximum punishment for subornation of perjury is a fine of £40, imprisonment for six months and the pillory; and for perjury a fine of £20, imprisonment for six months and the pillory in case the fine of £20 be not paid; whereas by the common law the extent of fine and imprisonment was not specifically limited, and until the recent abolition of the pillory, that punishment might have been added. There is in truth no one point in which the common law offence of perjury is not more extensive than that of the statute of Queen Elizabeth, excepting that by the latter the justices at quarter sessions are authorized to try it, whereas by long usage they are restrained from trying indictments for perjury at common law. In consequence of the greater facilities of the proceeding at common law, prosecutions under the statute have been extremely rare. We are not aware of any recorded instance of the trial of an indictment for perjury or subornation of perjury under the statute of Queen Elizabeth during the last century; and as it has become practically obsolete, we see no disadvantage or inconvenience which could arise from its entire repeal.

Besides the offence of perjury at common law, which, from its dangerous consequences to the administration of justice and the security of persons and property, has always been considered as a crime of great enormity, false swearing under a variety of circumstances, differing extremely from one another in their degrees of criminality, has been declared by numerous statutes, private as well as public, to amount to perjury, and to be punishable in the same degree. These clauses are not founded upon any general principle, and consequently they describe a distinct offence in each particular case, to which they inaccurately give the name of perjury; and all of them, with a very few exceptions, are framed with a total disregard to the peculiar characteristics of the crime of perjury and its obvious distinction from mere false swearing. For instance, by the 6th section of the statute 13th of King George III. c. 63, for establishing certain regulations for the better managing of the affairs of the East India Company, it is declared that if any person taking the elector's oath required by that Act to be taken before voting for directors at general courts, shall *thereby* commit wilful perjury, he shall be liable to the penalties of the statute 5th of Queen Elizabeth, c. 9, and the 2nd of King George II. c. 25. This statute, therefore, does not declare that the false swearing which it is meant to punish shall be perjury, but that if any person falsely taking the oath prescribed by the statute shall *thereby* be guilty of perjury, he shall be punished. But it is impossible that any person by falsely taking that oath can be guilty of *legal* perjury, as it is not taken in a judicial proceeding; and consequently, unless the word can in this particular case be construed to mean perjury in a *popular* sense, it might reasonably be doubted whether an indictment for perjury could be maintained upon this or any other of the numerous statutes in which the same form has been adopted. Again, in other statutes, by the careless use of general words, cases have been included which it never could have been the intention of the Legislature to constitute crimes of this class, and which it would be obviously absurd to treat as perjury. Thus the statute of King George I. c. 18, for regulating elections within the City of London, declares that "if any "person shall wilfully, falsely, and corruptly take the oaths set forth and appointed "by that Act, or shall corruptly suborn any other person to take the said oaths, "he shall incur such penalties, forfeitures, and disabilities, as persons convicted of "perjury at common law." This clause was intended to apply to the oaths of liverymen and electors at wardmotes in the City of London; but it is clear

that the words comprehend the oaths of allegiance and supremacy which are also specifically prescribed by the Act. These instances of inconsistency have been selected at random from the statute book, and many others of the same kind might be adduced to evince the want of caution which has been displayed in framing clauses of this description. The great objection, however, to all these clauses is, that they confound the aggravated offence of judicial perjury with the inferior crime of false swearing, and place in the same penal predicament the guilt of wilful false swearing in a court, by which not only the administration of justice is insulted, but the life and property of others may be unjustly sacrificed, and that of swearing falsely to some fact relating to fiscal regulations or the registry of a deed. It appears to us that the object of the law may be much more effectually attained by a general clause, such as will be found in the Digest, making it criminal in any person lawfully required by any competent authority to declare the truth upon his oath in any proceeding not judicial, wilfully to state a falsehood; and we propose to place this offence in a lower degree than judicial perjury in the classification of punishments. If this suggestion should be adopted by the Legislature, all clauses in statutes constituting false swearing perjury, and also those which impose the penalties of perjury upon certain instances of false swearing might be repealed, and thus a desirable uniformity in the law upon this important subject, and a proper distinction between two offences of very different degrees of criminality, would be effected.

But although these offences differ materially in their penal character, many of their component circumstances are common to each; and two modes of defining and digesting the law upon which they are founded, have presented themselves to our consideration. The first is to consider the false swearing as the substance of the offence in both cases, and the circumstance of its occurrence in the course of giving testimony in a judicial proceeding as an aggravation. The other course is to consider the two offences as entirely distinct, regarding as the characteristic of legal perjury the defiance of right and justice by false testimony in judicature, and treating false swearing simply as an act of disobedience to a positive requisition of the law, aggravated by a disregard of the religious sanction of an oath. The first of these modes of arrangement is, perhaps, the most logical, and it has been adopted with some varieties in most of the modern European codes; we have, however, in our digest of this subject followed the second mode above suggested, because the principle upon which it is founded approaches more nearly to the character of the existing law.

In our last Report* we remarked that the causing the death of an innocent man by means of perjury is not punishable as murder by the English law. There can, however, be no doubt that any conspiracy to effect such an object is a crime which is justly punishable with great severity. There is also another offence closely allied to perjury, which consists in the artfully making of circumstances, with a view to their being proved in evidence as circumstances with a view to mislead a jury. As, for instance, where one maliciously intending to prosecute another for theft secretly places some article of property in his chamber, trunk, or otherwise, so that it may appear to have been found in his possession. This offence is noticed in the Penal Code prepared by the Indian Law Commissioners, and is termed by them "the fabrication of false evidence." Their Report contains the following important observations on this subject†:—

"It appears to us, in the first place, that the offence which we have designated "as the fabricating of false evidence is not punished with adequate severity "under any of the systems to which we refer. This may perhaps be because "the offence, in its aggravated forms, is not one of very frequent occurrence in "western countries. It is notorious, however, that in this country the practice "is exceedingly common, and for obvious reasons. The mere assertion of a wit-"ness commands far less respect in India than in Europe or in the United States "of America. In countries in which the standard of morality is high, direct "evidence is generally considered as the best evidence. In England assuredly "it is so considered, and its value as compared with the value of circumstantial "evidence is perhaps overrated by the great majority of the population. But in "India we have reason to believe that the case is different. A judge, after he "has heard a transaction related in the same manner by several persons who de-"clare themselves to be eye-witnesses of it, and of whom he knows no harm, "often feels a considerable doubt whether the whole from beginning to end be

* P. 30, Art. 19, note (*t*). † P. 97, note G.

" not a fiction, and is glad to meet with some circumstance, however slight, which " supports the story, and which is not likely to have been devised for the purpose " of supporting the story.

" Hence, in England, a person who wishes to impose on a Court of Justice " knows that he is likely to succeed best by perjury. But in India, where a " judge is generally on his guard against direct false evidence, a more artful " mode of imposition is frequently employed. A lie is often conveyed to a court, " not by means of witnesses, but by means of circumstances, precisely because " circumstances are less likely to lie than witnesses. These two modes of im- " posing on the tribunals appear to us to be equally wicked and equally mis- " chievous. It will indeed be harder to bring home to an offender the fabricating " of false evidence, than the giving of false evidence. But wherever the former " offence is brought home, we would punish it as severely as the latter. If A " puts a purse in Z's bag, with the intention of causing Z to be convicted as a " thief, we would deal with A as if he had sworn that he saw Z take a purse. If " A conceals in Z's house a paper written in imitation of Z's hand, and purport- " ing to be a plan of a treasonable conspiracy, we would deal with A as if he had " sworn that he was present at a meeting of conspirators at which Z presided."

We think it a question worthy of great attention, whether the crime of perjury ought not to be marked by some gradations. It is strongly remarked, by the * Indian Law Commissioners that " the English law makes no distinction whatever " between the man who has attempted to take away his neighbour's life by false " swearing, and the man who has strained his conscience to give an undeserved " good character to a boy accused of petty theft; the former is punished far too " leniently, the latter perhaps too severely." We shall recur to these considerations when we have occasion to suggest the different classes of punishment.

IV. The following provision against deceitful practices by advocates and others was made in the 3d year of the reign of King Edward I. Offences by counsel, &c.

" If any serjeant pleader, or other, do any manner of deceipt or collusion in " the King's Court, or consent unto it in deceit of the Court, or to beguile the " Court, or the party, and thereof be attainted, he shall be imprisoned for a year " and a day, and from thenceforth shall not be heard to plead in that Court for " any man; and if he be no pleader, he shall be imprisoned in like manner by the " space of a year and a day at least; and if the trespass require greater punish " ment, it shall be at the King's pleasure."

We have here given the translation of the original statute (in Norman French), which is given in the ordinary editions of the statutes. It is, however, to be observed, that the words serjeant pleader are in the original *serjeant countor*, words which in their literal sense are inapplicable at the present day, the term *countor* being in strictness confined to the count or declaration in a writ of right, a form of proceeding abolished by a late statute. This provision is worthy of remark, as, although made five centuries and a half ago, it seems to be the only one which professes to subject an advocate to penal restraints, or in any manner to regulate his conduct. The terms of this ancient enactment are exceedingly ambiguous, leaving it in doubt what kinds of deceits, collusions, and beguilements, were intended to be prohibited,—whether it was intended to be applied and confined to malpractices of a grosser nature, such as the endeavour to give credit to some false instrument, or knowingly to assert some false fact to the deception of the court, or to extend to endeavours to impose on the legal understanding of the court by misrepresentations as to the state of the law, or by false and subtle reasoning. It is difficult, at the present day, to form any correct judgment as to the state of the courts and of the bar at the remote period when this Act was made.

In respect of the grosser delinquencies to which we have alluded, it is scarcely possible that a practical charge of such a nature should arise out of any mere abuse of an advocate's privileges and duties, in asserting the genuineness of an instrument produced or the truth of a fact suggested by his client,† however false the one or the other might eventually turn out to be. Important as the integrity and character of the bar may be to the administration of justice, we think that penal enactments have little tendency to secure the one, whilst they might cer-

* Pages 97, 98. See the passage at large in the Appendix to this Report.

† In the case of the King *v.* the Warden of the Fleet, 12 Mod. 341, Holt, Ch. Just., said:—" If " a client bring a forged deed to a counsel, the counsel ought to prosecute him; and that he had " known such a thing done."

tainly serve to throw suspicion on the other. In another point of view they may operate as a serious restraint on that salutary freedom which is essential to the fearless discharge of duties of great importance, not merely to individuals whose lives or property may be in question, but to the community at large. Against attempts to mislead a Court by subtle arguments, or even by false assertion in matters of law, the cause of justice must rest mainly on the superior knowledge and wisdom of its judges. Were an advocate to be restrained by no higher principle, he would not willingly expose himself to defeat, and perhaps reprehension, for any attempt to impose on the Court. Before inferior tribunals such practices may be, and occasionally are, more successful.* An unpractised magistrate may not unfrequently be induced to yield to artful but delusive reasoning. This may be a partial inconvenience, but it is one which results from the inability of the magistrate, and admits of no sufficient remedy from penal enactments against the advocate. The licence allowed to an advocate in commenting or reasoning either upon the law or the fact, is one which cannot without injury to the cause of justice be restrained by precise or formal rules. None can be devised which could possibly establish any plain or practical limit for defining the extent of the advocate's duties and liability, whilst vague and indefinite denunciations, like those of this ancient statute, so far as they affect the province of the advocate, if regarded at all, would frequently be unfavourable to the cause of justice, in shutting out that which tended to enlighten without excluding that which was intended to mislead.

It is not improbable that the distinction between the duties of the advocate and of the attorney were not so well defined at the time when this ancient statute was made (A. D. 1275) as they are at this day. Mr. Serjeant Hawkins † states that the offences existed at common law as well as by the statute. He states also that the penalties attached to attornies as well as serjeants. It is, however, observable that the several cases of malpractice, which he specifies as having been decided to be within the statute, concern acts the doing of which is not properly within the province of the advocate. Before we quit this subject we may observe that a practice formerly prevailed most discreditable to the bar, and which seems to be fully within the scope of this statute, we allude to the framing or signing of sham pleas, which used frequently to be devised for the purpose of mere delay, and sometimes constructed with great ingenuity and in a manner calculated to entrap an unwary antagonist. Later improvements in procedure having rendered such practices unprofitable, they are not so frequently resorted to.‡

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* Without offering any remark on the propriety of such a feeling, we may venture to say that a victory gained by subtle advocacy over strict justice would seldom be regarded as a circumstance disgraceful to the advocate. Saunders, who was afterwards Lord Chief Justice of the King's Bench, evidently thought it no shame to record of himself, in his own Reports, that he had been reprehended by the Court for his subtle pleading. In Roger North's Life of Lord Keeper Guilford, credit is claimed for the practice of some subtleties, which are by no means deserving of applause.

† Hawk. P. C. b. 1, c. 83, s. 38.

‡ It cannot, however, be doubted that the practice of special pleading is so unlimited and unrestricted as to be the subject of much abuse, and to afford a wide field for the practice of chicanery, and the causing of useless expense, vexation, and delay. We subjoin some of the observations made by the Indian Law Commissioners on this subject, as entitled to general attention. (See p. 98, note G of the Penal Code.)—

" We think this the proper place to notice an offence which bears a close affinity to that of giving " false evidence, and which we leave for the present unpunished, only on account of the defective state " of the existing law of procedure. We mean the crime of deliberately and knowingly asserting false- " hoods in pleading. Our opinions on this subject may startle persons accustomed to that boundless " licence which the English law allows to mendacity in suitors. On what principle that licence is allowed " we must confess ourselves unable to discover. A. lends Z. money; Z. repays it; A. brings an ac- " tion against Z. for the money, and affirms in his declaration that he lent the money, and has never " been repaid. On the trial, A.'s receipt is produced. It is not doubted. A. himself cannot deny " that he asserted a falsehood in his declaration. Ought A. to enjoy impunity? Again:—Z. brings " an action against A. for a debt which is really due. A.'s plea is a positive averment that he owes " Z. nothing. The case comes to trial; and it is proved by overwhelming evidence that the debt is " a just debt. A. does not even attempt a defence. Ought A. in this case to enjoy impunity? If, " in either of the cases which we have stated, A. were to suborn witnesses to support the lie which he " has put on the pleadings, every one of these witnesses, as well as A. himself, would be liable to " severe punishment. But false evidence, in the vast majority of cases, springs out of false pleading, " and would be almost entirely banished from the courts if false pleading could be prevented. It " appears to us that all the marks which indicate that an act is a proper subject for legal punishment " meet in the act of false pleading. That false pleading always does some harm is plain. Even " when it is not followed up by false evidence, it always delays justice. That false pleading produces " any compensating good to atone for this harm, has never, as far as we know, been even alleged. " That false pleading will be more common if it is unpunished than if it is punished, appears as cer- " tain as that rape, theft, embezzlement, would, if unpunished, be more common than they are now.

V. Next, as to offences by ministerial officers against the administration of justice. Offences by Ministerial Officers.

It is observable that most, if not all, of these are also offences within the more general class of crimes against the administration of the executive power. Those, therefore, which remain to be included within this more special description consist properly of offences which derive some aggravation from their being also offences against the administration of public justice.

The law of England regards several offences of this description as misdemeanors, aggravated by the consideration of their having been committed by officers of justice; and, in some instances, as in those of escapes of felons voluntarily permitted by gaolers and others, the offenders are guilty of felony.

Any prevention of justice, either by resisting a lawful arrest or escaping from lawful custody after an arrest made, or rescuing an offender or aiding him to escape, is an outrage against the law, which in every mode and degree in which it can exhibit itself, requires penal restraint; but such offences, as a class, supply some important and necessary distinctions. These relate either to the nature and magnitude of the offence with which the principal offender is charged, or the means by which his arrest is prevented or escape effected. An offence of this description is obviously of a more mischievous tendency in proportion to the enormity of the crime with which the principal offender is charged. This, therefore, is a circumstance necessarily to be considered in estimating the proper degree of punishment; and it seems to have been acted upon as a principle by the law of England in former times, though it was very defectively applied. For although a felon by breaking prison, and any one who aided him in escaping became thereby a felon, yet the party thus derivatively constituted a felon was not ousted of his clergy, although his principal might, under the particular circumstances, have been so ousted, but was liable to no greater term of imprisonment than for one year. This defect has been partially remedied by some modern statutes. Another distinction has been made as to the aiding of escapes and other like offences, between such an offence committed in respect of a party convicted and one charged merely on suspicion,—such a distinction has we think no real foundation in reason or policy. The offence consists in a direct defiance of the law by obstructing the due course of criminal justice, and it can avail but little in extenuation to plead that the party charged was not in truth guilty of the imputed offence; for this would be to countenance a very mischievous notion, that

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"It is evident, also, that there will be no more difficulty in trying a charge of false pleading than in "trying a charge of false evidence. The fact that a statement has been made in pleading will gene- "rally be more clearly proved than the fact that a statement has been made in evidence. The false- "hood of a statement made in pleading will be proved in exactly the same manner in which the "falsehood of a statement made in evidence is proved. Whether the accused person knew that he "was pleading falsely, the courts will determine on the same evidence on which they now determine "whether a witness knew that he was giving false testimony. We have as yet spoken only of the "direct injury produced to honest litigants by false pleading. But this injury appears to us to be "only a part, and perhaps not the greatest part, of the evil engendered by the practice. If there be "any place where truth ought to be held in peculiar honour, from which falsehood ought to be driven "with peculiar severity, in which exaggerations, which elsewhere would be applauded as the innocent "sport of the fancy, or pardoned as the natural effect of excited passion, ought to be discouraged, "that place is a Court of Justice. We object, therefore, to the use of legal fictions, even when the "meaning of those fictions is generally understood, and we have done our best to exclude them from "this code. But that a person should come before a court, should tell that court premeditated and "circumstantial lies for the purpose of preventing or postponing the settlement of a just demand, and "that by so doing he should incur no punishment whatever, seems to us to be a state of things to "which nothing but habit could reconcile wise and honest men. Public opinion is vitiated by the "vicious state of the law. Men who, in any other circumstances, would shrink from falsehood, have "no scruple about setting up false pleas against just demands. There is one place, and only one, "where deliberate untruths, told with the intent to injure, are not considered as discreditable, and "that place is a Court of Justice. Thus the authority of the tribunals operates to lower the standard "of morality, and to diminish the esteem in which veracity is held; and the very place which ought "to be kept sacred from misrepresentations such as would elsewhere be venial, becomes the only "place where it is considered as idle scrupulosity to shrink from deliberate falsehood.

"We consider a law for punishing false pleading as indispensably necessary to the expeditious and "satisfactory administration of justice, and we trust that the passing of such a law will speedily follow "the appearance of the code of procedure. We do not, as we have stated, at present propose such a "law, because, while the system of pleading remains unaltered in the courts of this country, and par- "ticularly in the courts established by royal charter, it will be difficult, or to speak more properly, "impossible to enforce such a law. We have, therefore, gone no further than to provide a punish- "ment for the frivolous and vexatious instituting of civil suits, a practice which, even while the exist- "ing systems of procedure remain unaltered, may, without any inconvenience, be made an offence, "The law on the subject of false evidence will, as it appears to us, render unnecessary any law for "punishing the frivolous and vexatious preferring of criminal charges."

any subject should be allowed to arrogate to himself the power of judging, and upon his own judgment to supersede the law. Such attempts, however, as experience shows, are rarely founded on any presumption in favour of innocence, but are usually resorted to for the sake of impunity to malefactors.

The defects of the ancient law in respect of escapes and rescues have been partially remedied by several modern statutes. These having been made on different occasions, and relating as they do to particular prisons, are capable we think of a more general, more compressed, and more systematic form.

It appears from the terms of the statute 1 of King Edw. II. stat. 2, that the offence of breaking prison was, before the making of that statute, capital. "Concerning prisoners which break prison, our Lord the King willeth and "commandeth that none from henceforth that breaketh prison shall have judg- "ment of life or member for breaking of prison only, except the cause for which "he was taken and imprisoned did require such judgment, if he had been con- "victed thereupon according to the law and custom of the realm, albeit in times "past it hath been used otherwise."

Such severity, however justifiable it might have been in ancient times, cannot but be deemed too severe, even after the mitigation effected by the above statute, which seems to have been long considered as obsolete, and may, we conceive, properly be repealed. Where one charged with a capital offence escapes previously to his trial, it would seem to be not only severe, but unreasonable to take any other course than to try him on the original charge. To punish the escape of an accused person capitally would in effect be either to make an unfavourable presumption from his conduct, in endeavouring to avoid trial, equivalent to full proof of guilt, or simply to punish the mere escape capitally without reference to actual guilt. The latter principle is virtually repudiated by the statute; for if the offence is to be judged of by the mere act itself, independently of the offender's guilt of the offence charged, the nature of the charge can make no difference. But if his guilt of the offence charged be material to the character of the escape, its truth or falsity must be inquired into and ascertained by the jury on his trial for the latter. If, then, in such a case the offender were to be convicted of the original offence charged, it would be superfluous to inquire as to the breach of prison; but if innocent of the main charge, he might still justly be punished for the escape, and for that only.

Obstructions and offences by private persons.

VI. A private person may offend against this branch of the executive power, either in not performing a duty cast upon him, or by resistance to officers in the execution of their duty, or in protecting offenders by affording the means of flight or concealment, or rendering other such aid or assistance, or by simply omitting to reveal his knowledge of offences either actually committed or merely meditated.

The first and second of these classes of offences have already been adverted to.

We may here remark, that several statutes, to which in the Notes to the Digest reference will be more particularly made, have been passed for punishing with greater severity obstructions of process, civil and criminal, within particular districts. The statute 8 and 9 of King Will. III. c. 27, s. 15, contains a provision of this description with respect to the execution of process within the Whitefriars, Savoy, Salisbury-court, Ram-alley, Mitre-court, Fuller's-rents, Baldwin's-gardens, Montague-close, the Minories, Mint, Clink or Deadman's-place. The statutes 9 of King Geo. I. c. 28, ss. 1 and 2, and 11 of King Geo. I. c. 22, ss. 1 and 2, contain similar enactments, the former as to Suffolk-place and the Mint, and the latter as to the hamlet of Wapping, Stepney, and other places within the limits of the weekly bills of mortality. Some of these districts were places of sanctuary; and as they were from time to time abolished by the legislature, it became necessary to protect the due execution of process within them by unusual penalties, in consequence of the desperate character of their inhabitants, and the notions of immunity which traditionally belonged to them. These reasons having no longer any existence, we apprehend that all statutes of this kind might properly be repealed.

It remains to offer some observations concerning acts done to protect offenders, and omissions to disclose the knowledge of offences, which are usually termed *misprisions*.

Wilfully aiding a known offender to escape ought, obviously, to be treated as a public offence. The right to have justice executed upon malefactors, subject to the royal prerogative of mercy, is a public right of the highest importance to society, and every one who violates it by wilfully preventing an offender from

being brought to justice, commits a public offence. And as the successful attainment of this unlawful object must be deemed to be criminal, so also, according to the ordinary rules of criminal jurisprudence, must every wilful endeavour to screen an offender be, where it is manifested by an aiding of flight, concealment, or other overt act evidencing the intention.

Although offences of this nature may vary in degree, and may be more or less mischievous, according to the magnitude of the crime of which the offender, whose impunity is thus effected, is guilty, yet the principle of restraining such practices is evidently not limited by the greater or less degree of such offender's guilt. It seems also to be clear that an offence of this nature ought not to depend upon the actual knowledge of the guilt, or even upon the fact of the guilt of the party so aided; it is enough that the cause of justice requires his apprehension in respect of some criminal charge; if that be known to a party who wilfully aids or conceals him, he offends against the course of public justice.

A portion of this class of offenders was distinguished under the Roman law by the title of "*Receptatores*," Dig. lib. 47, tit. 16; and a distinction was made between such *receptatores* as were "*socii sceleris*," in which case they were punishable to the same extent as principal offenders, and such as simply received offenders without being privy to the offence or sharing in the gain, and who were subjected to fines, or other punishment of slighter degree. The receiving of relations, whether by blood or marriage, was, although criminal, regarded as a mitigated offence.

It seems to us that the law of England is subject to some particular deviations from the general principles on which offences of the class to which we have just adverted seem to depend. One guilty of aiding a principal offender in evading the penalties of criminal justice by concealment of his person, or by any other overt act, falls within the general description of an accessory after the fact; that is, according to the authorities, one who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon, whether such felon be principal or accessory before the fact. This offence is in terms confined to cases of aiding where the original offender is guilty of felony; and it seems to be doubtful whether such a hindrance to public justice, where the original offence is inferior to felony, be punishable at all. Such a limitation is obviously contrary to the general principle on which obstructions to public justice are to be deemed penal, and the grounds of so limiting the offence seem, in all cases, to be of a purely technical and unsatisfactory nature, depending on the peculiar qualities incident to felony. Although it be true that such an offence may be greatly aggravated by the nature and magnitude of the original crime, the guilt of the offender being known to the party who wrongfully screens him from justice, yet as in substance the guilt of the latter consists in a wilful obstruction of the course of justice, it is manifest that it cannot properly be confined to cases where the original offence amounted to felony. Neither ought actual knowledge of an original offence committed to be essential to a derivative offence of this nature; it is an obvious obstruction of the course of justice, and consequently a violation of public right, wilfully to prevent the arresting of any one liable to be arrested in due course of law.

Another peculiarity of the law of England in relation to this class of offences, and also attributable to the same technical source, is, that by the common law an accessory after the fact could not be convicted,—at least no judgment could have been pronounced upon him—until after the conviction of the principal offender. This is objectionable, because, although the guilt of the accessory may be clear, his punishment is made to depend on casualties, which, by preventing the conviction of the principal felon, secure impunity to the accessory. Some alterations have already been made in this respect by particular statutes, but we think it desirable that every offence of this nature should be regarded as a substantive offence, independently of the conviction of the principal offender, and also, as we have already intimated, that it should be independent of the real guilt of the principal offender, in case the party intended to prevent the due execution of criminal process.

By the common law the bare knowledge and concealment of treason committed, or to be committed, by not revealing it as soon as conveniently might be to some judge of assize, or justice of the peace, was treason. But by the Stat. 1 and 2 of King Philip and Queen Mary, c. 10, s. 8, the offence is only a misprision of treason, and a high misdemeanor, punishable, however, with imprisonment for

life, loss of the profits of lands during life, and forfeiture of goods. The concealment of a felony committed or to be committed, which a man knows of, but which he never assented to, is, in the case of a public officer, punishable, according to the statute of Westminster, 3 of King Edward I. c. 9, by imprisonment for a year and a day; of a common person by imprisonment for a less discretionary time; and in both by fine and ransom, at the king's pleasure.

There is not, perhaps, such a strong necessity for compelling a party to reveal his knowledge of a crime committed by another, as there is for prohibiting attempts to frustrate public justice by aiding in the flight, or by the concealment of offenders. As a general principle, a man's active services may be required by the law for the purposes of public justice; he may be called upon, in some instances, to render corporal aid for the prevention of crimes, or the arrest of malefactors, or his services may be required for the investigation of truth, as a witness or juror. The same rule, it should seem, extends also to exacting, for the purpose of public justice, the disclosure by a party of crimes committed by others, which happen to be within his knowledge. The necessity for making such disclosures extends, perhaps, with greater force, to the knowledge of a meditated crime, the perpetration of which may, by means of such a disclosure, be prevented, than it does to the knowledge of one already committed.

But although the mere concealment of a party's knowledge of a crime committed by another may properly be regarded as a penal offence, there seems to be good reason for a limitation, founded on the magnitude of the crime concealed. To require every one, without distinction, as to the nature and degree of the offence, to become an accuser, would be productive of inconvenience in exposing numbers to penal prosecutions, multiplying criminal charges, and engendering private dissension. It may sometimes be more convenient that offences should be passed over, than that all should indiscriminately be made the subject of prosecution; and a law would be considered to be harsh and impolitic, if not unjust, which compelled every party injured by a criminal act, and, still more so, to compel every one who happened to know that another had been so injured, to make a public disclosure of the circumstances. Here, therefore, there is reason for limiting the law against mere misprisions to the concealment of such crimes as are of an aggravated complexion, on grounds which do not extend to *acts* of concealment, or other positive obstructions of the course of criminal justice; the latter, as amounting to actual violations of public right, cannot but be regarded as criminal, whatsoever be the degree of the original offence.

Indirect obstructions of the course of justice.

VII. We have now to notice some of those offences which indirectly tend to obstruct or pervert the course of justice.

Of such may be mentioned, in the first place, those which tend to the encouragement of offenders by stifling public prosecutions. Compounding felony, or even misdemeanor, is, by the law of England, regarded as a high offence, by which public justice is sacrificed to private gain. This species of offence is punishable at common law.* The publication of *ex parte* proceedings whilst a suit is still pending, has also, in several instances, been deemed to be illegal †.

Abuses of judicial authority.

VIII. Another class of offences against public justice, as recognized by the law of England, consists of abuses of the powers of justice for unjust and oppressive purposes. Amongst these is the unlawful exercise of their privileges by lords of franchises and others, in wrongfully arresting the persons, or attaching the goods of those not liable to such arrests or attachments. From the numerous penal provisions against such malpractices still remaining, offences of this nature appear to have been very common, and to have required strong remedies. At the present day, and more especially since the abolition of arrests on mesne process, the liability to an action in damages, and to forfeiture of the abused franchise, generally afford a sufficient protection against abuses of this description, without any necessity for penal enactments in addition to such forfeiture; and the same observation applies to several ancient statutes concerning oppressive distresses, particularly as to the distraining of *averia carucæ*.‡

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* Collins *v.* Blantern, 2. Wils. 341.

† Obstructions of the proceedings of courts of justice will hereafter be considered in common with *contempts* of court. The publication of *ex parte* proceedings, *pendente lite*, will also be considered in conjunction with libels.

‡ See the stat. 51 Hen. III. stat. 4; 28 Edw. I. stat. 1, c. 12; and the notes to the corresponding part of the digest.

The offence of common barretry * has survived many others of a like vague and general description, as in the instances of offenders described as *depopulatores agrorum, insidiatores viarum*, and the like, which offences were formerly frequent, but which have long been justly exploded as being of too indefinite and uncertain a character. The offence is thus described by Lord Coke:—"A barretor "is a common mover and exciter, or maintainer of suits, quarrels, or parts, either "in courts or elsewhere in the country. In *courts*, as in courts of record or not "of record; as in the county, hundred, or other inferior courts. In the *country* "in three manners:—First. In disturbance of the peace. Secondly. In taking or "keeping of possession of lands in controversy, not only by force but also by "subtlety and a deceit, and most commonly in suppression of truth and right. "Thirdly. By false inventions and sowing calumniations, rumours, and reports, "whereby discord and disquiet may grow between neighbours."† Common Barretry.

All the authorities agree in this, that no indictment is maintainable in respect of any single act which may be comprised within this very vague and indefinite description. The offence is therefore of a cumulative character, depending on a multiplicity of distinct and separate acts, none of which taken singly could be regarded as criminal. A penal offence so constituted is not, we conceive, warranted by the ordinary rules of criminal jurisprudence. It is difficult to understand on what legal principle two distinct unconnected acts should cumulatively become criminal, whilst each separately is not an offence. It may frequently happen that one single act of this nature may be far more mischievous in its consequences, than two other acts are in the aggregate. The *malus animus* on which such an offence must depend may be as clearly and explicitly shown in one instance as in two, and it would be highly unjust to convict a defendant on a cumulative charge, without distinct proof of malice in each transaction. If repetition constitute a public injury, the original offence must also be of public detriment, and the difference can exist in degree only.

There is, we apprehend, no principle which can justify regarding one act as innocent, and treating a second, of precisely the same quality, as criminal. On the contrary, the very object of punishment, viz., prevention of mischief, is defeated by not preventing it *in limine*, in accordance with the general principle, which declares that every attempt to commit a crime constitutes a substantive offence. It is scarcely necessary to consider whether, although such an offence cannot properly be supported in its cumulative character, every single act of the kind may not properly be deemed to be criminal. It does not seem that, even in ancient times, when the limits of penal law were far more loose and indefinite than they now are, an indictment could be supported, charging such an offence otherwise than in the cumulative form implied by the terms "common barretor." Fomenting a quarrel between two neighbours, or even advising or encouraging litigation, although it may be a malicious or criminal act, can scarcely justify penal censures, and it seems to us that a law which warranted a charge of so indefinite and doubtful a character would tend to promote the very evil which it was meant to exclude, and afford a pretext for unnecessary and vexatious litigation.

The reasons for allowing so general a charge are by no means satisfactory. They are thus set forth in Hawkins's Pleas of the Crown.‡ "Barratry is an offence of "a complicated nature, consisting in the repetition of divers acts in disturbance of "the common peace, all of which it would be too prolix to enumerate in the in-"dictment; and therefore experience hath settled it to be sufficient to charge a "man generally as a *common barrator* (which is a word of art appropriated to "this purpose) and before the trial to give the defendant a note of the particular "matters which you intend to prove against him." The generality, uncertainty, and complexity of such a charge are cogent reasons for withdrawing such an

* The present use of the term barretry constitutes a singular deviation from its original sense. Mr. Hume (Commentaries on the Law of Scotland, respecting Crimes, vol. i. p. 587, 3rd edition) observes that "Barratry, in the law of England, is the offence of stirring up suits and quarrels among "his Majesty's subjects. The term is, however, of foreign origin, and seems ordinarily to have been "applied in Italy, and other countries, to the traffic of ecclesiastical benefices, but was afterwards used "in a more general sense as applicable to all corrupt buying and selling of justice. With us it signifies "the corrupt purchasing of benefices, or offices of collection, from the see of Rome, by persons who "left the realm for that purpose; a practice which had become frequent, and was, in more ways than "one, injurious to the realm."

† 1 Inst. 368 a.

‡ Vol. iv, bk. 2, ch. 25, p. 30.

offence altogether from the operation of the criminal law; and certainly do not justify a departure from one of the most useful rules of criminal justice, viz., that the particulars of the offence shall be stated upon the face of the record; more especially when, afterwards, but in a form much less favourable to the accused, the particulars must be stated previously to the trial.

The statute 12 of King Geo. I. c. 29, s. 4, enacts, that if any person who shall have been convicted of common barretry shall practise as an attorney or solicitor, he shall be transported for seven years.* We think that the justice and policy of this severe enactment are very questionable. An attorney may be deprived of his livelihood by a conviction, under circumstances which do not in any way impeach his character either for ability or integrity in the exercise of his profession, and which may have no relation whatsoever to professional character. It would be difficult to frame a more indefinite and vague charge against an attorney, whose business and whose duty it may be to devote his talents, his labour, and his money to the conduct of suits, than that he is a maintainer of suits without alleging any dishonest or deceitful practice,—a charge which, could it be stated and established, would be a proper ground for examination and redress in a summary way, by application to the court of which the offender was an attorney.

In conclusion we may observe, that we should with great reluctance recommend the repeal of any law which tended, by creating a salutary degree of terror, to restrain needy practitioners in the legal profession from stirring up quarrels and suits for selfish and mercenary purposes. We do not, however, consider that the present law, fallen as it nearly is into desuetude, has any material or sensible effect in repressing such practices, and we therefore recommend its repeal, as being an anomalous and indefinite law of doubtful policy, and of an oppressive character.

Maintenance.

Maintenance, an offence of great antiquity, seems at the present day to rest mainly on the principle that the officious interference by a stranger to a suit, in lending aid to either of the litigants, tends to oppression. There is nothing immoral in the act itself, nor does it constitute any violation of any public or private right. The question, whether it shall be deemed criminal, has no reference to the merits or demerits of any particular controversy, or to the probability that it will unjustly determine or protract a suit. The only debateable point seems to be whether such conduct ought to be deemed criminal by reason of its tendency to oppress one litigant party, by adding to his adversary's means of protracting the litigation. The policy of such a prohibition, and the prevention of such aid by declaring the party who gives it to be a criminal, is very questionable, even although the difficulty of carrying such a law into effect were out of the question. Disparity in the means and circumstances of litigating parties is a necessary evil. It may be lessened to some extent by provisions in favour of suitors in humble circumstances; but it is doubtful whether, if all aid from strangers to the suit could be prohibited, such a result would be advantageous to the course of justice. If one party were thus precluded from obtaining assistance to aid him in carrying on an unjust and oppressive suit, an oppressed and injured party would also be prevented from obtaining the means of resisting injustice. The law would probably operate in favour of the former; an unjust and fraudulent litigant would not be fettered with the scruples which might restrain a more honest adversary, and would obtain aid by covert and illegal means. Whilst the policy of such a law is doubtful, the difficulty of framing a definite and practicable law is certain. It would be necessary to except from its operation all who had any common interest with a party in the subject matter of the suit. In a case of common interest, as for instance a tithe suit, in which the rights of the landowners of a parish were involved, it would be unjust that all should not contribute to the expenses of a suit by which those rights were to be decided. Aid afforded by relations must also form an exception. A law would offend against moral feeling which prevented such aid from being rendered by a

* It would appear from the fact of this highly penal statute being passed, and also from several contemporaneous dicta of the judges of that time, that some peculiar cases must have occurred about the beginning of the last century, by which the attention of the courts was particularly drawn to the subject of barretry. In the case of the King *v.* the Warden of the Fleet, 12 Mod. Reports, 340, it was objected to a witness that he had been convicted of common barretry, and a record of his conviction was produced, which showed that he had been fined £100. Holt, C. J. said, "If he had had the "handling of him he had not escaped the pillory, and that he remembered Serjeant Maynard used to "say, it were better for the country to be rid of one barretor than of twenty highwaymen."

father to a son, or a son to a mother, at a time of need. Neither could the exception be restrained within these limits; a law, making it a crime to advance money to a friend, or out of charity to a poor man, to enable him to obtain his right, would militate against the best feelings of human nature. It is plain, then, that a definite and practicable law for the prevention of such aid must necessarily be included within very narrow limits; and that the law, even so reduced, would be one not adapted to practice, so difficult would it usually be to prove, not only the advance of money (the most effectual mode of aiding a suit), but also the intent, viz., that it was advanced to aid the party in continuing the suit, and to distinguish by evidence between the case of a friendly or charitable act and a mere officious intermeddling from an evil motive, which only could constitute the real offence against the law.

The offence of maintenance is described by the authorities as the unlawful taking in hand or upholding of quarrels or suits, to the disturbance or hindrance of common right.* This is described as being either *ruralis* or *curialis*. That *in the country* is stated to be where one *assists* another in his pretensions to certain lands, by taking or holding the possession of them for him by force or subtlety, or where one stirs up quarrels or suits in the country relating to matters wherein he is in no way concerned.†

Maintenance *in courts of justice* is where one officiously intermeddles in a suit depending in any such court, which no way belongs to him, by assisting either party with money or otherwise in the prosecution or defence of any such suit.‡

This second division of the offence is again subject to three distinctions.—

1st. Where one maintains another without any contract to have any part of the thing in suit, and which is generally designated as *maintenance*.

2dly. Where one maintains one side to have part of the thing in suit, which is called *champerty*.

3dly. Where one laboureth a jury, which is called *embracery*.

With respect to the first branch or *rural maintenance*, which consists in the taking or holding of lands from another with *force*, if this be done under circumstances which amount to a disturbance of, or which even endanger, the public peace, the offence is referable to the more appropriate class of offences against the public peace, with which it is more properly associated than with such offences as supplying money to a suitor in a court of justice, to enable him to carry on his suit, or corrupting a juror. Besides, where the taking or holding of lands is peaceable, assisting another in these acts cannot be wrong, if the party assisted be lawfully entitled to possession; if he be not so entitled, it is equally wrong in both.

The second branch, consisting in the stirring up of quarrels and suits, is undistinguishable from the offence of common barretry; and such a description seems to be much too vague and ambiguous to constitute, in itself, a sufficient definition of an indictable offence.

Of the three descriptions of maintenance in courts of justice, the second, called champerty, differs from the first in no other respect than in the circumstance that the party assisting in the suit is by agreement to have part of the thing in suit; how far this may afford any ground for distinguishing it from the species of maintenance first mentioned, where the assisting party is a mere stranger, we shall have occasion to consider hereafter; observing, however, that if a party to such an agreement be an officer concerned in the administration of justice, or to receive a part of what is recovered as the reward of corrupt partiality, the offence, which is one of great magnitude, falls under a different and distinct description. The same observation is likewise applicable to the offence of embracery, or labouring a jury to return a corrupt verdict. With respect to the first or general branch of maintenance in courts which, according to the common law, consists in supplying either aid or money to a litigant party, we may observe that, whilst exceptions have been made in some instances, where the enforcement of the general rule would be plainly repugnant to good feeling, yet even this has not been done upon any general or systematic principle.

Mr. Justice Buller, in the case of Master *v.* Miller, § in commenting on this offence, observes, "It is curious, and not altogether useless, to see "how the doctrine of maintenance has, from time to time, been received in

* 1 Hawk. P. C., c. 83, s. 1; 4 Black. Comm., 134; 1 Russ., 266.
† 1 Hawk. P. C., c. 83, s. 1, 2.
‡ 1 Hawk. P. C., c. 83, s. 1, 2.
§ 4 Term Reports, 340.

" Westminster Hall. At one time, not only he who laid out money to assist " another in his cause, but he that, by his friendship or interest, saved him " an expense which he would otherwise be put to, was held guilty of main- " tenance.—*Bro. tit.* '*Maintenance*,' 7, 14, 17, &c. Nay, if he officiously gave " evidence it was maintenance; so that he must have had a subpœna, or sup- " press the truth. That such doctrine, repugnant to every honest feeling of the " human heart, should be soon laid aside, must be expected." And although it has been held that one of kin or affinity to a party may counsel and assist him, he cannot justify the laying out any of his own money in the cause, unless he be either father, son, or heir apparent.* The allowing a kinsman to assist by contributing in labour, but to prohibit him from rendering pecuniary aid, seems to be a mere arbitrary distinction. The confining the advancing of money to the case of a father, son, and heir apparent, may, perhaps, so far at least as regards the son and the heir, where a descendible estate is in question, be accounted for on the ground of private personal interest; but, to be consistent, the law ought to permit the same thing to be done by the next of kin, where the suit concerns personal property.

The law admits one exception to the offence, which is of a very large and indefinite description. Any one *in charity* may lawfully give money to a *poor man*, to enable him to carry on his suit.† This exception, in effect, establishes the principle that the supplying aid, from benevolent motives, to one whose circumstances require it, cannot be deemed criminal. Such assistance may, no doubt, be rendered from motives of hostility to the adversary; but, however desirable it might be to prevent a malevolent person from thus using his resources in such manner for the purpose of vexation, it may well be doubted whether, on the whole, the prohibition is of public advantage. The general policy of such a law is, as we have already observed, exceedingly doubtful. If aid in some instances may tend to oppression, it may in others be absolutely necessary in order to resist oppression and obtain justice; and if assistance could not be rendered to a party contending for his rights without subjecting the party affording it to a criminal prosecution, it may well be apprehended that aids essential to the attainment of justice by the distressed would be frequently withheld. The law itself would neither be definite nor of easy application; the exceptions to it would be extensive, and the investigation of offences depending on the mere secret intention of the accused, not as in ordinary cases manifested by some act, essential to the offence, of a decisive character, would frequently be productive of difficulty and embarrassment.

The foregoing observations on this offence have been made in reference to the present state of society and the existing law. The anxiety of the Legislature in former times to repress this offence, as evidenced by repeated statutes, and the present neglect of those provisions, are to be accounted for by the total change which has taken place in the condition of society. When landed property was in the hands of fewer proprietors, to many of whom were attached numerous bands of retainers and dependents, ready to maintain by violence the quarrels of their superiors—when, in proportion as the power of individuals was great, that of the law was weak—when men were more apt to terminate their quarrels by force than by submission, either to public opinion or legal authority—it may readily be conceived to have been of the highest importance to the public peace to prevent the sowing of discord, the fomenting of dissentions among powerful potentates, and the espousing of quarrels by those through whose great influence the due administration of justice might be endangered. That the prevention of evils so serious was within the contemplation of the Legislature in former times, may fairly be inferred from the language of the different statutes by which offences of this description are prohibited. These forbid maintenance "to the disturbance of the public peace," and "to the hindrance of justice;" and one branch of maintenance consists in embracery, or "the labouring of jurors," an association of offences which seems strongly to indicate that by the offence of maintenance, against which such repeated legislative prohibitions were directed, was not simply meant that which is understood to constitute maintenance at the present day, viz., an officious interference in a suit between other parties, by affording pecuniary or other such aid to either party, but aid through the medium of fraud,

* 1 Hawk. P. C., c. 83, s. 26.
† 1 Hawk. P. C., c. 83, s. 26.

and probably of *force*, used to influence or overawe those concerned in the administration of justice.

Mr. Barrington, in commenting on the *articuli super chartas*, (28 of King Edw. I. stat. 3, c. 11,)* observes, "The 11th chapter forbids maintenance and "champerty, which is frequently provided against by subsequent statutes; "this offence therefore must have been commonly practised, although we never "hear of such a prosecution at present. The reason of which seems to have "been that when a man of power formerly supported a law suit, the judges "were influenced in their determinations as they are now in every part of "Europe, except in this happy and free country. Instances of the great cor-"ruption of judges at this time may be found in the Parliamentary History, "which cites Holinshed for an account of every judge in the superior Courts, "except John de Mettingham and Elias de Buckingham, being most severely "fined to the amount of 10,000 marks." He further observes,† that "the "increased punishment by the statute 31 of King Edward I. st. 3, no less than "three years' imprisonment, showed that the practice was a growing evil."

The statute 20 of King Edward III., c. 4, prohibits prelates, earls, barons, and all others, great and small, from taking in hand quarrels other than their own, nor the same maintain, by them or any other, privily nor openly, for gift, promise, amity, favour, doubt nor fear, nor for none other cause, in disturbance of law and hindrance of right, but that every man may be free to sue for and defend his right in our courts and elsewhere, according to the law.

One of the articles of inquiry mentioned in the Book of Assizes, to be inquired into by the judges of the King's Bench was, "Item de ceux que veignent forci-"blement en *Court le Roy counter assizes* en effrayance de la peas que les "jurors n'osent dire verité."

The uncertainty of the law respecting this offence cannot, we think, be better illustrated than by a reference to the manner in which the law is expounded in one of the best abridgments of the law.

Bacon's Abridgment, tit. "Maintenance," under the head "*What shall be said "to amount to an act of maintenance?*" contains the following positions:—

"*It is said* that, not only he who assists another with money in his cause, as "by retaining counsel for him, or otherwise bearing him out in the whole or part "of the expense, but also he who, by his friendship or interest, saves him that "expense which otherwise he may be put to, is guilty of maintenance, as where "one persuades, or but endeavours to persuade, a man to be of counsel for another "gratis.

"Also *it seems to be* an act of maintenance to open evidence to the jury, or to "*give evidence* officiously without being called upon to do it, or to speak in a "cause as one of counsel with the party, or to retain an attorney for him; and "*some have said*, that it is maintenance even barely *to go along with him to "enquire* for a person learned in the law."

According to one of the former positions, a man who happened to be in Court where injustice was about to be effected through the medium of perjury, must either by silence allow a foul conspiracy to be perpetrated, or be deemed to be a criminal for disclosing the truth to the prevention of injustice.

"*It seems to be* no maintenance for a man to give another friendly advice what "action is proper for him to bring for such a debt, or what method is safest to "free him from such an arrest, or what counsellor or attorney is likely to do his "business most effectually; for it would be extremely hard to make such neigh-"bourly acts of kindness, which seem rather commendable than blame-worthy, to "come under the notion of maintenance, which always seems to imply a conten-"tious and over-busy intermeddling with other men's matters, in which respect "it is highly criminal! *Yet it is said* that a man of great power, not learned in "the law, may be guilty of maintenance by telling another who asks his advice "that he has a good title."

It is, we think, not to the credit of this branch of the law that it should be stated to be doubtful whether so mere an act of kindness as the recommending to another an attorney of talent and character be a criminal act.

"It is no maintenance to give a man money who has no suit then depending, "*unless* it plainly appear that it was given with a design to assist in a suit in-"tended, which suit is afterwards actually brought.

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* Barrington on the Statutes, 185.

† *Ib.*, p. 185, note (2).

" It is as much an act of maintenance to support a man *after judgment* given " as to do it pending a plea."

It is singular that this last position, doubtful as it is in point of principle, is the only one laid down positively and without qualification annexed.

Champerty.

The offence of *Champerty* stands much on the same principles with maintenance, of which indeed it is but a particular species. Many of the observations therefore which have been made as to the latter offence are applicable also to the former. Champerty consists in a bargain made with a party to a suit to carry it on at his own expense in consideration of becoming entitled to a share of the land or other subject matter of the suit. The policy of a law prohibiting such a transaction is by no means clear. A party compelled to litigate in his own defence may possess no other means of doing so than by entitling one who will render him pecuniary aid, to be repaid out of the subject of the suit. It may easily be collected from several ancient statutes relating to this offence, which may now almost be regarded as obsolete, that in ancient times practices of this nature were the means of great abuses practised even by officers of justice. Thus the 13th of King Edw. I. stat. 1, c. 49 enacts, " The Chancellor, Trea- " surer, Justices, nor any of the King's Council, no clerk of the Chancery, nor of the " Exchequer, nor of any justice or other officer, nor any of the King's house, " clerk or lay, shall not receive any church nor advowson of a church, land nor " tenement in fee by gift nor by purchase, nor to farm, nor *by champerty* nor " otherwise, so long as the thing is in plea before us or before any of our officers, " nor shall take no reward thereof; and he that doth contrary to this Act, " either himself or by another, or make any bargain, shall be punished at " the King's pleasure, as well he that purchaseth as he that doth sell." Again, the statute 28th of King Edw. I. st. 3. c. 11, enacts as follows:— " And further, because the King hath heretofore ordained by statute that none " of his ministers shall take no plea for *maintenance*, by which statute other " officers were not bounden before this time; the King will, that no officer nor " any other (for to have part of the thing in plea) shall not take upon him the " business that is in suit, nor none upon any such covenant shall give up his " right to another; and if any do, and he be attainted thereof, the taker shall " forfeit unto the King so much of his lands and goods as doth amount to the " value of the part that he hath purchased for such *maintenance*. And for this " atteindre, whosoever will, shall be received to sue for the King before the " justices before whom the plea hangeth, and the judgment shall be given by " them. But it may not be understood hereby that any person shall be prohibit " to have counsel of pleaders, or of learned men in the law for his fee, or of his " parents or next friends."

" And by the 33rd of King Edw. I. st. 3, it is enacted, " That where it is con- " tained in our statute that none of our Court shall take any plea to champerty " by craft nor by engine, and that no pleaders, apprentices, attornies, stewards " of great men, bailiffs, nor any other of the realm, shall take for maintenance or " the like bargain, any manner of suit or plea against other, whereby all the " realm is much grieved, and both rich and poor troubled in divers manners, it " is provided by a common accord, that all such as from henceforth shall be " attainted of such emprises, suits, or bargains, and such as consent thereunto " shall have imprisonment of three years, and shall make fine at the King's " pleasure."

Upon the whole these statutes, f not entirely obsolete, have so nearly become so that they may, we think, be dispensed with; and we do not think it expedient that the offence of champerty, founded as it is on a doubtful principle, and disregarded as it has long been, should be retained.

The offence of buying or selling a pretended title is thus described in the Abridgment, before referred to, tit. " Maintenance," E. " It seems an high " offence at common law, as *plainly tending to oppression*, for a man to buy at an " under rate a doubtful title known to be disputed, to the intent that the buyer " may carry on the suit which the seller doth not think it worth while to do; and " it seems not to be material whether the title be good or bad, or whether the " seller were in possession or not, unless the possession were lawful and uncon- " tested." The statute 1 of King Rich. II., c. 9, recites that many people, having true title to lands, &c., were wrongfully delayed by means that the defendants did make gifts and feoffments of their lands in debate, and of their *goods* to great men, against whom the pursuants durst not make their pursuits, and also that

many persons used to disseize others, and anon to make feoffments sometimes to great men to have maintenance, and sometimes to persons unknown, to the intent to delay the said disseizees, &c. The statute then provides that such fraudulent feoffments shall be void. (See also the statute 32 of King Hen. VIII., c. 9.) The recital to the statute 1 of King Rich. II., c. 9. plainly shows that the regarding the selling of a pretended or disputed title as a high offence was founded on reasons which were, to a great extent, peculiar to the state of society, manners, and habits of ancient times. No greater hardship and injustice can well be conceived than that titles should be conveyed to men of influence and power so great as to defy justice, and when the proceedings were far more complicated, tedious, and expensive than they are at the present day. A criminal law prohibiting the sale of titles may occasionally exclude some inconvenience; but any advantage of this description is obtained at the expense of embarrassing the sale of property, to the great hardship of the real owner; and, upon the whole, we venture to submit that the offence is of too doubtful policy to render its continuance advisable.

Prosecutions for offences comprehended under the general head of "Maintenance" are so rare, that their very rarity has been a protection against the disapproval of judges, and those alterations which a frequent recurrence of doubt and vexation would probably have occasioned. It may, perhaps, be said that if such a law be of no positive practical use, yet, in its dormant or nearly obsolete state, it works no evil. But although no cases have lately occurred where the doctrine of maintenance has been discussed in the courts, it is by no means true that this law has not been used as the means of great vexation. Instances of this, in recent times, have fallen within our own professional observation, in the case of prosecutions commenced, although not persevered in. Besides, it cannot properly be assumed that a law, defective in principle, works no evil, because prosecutions founded upon it are rare; on the contrary, inconvenience and expense are frequently incurred by persons wishing to ascertain whether they may, without acting criminally, and subjecting themselves to penalties, contribute to a proceeding, even in cases where such contribution would not only be legal, but beneficial and commendable. Others, it is not unfair to suppose, have been actually deterred, by such apprehensions, from doing what was lawful, to their own inconvenience, if not to that of the public; and it is in itself an evil of no small magnitude, that people should live under the fear of an oppressive law, although it may be improbable that it should be actually enforced. The objection may, we conceive, be founded on a still higher principle than mere personal inconvenience occasioned to individuals. To ensure respect to the laws, it must be known that they are founded on the basis of reason and experience; and, to allow large and undefined branches of it to rest on no better foundation than that, in a semi-barbarous state of society, when the progress of justice was often retarded by violence, laws of this character might be necessary and proper, is to expose the whole system to suspicion. So long as such laws exist, they must be read and studied; they must occupy a portion of the time, not only of the professional student, but of every one who would avoid vexation and inconvenience; and they must necessarily obstruct every attempt to simplify the criminal law, and to render it more accessible to the whole community.

OFFENCES AGAINST THE EXECUTIVE POWER.

SUMMARY OF CONTENTS.

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Prefatory Articles.

Art. 1.

Definition of 'Officer.'

The term "officer" shall be deemed to signify any person duly appointed and invested with authority to administer any part of the executive power of the Crown, or to execute any other public duty imposed by law, whether it be judicial, ministerial, or mixed. (*a*)

(*a*) Offences committed by ecclesiastical or naval or military officers are usually inquired of and punished according to the peculiar rules of ecclesiastical or naval or military law, and not by indictment or information in the ordinary courts of criminal jurisdiction. Were it otherwise, such an officer might be twice punished in respect of the same offence. Where, however, an offence is not purely of an ecclesiastical, naval or military character, but constitutes an offence punishable in the ordinary criminal courts, it is cognizable there, although it may have been committed under colour of discharging an ecclesiastical, naval, or military duty—as where an ecclesiastical officer is guilty of extortion.

Art. 2.

"Judicial Officer."

The term "judicial officer" shall be deemed to signify any judge, magistrate, or other officer invested with authority to decide matters submitted to him in the course of justice according to right.

Art. 3.

"Ministerial Officer."

The term "ministerial officer" shall be deemed to signify any other than a judicial officer.

Art. 4.

"Bribe."

Where the offering, promising, taking, or agreeing to take any bribe shall be made penal, the term "bribe" shall be deemed to include any reward, benefit, or advantage whatsoever, present or future, accruing or to accrue either to the party influenced or intended to be influenced, or to any other person.

OFFENCES AGAINST THE EXECUTIVE POWER, GENERALLY.

Omissions to discharge Legal Duties.

Art. 5.

Whosoever shall unlawfully refuse or omit to take upon himself and serve any public office shall incur the penalties of the class. (*b*)

Refusal to execute an office.

(*b*) This rule is warranted by many authorities. In R. *v.* Jones, 2 Strange 1146, it was held that an indictment lay against the defendant for refusing to take upon himself the office of overseer, and that the disobeying an Act of Parliament was indictable upon the principles of the common law. In R. *v.* Lone, 1 Strange 920, the defendant was held to be indictable for not executing the office of constable, because it is an office concerning public justice. And see 3 Keble, 197, 230; Cro. Car. 557; 1 Sid. 272; Comb. 416; Skinner, 669; R. *v.* Jennings, Pasch. 8th of Queen Anne, cited 1 Strange, 920; 5 Mod. 96; 1 Vent. 344; Trem. Ent. 221; Doug. 534.

Art. 6.

No person shall incur the penalties in the last preceding article mentioned, in the case of any such refusal or omission as therein mentioned, where any other penalty or mode of proceeding is specially prescribed by law.

Art. 7.

The refusal or omission of a party to take upon himself and serve any public office shall not be deemed to be unlawful in any case where the party elected or appointed to an office, being by law or custom entitled to compound for not serving such office, shall render or offer to render such composition.

Art. 8.

Any officer or person whatsoever bound to execute any office or public duty, who shall wilfully omit to execute the same, or shall be negligent touching the execution thereof, shall incur the penalties of the class. (*c*)

Officers, or other persons guilty of omission or negligence in office.

(*c*) By the 2nd Resolution in the case of the Queen *v.* Wyatt, 1 Salk. 381, "Where an officer "neglects a duty incumbent upon him either by common law or statute, he is for his default indict-"able." In the case of the King *v.* Bambridge, M. 23 Geo. III., (1 Hawk. P. C. c. 66, s. 1,) it was held that where a person holding a public office under the king's letters patent, or derivatively from such authority, is amenable to the law for any misbehaviour in his official conduct, and obnoxious to punishment for not faithfully discharging it. In R. *v.* Jones, Strange, 1146, a distinction is made between penalties for refusing to take an office, and such as are for neglect of duty after he is once elected. An indictment lies for any abuse in the execution of an office, Comyn's Digest, tit. Indictment, D. Every sheriff, coroner, constable, or the like, who neglects his duty, is guilty of a misdemeanor, punishable with fine and imprisonment; and in very notorious cases, his office, if a beneficial one, may be forfeited, 4 Black. Com. 140. If a coroner refuse to execute his office when sent for, he shall be fined and imprisoned, 1 Hale's P. C. 58; and the Stat. 25 Geo. II. c. 29, s. 6, expressly provides that Coroners, when convicted of extortion, of wilful neglect of duty, or misdemeanor in their office, may be amoved by the judgment of the Court in which they are so convicted. It is expressly enacted by the 6 and 7 Will. IV. c. 89, s. 2, that if a coroner refuse to issue his order for a *post mortem* examination, when required to do so by a majority of the jury, "he shall be deemed "guilty of a misdemeanor, and be punishable in like manner as if the same were a misdemeanor at "common law." A coroner being an officer bound to execute the public duty imposed by this statute, his refusal to issue an order for a *post mortem* examination would clearly fall within the terms of Article 7, and, therefore, it is not necessary to continue this special provision.

By the St. 5 Rich. II. St. 2, c. 4, it is enacted that, "If any sheriff of the realm be from hence-"forth negligent in making his returns of Writs of the Parliament; or that he leave out of the said "returns any cities or boroughs which be bound and of old time were wont to come to the Parliament, "he shall be amerced, or otherwise punished, in the manner as was accustomed to be done in the said "case in times past." This Statute, if not obsolete, can no longer be regarded as of much use; as for all practical purposes the performance of such a duty would be sufficiently secured by the apprehension of incurring a contempt. At all events, it is within the terms of the above general provision.

It should seem also that the following enactment of the same statute may be regarded as obsolete:—"Any person having the summons of Parliament, be he archbishop, bishop, duke, earl, "baron, banneret, knight of the shire, citizen of city, burgess of borough, or other singular person or "commonalty, absenting himself, and coming not at the said summons, except he may reasonably and "honestly excuse himself to our Lord the King, is to be amerced and be otherwise punished, accord-"ing as of old times hath been used to be done within the realm of England in the like case." The offence would, without any such enactment, be punishable as a contempt of the King and a breach of public duty.

Art. 9.

The penalties of the last preceding Article shall be deemed to attach whensoever any officer shall unlawfully omit to discharge or perform any particular act of duty incident to his office, or shall be negligent in the discharge or performance of any such act of duty; and whensoever any person, being lawfully bound to do any act for the advancement of the law, the maintenance of the peace, or other public purpose, or being lawfully required to aid any officer or other person in the execution or discharge of any public duty, shall refuse or omit to do such act or render such aid, or shall be negligent in doing such act or rendering such aid.

ART. 10.

Neglect to transmit writs for the election of Members to serve in Parliament.

Whosoever, being a person concerned in transmitting or delivering writs for the election of members to serve in Parliament, shall wilfully neglect or delay to deliver or transmit any such writ, or shall accept any fee, or do any matter or thing in violation of an Act passed in the 53rd year of the reign of King George III., intituled "An Act for the more regular conveyance of writs for the election "of members to serve in Parliament," shall incur the penalties of the class. (*d*)

(*d*) 53 Geo. III. c. 89, s. 6.

ART. 11.

Mayor or other chief officer in a corporation hindering the election of any other mayor, &c.

Whosoever, being a mayor, bailiff, or other chief officer of any borough, city, or town corporate, shall voluntarily absent himself from, or knowingly or designedly prevent or hinder the election of any other mayor, bailiff, or other chief officer in the same city, borough, or town corporate, upon the day or within the time appointed by charter or ancient usage for such election, shall incur the penalties of the class. (*e*)

(*e*) 11 Geo. I. c. 4, s. 6. This enactment does not appear to be repealed or superseded by the Municipal Corporation Act (5 and 6 Will. IV. c. 76,) with respect to the boroughs named in the Schedules to that Act; and it is, at all events, in force in the boroughs not contained in them.

ART. 12.

Churchwardens, &c. refusing to call meetings as required by the statute 1 and 2 Will. IV. c. 60.

Whosoever, being a churchwarden, rate-collector, overseer, or other parish officer, shall refuse to call meetings according to the provisions of an Act passed in the 1st and 2nd years of the reign of King William IV., intituled, "An Act for the better regulation of vestries, and for the appointment of auditors of accounts in certain parishes of England and Wales," or shall refuse or neglect to make and give the declarations and notices directed to be made and given by that Act, or to receive the vote of any rate-payer as therein mentioned, or shall, in any manner whatsoever, alter, falsify, conceal, or suppress any vote or votes as therein mentioned, shall incur the penalties of the class. (*f*)

(*f*) 1 and 2 Will. IV. c. 60, s. 11. As these offences are punishable generally as misdemeanors, it will probably be deemed to be unnecessary that they should be specially enumerated in the Digest, the general offence of breach of official duty subjecting the offender to the same extent of punishment.

ART. 13.

Executing official duties before taking the oath of office, &c.

Whosoever, being entitled to, or assuming to be entitled to any office, shall unlawfully (*g*) do any official act before he shall have taken the oath of office, and given such security as is or may be required by law to be taken and given before such person shall enter upon the execution of such office, shall incur the penalties of the class.

(*g*) There are some official acts which may be lawfully done before the taking the official oath, where an oath is required by law.

ART. 14.

Officer liable for acts of his deputy, &c.

Every officer shall be deemed to be liable in respect of any offence committed by his deputy or agent, provided it be committed with his consent, or by his authority. (*h*)

(*h*) This is a provision which will hereafter be applied to many other classes of offences.

ART. 15.

Who a deputy.

Every person intrusted by any officer with the performance of any official duty shall be deemed to be the deputy of such officer for the purposes of the last preceding Article, whether such officer may lawfully appoint a deputy or not.

ART. 16.

Officer, not lawfully appointed to office, liable to penalties.

Whosoever shall assume to act as an officer shall, as concerns the liability to penalties for anything done by him, be deemed to be such officer, although he cannot legally claim to exercise such office.

ART. 17.

Disobedience of a statute.

Whosoever shall wilfully disobey any statute of the realm by doing or omitting to do any matter or thing generally prohibited or generally required to be done by such statute, shall incur the penalties of the class. (*i*)

(*i*) The offence consists simply in disobedience of the law; it is not essential to the offence that the party should have acted with any corrupt motive. In the case of the King *v.* Sainsbury, 4 T. R. 457, Ashhurst J. observes, "What the law says shall not be done, it becomes illegal to do, and is therefore "the subject matter of an indictment, without the addition of any corrupt motives."

Where no particular remedy is pointed out by a statute giving the sessions (or other court) jurisdiction, or where such remedy is given, but is by any circumstance rendered impracticable, the only remedy is by indictment. R. *v.* Robinson, 2 Burr. 799. But where the summary remedy can be pursued, it is unreasonable, oppressive, and wrong to take the remedy by indictment, *ib.* For any thing generally prohibited by statute, if it be done, an indictment lies for it. Comyn's Dig. tit. In-

dictment, D.; as for champerty, Crompton's Justice, 87 b., for being a vagabond, Cro. Jac. 577; 2 Rol. 172; and see 1 Sid. 409; 1 Vent. 13; 4 Mod. 145.

An indictment lies for a thing to the public damage, although it be prohibited only by a private statute, per Twisden, 1 Sid. 209.

An indictment does not lie for a thing prohibited by a private statute, which tends only to the pamage of a particular person. 1 Sid. 208–9; Comyn's Dig., tit. Indictment, E.

Information lies if a man omit a thing which some statute requires to be done, or does anything prohibited by a statute. 2 Mod. 302.

"It seems to be a good general ground, that wherever a statute prohibits a matter of a public grievance to the liberties and security of the subject, or commands a matter of public convenience, as the repairing of the common street of a town, an offender against such statute is punishable, not only at the suit of the party aggrieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it. Yet if the party offending have been fined to the King in the action brought by the party, as it is said that he may be in every action, for doing a thing prohibited by statute, it seems questionable whether he may afterwards be indicted, because that would make him liable to a second fine for the same offence." 2 Hawk. P. C. c. 25, s. 4. Vin. Ab. Ind. H. 3, pl. 2. The law for setting a fine for the King in a mere action for damages in such a case may be regarded as obsolete, and does not, or, at least as appears to us, ought not, in such a case to bar an indictment.

ART. 18.

The rule contained in the last preceding Article shall not apply, where any mode of proceeding shall be specially prescribed or penalty imposed, in respect of disobedience, by the same clause of the statute which enacts such prohibition, or shall be exclusively prescribed by some other provision of the same or some other statute. (*k*)

(*k*) The law contained in this Article, and the reason for it, are thus explained by Lord Mansfield, in the case of Rex *v.* Wright, 1 Burr. 543:—"Where new-created offences are only prohibited by "the general prohibitory clause of an Act of Parliament, an indictment will lie; but where there is a "prohibitory particular clause, specifying only particular remedies, there such remedies must be pur-"sued; for, otherwise, the defendant would be liable to a double prosecution,—one upon the general "prohibition, and the other upon the particular specific remedy." Mr. Justice Denison, in the same case, thus states the distinction:—"Where an offence is not so at common law, but made an offence "by Act of Parliament, yet an indictment will lie, where there is a substantive prohibitory clause in "such Act of Parliament, though there be afterwards a particular provision and a particular remedy "given; but it is otherwise where the Act is not prohibitory, but only inflicts the forfeiture and "specifies the remedy." In a later case (Rex *v.* Harris, 4 Term. Rep. 205), Mr. Justice Ashhurst says:—"It is a clear and established principle, that when a new offence is created by an Act of "Parliament, and a penalty is annexed to it by a separate and substantive clause, it is not necessary "for the prosecutor to sue for the penalty; but he may proceed upon the prior clause, on the ground "of its being a misdemeanor."

ART. 19.

Disobedience of lawful warrant, order, or commands.

Whosoever shall unlawfully and wilfully disobey any lawful order, warrant, or command duly made, issued, or given by any court, officer, or other person whatsoever acting in any public capacity, and duly authorized in that behalf, shall, where no other penalty or mode of proceeding shall be expressly prescribed in respect of such disobedience, incur the penalties of the class. (*l*)

(*l*) There are many precedents of this species of offence, and the principles relating to it have been already adverted to. An indictment lies against an overseer of the poor, for refusing to pay a weekly sum to a pauper, in pursuance of an order of justices, Rex *v.* Davis, 2 Burr. 799; and, upon the same principle, against the putative father of a bastard child, for refusing to obey an order of maintenance. The offence extends in principle to every instance of wilful disobedience to any order which a party is bound to obey, and where no special means are furnished by the law for the prevention of disobedience.

ART. 20.

Disobeying orders, &c., of Poor Law Commissioners.

Whosoever shall wilfully neglect or disobey any of the rules, orders, or regulations of the Poor Law Commissioners of England and Wales, appointed under an Act passed in the 4th and 5th years of the reign of King Will. IV. intituled "An Act for the Amendment and better Administration of the Laws relating to the Poor in England and Wales," or of the Assistant Commissioners for carrying such Act into execution, or be guilty of any contempt of the said Commissioners sitting as a board, shall, in respect of a third, and any subsequent offence, incur the penalties of the class. (*m*)

(*m*) 4 and 5 Will. IV. c. 76, s. 98. This, and many other special offences of a like nature, fall within the former provisions, and are, of course, unnecessary, except where a higher punishment is annexed to the special, than to the general offence.

ART. 21.

Refusing to attend in obedience to summons of Poor Law Commissioners.

Whosoever shall wilfully refuse to attend, in obedience to any summons of any such Poor Law Commissioner or Assistant Commissioner, as is mentioned in the last preceding Article, or to give evidence, or shall wilfully alter, suppress, conceal, destroy, or refuse to produce any books, contracts, agreements, accounts, and writings, or copies of the same, which may be lawfully required to be produced before such Poor Law Commissioners or Assistant Commissioners, shall incur the penalties of the class. (*n*)

(*n*) 4 and 5 Will. IV. c. 76, s. 13. This offence is now punishable as a misdemeanor. If the

general offence (Art. 19) be made punishable to the same extent, the necessity for this special enactment will be superseded.

ART. 22.

Refusing to attend in obedience to summons of Tithe Commissioners.

Whosoever shall refuse to attend, in obedience to any lawful summons of any commissioner or assistant commissioner for carrying into effect an Act passed in the 6th and 7th years of the reign of King Will. IV., intituled "An Act for the Commutation of Tithes in England and Wales," or to give evidence, or shall wilfully alter, withhold, destroy, or refuse to produce any book, deed, contract, agreement, account, or writing, terrier, map, plan, or survey, or any copy of the same which may be lawfully required to be produced before such commissioner or assistant commissioner, shall incur the penalties of the class. (*o*)

(*o*) 6 and 7 Will. IV. c. 71, s. 93. This offence is now punishable as a misdemeanor. If the general offence (Art. 19.) be made punishable to the same extent, the necessity for this special enactment will be superseded.

DIRECT OBSTRUCTIONS OF THE EXECUTIVE POWER.

ART. 23.

Obstructions of officers.

Whosoever shall wilfully and unlawfully prevent, or endeavour to prevent any officer or other person, lawfully acting or proceeding to act in the execution or discharge of any public office or duty, from so acting or proceeding to act, shall, unless it be otherwise specially provided, incur the penalties of the class. (*p*)

(*p*) See the Prefatory Remarks, pp. 19 and 30.

ART. 24.

Assaulting officers in exercise of duty concerning the preservation of wrecks.

Whosoever shall assault and strike or wound any magistrate, officer, or other person lawfully authorized, on account of the exercise of his duty in, or concerning the preservation of, any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water, shall incur the penalties of the class. (*q*)

(*q*) 9 Geo. IV. c. 31, s. 24. In the above Article, we have followed the language of this recent statute. The offence is now a misdemeanor, punishable with seven years' transportation, or imprisonment at the discretion of the Court.

ART. 25.

Assaults on peace officers.

Whosoever shall assault any peace officer acting in the due execution of his duty, or any person lawfully acting in aid of such officer, or shall assault any other person with intent to resist the lawful apprehension or detainer of himself or any other person for any offence for which he or such other person may be lawfully apprehended or detained, or shall incite or encourage any other person to commit any assault with either of such intents, shall incur the penalties of the class. (*r*)

(*r*) 9 Geo. IV. c. 31, s. 25; 1 & 2 Will. IV. c. 41, s. 11. This Article is necessary on account of the aggravated punishment inflicted in respect of the offences specified in the statute. Besides the assaults digested in the above Articles, there are the offences of assaulting officers of the Customs or Excise, which will be more appropriately placed under the head of Offences against the Revenue.

ART. 26.

Disturbing elections.

Whosoever shall, by force of arms, or by malice or menacing, disturb any to make free election, shall incur the penalties of the class. (*s*)

(*s*) 3 Edw. I. c. 5. The punishment of this offence is *great forfeiture*. We have deemed it proper to include this ancient enactment, made for the protection of persons exercising an important public function, although the law does not appear to have been put in force for centuries. If this provision be retained, it ought to be made more precise. Sir Edward Coke says (2 Inst. 169), "This statute is excellently penned, for that generally it extendeth to all elections, that is to "say, to every dignity, office or place elective, be it ecclesiastical or temporal, of what kind or quality "soever." Selden, however, expresses an opinion that this clause related exclusively to elections of the clergy.—Discourse on the Laws and Government of England, Part I. p. 144. It will of course be obvious from the date of the statute that the provision could not apply to Parliamentary elections.

ART. 27.

Assaulting officers of Penitentiary.

Whosoever, being a convict in the General Penitentiary at Millbank, shall assault the governor thereof, or any officer or servant employed therein, shall be liable to be confined in the said Penitentiary for any term not exceeding two years, in addition to the term for which, at the time of committing such offence, he was subject to be confined, and shall also be liable, if a male, to be publicly or privately whipped, if the Court shall so think fit. (*t*)

(*t*) 7 & 8 Geo. IV. c. 33, s. 1. See the note to the next following Article.

ART. 28.

Whosoever, being in lawful custody for any term of imprisonment in any prison, penitentiary, or other place of confinement, shall assault the gaoler, keeper or governor thereof, or any ministerial officer or servant employed therein, shall be liable to be imprisoned for any term not exceeding years, in addition to the term for which at the time of committing such offence he was subject to be confined. (*u*)

Assaulting gaolers and other officers of prisons.

(*u*) We propose that a general provision of this kind shall be substituted for the preceding existing enactment, which is confined to prisoners in the Penitentiary at Millbank.

ART. 29.

Any sentence of imprisonment authorized to be inflicted on any offender in respect of any offence committed during his imprisonment for any term under any sentence or order, shall be appointed to commence at the expiration of any term or terms of imprisonment for which he shall then be subject to imprisonment.

General rule.

OFFENCES TENDING INDIRECTLY TO IMPAIR OR OBSTRUCT THE EXECUTIVE POWER.

ART. 30.

Whosoever directly or indirectly shall sell or purchase, or promise or agree to sell or purchase, or shall receive or have, or promise or agree to receive or have, for himself or any other person, or shall give or pay, or promise or agree to give or pay, any reward or profit for any office, commission, place, or employment, specified or described in Art. 32, or for any deputation thereto, or for any part or participation of the profits thereof, or for any appointment or nomination thereto, or resignation thereof, or for the consent or voice of any person to any such appointment, nomination or resignation, shall incur the penalties of the class. (*v*)

Selling public offices.

(*v*) 5 & 6 Edw. VI. c. 16; 49 Geo. III. c. 126, s. 3; 6 Geo. IV. c. 105, s. 10. See note to Art. 33.

ART. 31.

Whosoever directly or indirectly shall receive or have, or promise or agree to receive or have any reward or profit for any interest, solicitation, recommendation, or negotiation made or to be made, or pretended to have been made, or under any pretence that the same will be made, concerning or relating to any nomination, appointment or deputation to, or resignation of, any office, commission, place or employment specified and described in Art. 32, or under any pretence for using or having used any interest, solicitation, recommendation, or negotiation in or about any such nomination, appointment, deputation, or resignation, or for the obtaining or having obtained the consent or voice of any person as aforesaid, to such nomination, appointment, deputation or resignation; or,

Taking reward for procuring resignations of office, &c.

Shall give or pay, or promise or agree to give or pay any reward or profit, for any interest, solicitation, recommendation or negotiation made or to be made, concerning or relating to any nomination, appointment, or deputation to, or resignation of, any such office, commission, place or employment as aforesaid, or for obtaining or having obtained, directly or indirectly, the consent or voice of any person as aforesaid to any such nomination, appointment, deputation or resignation; or

Giving reward for procuring office, &c.

Shall for or in expectation of reward or profit, solicit, recommend or negotiate in any manner for any person in any matter concerning or relating to any such nomination, appointment, deputation or resignation aforesaid, or for obtaining, directly or indirectly, the consent or voice of any person to any such nomination, appointment or deputation, or resignation aforesaid, shall incur the penalties of the class. (*w*)

Soliciting or negotiating for offices, &c.

(*w*) 5 & 6 Edw. VI. c. 16; 49 Geo. III. c. 126, s. 4; 6 Geo. IV. c. 105, s. 10. See note to Art. 33.

ART. 32.

The rules contained in the last three preceding Articles shall be deemed to apply (subject to such exceptions as are specified in Art. 33) to all offices, in anywise concerning or relating to the administration or execution of justice; or,

The receipt, control, payment, account, or auditorship of the Queen's money, rent, or revenue; or,

The surveying of any of the Queen's lands, tenements, or hereditaments; or,

The keeping of any of the Queen's towns, castles, or fortresses, used for a place of strength and defence; or,

Any clerkship in any court of record wherein justice is to be administered;

And also to all offices in the gift of the Crown, or to any office appointed by the Crown, and all Commissions civil, naval, or military; and to all places and employments, and to all deputations to any such offices, commissions, places, or employments in the respective departments, or under the appointment, or superintendence, and control of the Lord High Treasurer or Commissioners of the Treasury, the Secretary of State, the Lord High Admiral or Commissioners of the Admiralty, the Master General, and principal officers of Her Majesty's Ordnance, the Commander in Chief, the Secretary at War, the Paymaster-General of Her Majesty's forces, the Commissioners for the affairs of India, the Commissioners of the Excise, the Treasurer of the Navy, the Commissioners of the Navy, the Commissioners for Victualling, the Commissioners of Transports, the Commissary-General, the Storekeeper-General, and also the principal Officers of any other public department or office of Her Majesty's Government in any part of the United Kingdom, or in any of Her Majesty's dominions, colonies, or plantations;

And also to all offices, commissions, places, and employments, belonging to, or under the appointment or control of the United Company of Merchants of England trading to the East Indies. (*x*)

(*x*) 5 & 6 Ed. VI. c. 16; 49 Geo. III. c. 126. See Note to Art. 33.

ART. 33.

The rules contained in Articles 30 and 31, shall not be deemed to apply to any office whereof any person is seised of an estate of inheritance, nor to any office of parkership, or of the keeping of any park, house, manor, garden, chase or forest, or any of them; nor to any office to be given or granted by the Chief Justices of the Queen's Bench or Common Pleas, or any of the Justices of Assize; nor to any office which at the time of the passing of an Act of the 49th year of the reign of King Geo. III., intituled "An Act for the further prevention of the sale and brokerage of offices," was legally saleable, and in the gift of any person, by virtue of any office of which such person then was, or has since been, or shall be possessed under any patent or appointment for his life; nor to any purchases, sales, or exchanges, of any commissions or appointments in the Band of Gentlemen Pensioners, or in Her Majesty's Yeoman Guard, or in the Marshalsea and the Court of the Queen of the Palace of the Queen at Westminster, or of any commissions in Her Majesty's forces for such prices as shall be regulated and fixed by any regulation made or to be made by Her Majesty in that behalf, or to any act or thing done in relation thereto by any agents, provided that such agents shall be agents of regiments authorized by the Commander-in-Chief of Her Majesty's forces, or by the colonels or commandants of regiments or corps, and shall act therein under such regulations only as are or shall from time to time be established by Her Majesty, and shall not cause or procure, or knowingly permit, or suffer to be printed or advertised, any advertisement, or proposal for any purchase or sale, or exchange of any commission, or any negotiation relating thereto, and shall not receive or have any fee or reward, or directly or indirectly agree to receive or have any fee or reward, for acting in such behalf; nor to any deputation to any office in any case in which it is lawful to appoint a deputy, or any agreement lawfully made in respect of any allowance, salary, or payment made, or agreed to be made, by or to such principal or deputy respectively out of the fees or profits of such office; nor to any annual reservation, charge, or payment made, or required to be made, out of the fees, perquisites, or profits of any office, to any person who shall have held such office in any commission or appointment of any person succeeding to such office: Provided always, that the amount of such reservation, charge, or payment, and the circumstances and reasons under which the same shall have been permitted, shall be stated in the commission, patent, warrant, or instrument of appointment of the person so succeeding to, and holding, such office, and paying or securing such money as aforesaid. (*y*)

(*y*) 5 & 6 Edw. VI. c. 16; 49 Geo. III. c. 126, s. 7. We have inserted the provisions of the statutes relating to the sale of offices without any material alteration, although we think that they do not adequately express the principle upon which the law is founded. See Prefatory Remarks, p. 15. Some of the exceptions contained in the Stat. 49 Geo. III. c. 126, s. 7, were probably occasioned by temporary or personal considerations and a regard to vested interests, which it would have been unjust to sacrifice. They are, however, inconsistent with the principle of the law; for it is obvious that it must always be a public disadvantage that offices, which require the discharge of public duties, should be occupied, not by those who are best qualified for them, but by those who are able to pay most to obtain them. The disadvantage to the public may be less in the case of mere ceremonial offices, such as commissions in the band of Gentlemen Pensioners, or the Yeomen of the Queen's

Guard; but we can perceive no sufficient reasons why such offices, and more particularly offices in the Palace court (which directly affect the administration of justice) should be lawfully bought and sold, while the sale of offices of a similar character is in other instances prohibited under heavy penalties. This consideration, however, presents a practical difficulty in the improvement of the law, which we do not feel ourselves competent to dispose of; and we, therefore, on the present occasion, merely submit our opinion that in order to make the law on this subject complete, the prohibition of the sale of offices of a public nature should be general, and that the exceptions should be restricted to such cases as cannot by possibility occasion the mischief which it is the object of the law to prevent.

Art. 34.

Keeping office for the sale of public offices, &c.

Whosoever shall open or keep any house, room, office or place for the soliciting, transacting or negotiating, in any manner whatever, any business relating to vacancies in, or the sale or purchase of, or appointment, nomination or deputation to, or resignation, transfer or exchange of any offices, commissions, places or employments whatever in or under any public department shall incur the penalties of the class. (*z*)

(*z*) 5 & 6 Edw. VI. c. 16; 49 Geo. III. c. 126, s. 5; 6 Geo. IV. c. 105, s. 10. See note to Art. 33.

Art. 35.

Corrupt solicitation of ministerial officers.

Whosoever shall by any means endeavour to force, persuade, or induce any ministerial officer to do, or omit to do, any act in violation of his official duty, such offender knowing the same to be contrary to the duty of such officer, shall incur the penalties of the class. (*a*)

(*a*) The comprehensive definition of this high offence contained in the above Article seems to be fully warranted by the authorities. "Bribery," says Mr. J. Blackstone, 4 Comm. 139, in treating of offences against public justice, "is where a judge or other person concerned in the administration of "justice takes any undue reward to influence his behaviour in office." See also 1 Hawk. P. C. 168; 3 Inst. 147. But we should observe that the offence of offering a bribe is by no means confined to corruptly influencing judicial officers. The functions of the executive system, in all its parts, ministerial and judicial, cannot possibly be exercised purely, and effectually, if the temptation to sacrifice duty to gain be not rigorously excluded by means of penal laws. The mischief which would result from excluding offences of this kind from the operation of the criminal law cannot be more strongly illustrated than by reference to the case of bribery, committed with a view to the corrupt disposal of a public office. The injury which may thus be occasioned to the public is incalculable; the unjust exclusion of an officer able and willing faithfully to discharge his duty might well be regarded as a public injury; such an offence, however, bears no proportion to that of impairing the executive powers, or rendering their exercise odious and oppressive, by procuring them to be placed in the hands of an incompetent or unprincipled man. It is upon this principle that it has been held to be a misdemeanor to offer a sum of money to the first Lord of the Treasury for the purpose of obtaining an office or appointment under Government; R. *v.* Vaughan, Burr. 2494. The reasons delivered by Lord Mansfield for the decision of the court in that case are just and important. He observes: "A minister trusted by the "King to recommend fit persons to offices would betray that trust, and disappoint that confidence, if "he should secretly take a bribe for that recommendation. A terrible consequence would result to "the public if every thing that such an officer is concerned in advising the disposal of should be set "up to sale." There are many other instances of a similar nature. Most of the impeachments against ministers (as observed by Lord Mansfield in the same case) have been for taking money to procure offices grantable by the Crown. In many other instances of inferior note, such practices have been held to be indictable at common law, and others have been subjected to special punishment by statute. It is an indictable offence at common law to offer money to a corporator to vote for a mayor of a corporation.

Art. 36.

Taking of bribe by a ministerial officer.

Whosoever, being a ministerial officer, shall take, or agree to take, any bribe offered or promised with intent to induce him unlawfully to do, or omit to do, any act in violation of his official duty, shall incur the penalties of the class. (*b*)

(*b*) According to some authorities this offence is confined, as regards a judge or officer, to the case where the party *actually receives* a bribe, although a party offering a bribe is guilty of the offence, whether the bribe be received or not, 3 Inst. 146; 4 Black. Comm. 140. We do not see any sufficient reason for this distinction; if a private person be guilty of a crime in offering a bribe, it should seem *à fortiori* that an officer who, contrary to his official duty, corruptly *agrees* to take the bribe, is also worthy of punishment.

Abuses of the Executive Power.

Art. 37.

Officer committing excess or abuse of authority.

Any officer who shall wilfully commit any excess or abuse of authority to the injury or tending to the injury of any other person, shall incur the penalties of the class. (*c*)

(*c*) It is clear that an officer may be indicted for misfeasance, as well as neglect and corruption. Thus an overseer of the poor is guilty of an indictable misdemeanor if he relieves the poor when there is no occasion for it. Tawney's Case, 16 Viner's Abr. 415. An overseer is also liable to an indictment for lodging the poor in an unwholesome chamber; Rex. v. Wetherill, Cald. 432; or for exacting labour from a sick pauper, Cald. 76.

Art. 38.

Abuses of official authority.

Any officer who shall, in violation of his duty, corruptly or maliciously do any

act, or shall corruptly or maliciously omit to do any act with intent, in so doing or omitting to do such act, to defraud, oppress, or injure any other person, shall incur the penalties of the class.

ART. 39.

Extortion by officers.

Any officer who shall, under colour of his office, unlawfully take from any other person any money, or other moveable property, that is not due to him, or more than is due, or before it is due, shall be guilty of extortion, and incur the penalties of the class. (*d*)

(*d*) Extortion signifies, in a large sense, any oppression under colour of right; but Sir E. Coke says that, "in its proper sense, it is a great misprision, by wresting or unlawfully taking by any officer, by colour of his office, any money or valuable thing of or from any man, either that is not due, or more than is due, or before it is due." See Co. Litt. 368 b. 1 Hawk. P. C. c. 68, s. 1.

ART. 40.

Offence aggravated by being committed under colour or pretence of office.

Whosoever shall, under colour or pretence of executing any office, commit any offence, shall, in addition to any penalties to be incurred upon conviction for such offence, be liable to be imprisoned for any term not exceeding years.

ART. 41.

Disclosing matter, the knowledge of which has been acquired in official capacity.

Whosoever shall unlawfully, and contrary to his oath of office, or otherwise in violation of any official or other public duty, publish, or disclose any matter whereof he shall have acquired the knowledge in any official capacity, shall incur the penalties of the class. (*e*)

(*e*) It is said to be a high misprision to disclose an examination before the Privy Council, or in a grand juror to disclose to a party the evidence given before the grand jury against him. See 4 Blackstone's Comm. 126.

ART. 42.

The penalties of the last preceding Article shall be incurred, although, at the time of making such unlawful publication, or disclosure, the offender shall have ceased to act in such official capacity.

OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE.

ART. 43.

Justices violating their oath.

Justices who shall be found in default, in any of the points contained in the oath required to be taken by them by a statute of the 18th year of the reign of King Edw. III., shall incur the penalties of the class. (*f*)

(*f*) 18 Edw. III. St. 4; 20 Edw. III. c. 1. See the Prefatory Remarks, p. 21.

ART. 44.

Judicial officers wilfully omitting to do their duty.

If any other judicial officer shall, in violation of his oath of office, where such oath shall be required by law, or shall otherwise in violation of his duty as such officer, wilfully do, or omit to do any act, he shall incur the penalties of the class. (*g*)

(*g*) Where a justice of the peace illegally refuses to proceed upon a lawful complaint or information, the usual mode of proceeding is by application to the Court of Queen's Bench for a Mandamus; but the refusal is an indictable offence. The above Article renders it unnecessary to insert specially in the Digest the offence of "the mayor, sheriffs, and aldermen, which have the governance of the "city of London, not causing to be redressed and corrected the defaults, errors, and misprisions which "be notoriously used in the same city, and the same not duly punishing from time to time," which was punishable by penalty, by the advice and discretion of the justices thereto assigned. 28 Edw. III. c. 10, s. 1; 1 Hen. IV. c. 15.

ART. 45.

Corruptly influencing judicial officers, arbitrators, &c.

Whosoever shall by any means whatsoever endeavour unduly or corruptly to influence any judicial officer, or any arbitrator or umpire in his conduct as such judicial officer, arbitrator, or umpire, shall incur the penalties of the class.

ART. 46.

Corrupt agreement by judicial officers, arbitrators, &c.

Whosoever shall take or agree to take any bribe, given or offered with intent unduly and corruptly to influence his conduct as a judicial officer, arbitrator, or umpire, or, being a judicial officer, arbitrator, or umpire, shall agree with or promise to any other person to make, pronounce, or deliver, or omit to make, pronounce, or deliver any decree, sentence, order, or award, for or against any party, in any proceeding civil or criminal, or in any reference or arbitration respectively, shall incur the penalties of the class. (*h*)

(*h*) We conceive that although the ordinary mode of proceeding against judges has been by impeachment, an indictment may be maintained against them as well as against inferior judicial officers.

Mr. Serjeant Hawkins says that "At common law, bribery in a judge, in relation to a cause depending before him, was looked upon as an offence of so heinous a nature, that it was sometimes punished as high treason before the 25 Edw. III., and at this day it is certainly a very high offence, and punishable, not only with the forfeiture of the offender's office of justice, but also with fine and imprisonment." 1 Hawk. P.C. c. 67, s. 6.

Art. 47.

Judges rasing, &c., rolls, &c.

Whosoever, being a judge or clerk, shall falsely enter pleas, rase rolls, or change any verdict, so that by such default there ensueth disherison of any of the parties, shall incur the penalties of the class. (*i*)

(*i*) 8 Rich. II. c. 4. We have inserted this provision of an ancient statute, as it has never been formally repealed. It is doubtful, however, whether the offence under the statute was an indictable offence, being expressly punishable by the king and council; see 1 Hale's, P. C. 648. At all events, it is obviously inapplicable to modern times; and as it is confined by its terms to such defaults as cause *disherison*, it could never have applied to the falsification of records in personal actions. See Barrington's Ancient Statutes, p. 325.

Art. 48.

Entering false judgments, &c., on rolls, &c.

Whosoever shall upon any record, roll, parchment, or paper for entering the judgment, decree, sentence, or proceedings of any court of justice, wilfully and falsely enter any judgment, decree, sentence, or verdict, or any plea or other matter or thing whereby Her Majesty the Queen, or any party, shall or may be prejudiced shall incur the penalties of the class. (*j*)

(*j*) The 7 & 8 Geo. IV., c. 28, s. 11, and the 2 Will. IV., c. 34, s. 9, contain the following provisions as to uttering false certificates of convictions; the former relating to felonies generally, and the latter to offences against the coin.

"If any clerk of the court, officer having the custody of the records of the court, or deputy of such "clerk or officer, shall utter a false certificate of any indictment and conviction of a previous felony; "or if any person, other than such clerk, officer, or deputy, shall sign any such certificate as such clerk, "officer, or deputy, or shall utter any such certificate with a false or counterfeit signature thereto, every "such offender shall be guilty of felony, &c."—(7 & 8 Geo. IV. c. 28, s. 11.)

"If any clerk of the court, or other officer, having the custody of the records of the court where the "offender was first convicted, or the deputy of such clerk or officer, shall certify or utter as true any "false copy of any indictment or conviction for any offence against this Act, knowing the same to "be false; or if any person, other than such clerk, officer, or deputy, shall sign or certify any copy of "any such indictment or conviction as such clerk, officer, or deputy, or shall utter any copy thereof "with a false or counterfeit signature thereto, knowing the same to be false or counterfeit, every such "offender shall be guilty of felony, &c."—(2 Will. IV. c. 34, s. 9.)

We have for the present consolidated these enactments in the law of forgery, Art. 71, though they may be considered to belong as appropriately to this division of the Digest.

Art. 49.

Officers of Record Office certifying false copies of records.

Whosoever, being a person belonging to or employed in the public Record Office, shall certify any writing to be a true and authentic copy of a record in the custody of the Master of the Rolls, knowing the same to be false in any material part, shall incur the penalties of the class. (*k*)

(*k*) 1 & 2 Vic. c. 94, s. 19. This article we have also at present inserted under that branch of the digest which relates to forgery.—(See Art. 54.)

Art. 50.

Endeavouring corruptly to influence jurors.

Whosoever shall by any means whatsoever endeavour unduly and corruptly to influence any person impannelled, summoned, or expected to serve as a juror in any proceeding, in respect of his duty as such juror, shall incur the penalties of the class. (*l*)

(*l*) This offence is termed embracery. Mr. Serjeant Hawkins says, "It seems clear that any "attempt whatsoever to corrupt, or influence, or instruct a jury, or any way to incline them to be more "favourable to one side than to the other by money, promises, letters, threats, or persuasions, except "only by the strength of the evidence, and the arguments of the counsel in open court at the trial of "the cause, is a proper act of embracery, whether the jurors on whom such attempt is made give any "verdict or not, or whether the verdict given be true or false." 1 Hawk. P.C. c. 85, s. 1., see also Co. Litt. 369 a. It has also been held that the bare giving of money to another to be distributed among jurors is an offence in the nature of embracery, whether any of it be actually given to them or not. 1 Hawk. P.C. c. 85, s. 4.

At the common law, probably in analogy to the doctrine of maintenance, if one not being a party in any proceeding, civil or criminal, nor a servant or agent of such party, directly or indirectly, solicited any person impanelled or summoned as a juror in such proceeding to appear and serve as such juror, he was guilty of a misdemeanor.

Mr. Serjeant Hawkins says, "The law so far abhors all corruption of this kind, that it prohibits "everything that has the least tendency to it, what specious pretence soever it may be covered with; "and, therefore, it will not suffer a mere stranger so much as to labour a juror to appear and act "according to his conscience."—1 Hawkins's P. C. book 85, s. 2. In Sir Thomas Palmer's case, Noy's Reports, p. 102, it was resolved by the Lord Keeper Egerton and the two Chief Justices (one of whom was Sir Edward Coke), "First, that the party himself might labour with the jury to appear, "but not a stranger; and, secondly, that the party himself cannot instruct or promise reward for or "before appearance, for that is embracery."

ART. 51.

Corrupt agreement by juror, &c.

Whosoever, having been impannelled or summoned to serve as a juror in any proceeding, shall take or agree to take any bribe given or offered, with intent unduly and corruptly to influence his conduct as a juror, or shall agree with or promise to any other person to make, pronounce, or deliver any verdict for or against any party in any proceeding, shall incur the penalties of the class. (*m*)

(*m*) This provision is suggested by the 61st section of stat. 6 Geo. IV. c. 50 (the Jury Act), which provides that "notwithstanding anything in that Act contained, every person who shall be guilty of the offence of embracery, and every juror who shall wilfully or corruptly consent thereto, shall and may be respectively proceeded against by indictment or information, and be punished by fine or imprisonment, in like manner as every such person and juror might have been before the passing of that Act."

ART. 52.

The last two preceding Articles shall apply although the person so endeavoured to be influenced, or taking or agreeing to take any bribe shall not be afterwards sworn, and also where no verdict shall be given, and whether the verdict, if given, be true or false. (*n*)

(*n*) 1 Hawk. P.C. c. 85, s. 15.

ART. 53.

Preventing any person from serving as a juror.

Whosoever shall unlawfully prevent, or endeavour to prevent, any person lawfully summoned or otherwise lawfully bound to serve as a juror from serving as such juror, shall incur the penalties of the class. (*o*)

(*o*) Mr. Serjeant Hawkins says, "It seems clear that no one whatsoever can justify the labouring a "juror not to appear."—1 Hawkins's, P. C. c. 85, s. 6. In the case of Hussey *v.* Cook, Hobart, 194, it was resolved, "that the party himself, or his servant, or son, or near kinsman, might procure the "jury to appear, there being no other ill-qualified circumstance in it; but if either the party or any "other should solicit any of the jury not to appear, it was punishable, for that doth both delay justice, "and is a kind of packing of a jury."

ART. 54.

Person procuring himself to be returned as juror.

Whosoever shall, by any indirect means or contrivance, procure himself to be returned, impanelled, or sworn as a juror upon any trial, inquest, or other judicial proceeding, with intent to procure a verdict, or any undue advantage, for any person interested in such trial, inquest, or proceeding, shall incur the penalties of the class. (*p*)

(*p*) See the case of Rex *v.* Opie, 1 Saund. 301, and 1 Hawkins's, P. C. c. 85, s. 4.

ART. 55.

Witnesses refusing to give evidence, &c.

Whosoever, being lawfully bound or required by recognizance, subpœna, summons, or otherwise, to appear and give evidence as a witness, or to produce any book or writing upon any trial, or other judicial proceeding or inquiry, shall unlawfully and wilfully refuse or neglect to appear or to answer all lawful questions, or to produce such books or writings as upon such occasion he shall by law be bound to produce, shall incur the penalties of the class. (*q*)

(*q*) See Rex *v.* Ring, 8 Term Rep. 585; Hammond *v.* Stewart, 1 Strange, 510; 1 Chitty's C. L., 614.

ART. 56.

The penalties of the last preceding Article shall not be incurred unless the lawful expenses of the person so bound or required to appear as therein mentioned, shall have been tendered to him, where such tender shall be required by law.

ART. 57.

Preventing witnesses from attending trials, &c.

Whosoever shall wrongfully and wilfully prevent, or endeavour to prevent any person lawfully bound by recognizance, subpœna, summons, or otherwise, to appear and give evidence, or to produce any book or writing upon any trial or other judicial proceeding or inquiry, from so appearing and giving evidence, or producing such book or writing, shall incur the penalties of the class. (*r*)

(*r*) 2 Hawk. P. C., c. 21, s. 16; Rex *v.* Lawley, 2 Strange, 904.

ART. 58.

Perjury.

Whosoever shall commit the crime of perjury shall incur the penalties of the class. (*s*)

(*s*) In the Prefatory Remarks, p. 23, we have fully stated our reasons for distinguishing between

the compound offence of false swearing to a material point in a judicial proceeding (which is properly legal perjury), and that of simple false swearing, which by many statutes is inaccurately termed perjury. The punishment of Perjury by the common law was discretionary fine and imprisonment, and the pillory. By the stat. 2 Geo. II., c. 25, s. 2, imprisonment, with hard labour, for seven years, or transportation for the same period, might be inflicted. Another consequence of a conviction for perjury derived from very ancient times, and intended to be penal, though it formed no part of the sentence (*Rex* v. *Gripe*, Comyn's Reports, 43), was a perpetual incapacity to give evidence in Courts of Justice. As a punishment, this consequence seems to be inefficient, as the offender would seldom be materially affected by it; and it operates unjustly by depriving persons unconnected with his crime of the interest they may have in his testimony. We have already expressed our opinion respecting the propriety of repealing the statute 5 Eliz. c. 9. See Prefatory Remarks, p. 25.

Art. 59.

To the crime of perjury it is essential,—

1st. That an oath be lawfully administered by competent authority (*t*) to a party as a witness or deponent in some judicial proceeding. (*u*) Definition of perjury.

2d. That the party swear affirmatively or negatively to some fact material to the proceeding, (*v*) or to his belief of such a fact, (*w*) knowing that which he swears to be false, or not knowing it to be true. (*x*)

(*t*) Most Courts of Justice have power, either by immemorial usage or some particular statute, to examine upon oath respecting matters within their jurisdiction; so also Justices of the Peace are authorized, by various statutes, to administer oaths in certain cases. The statute 7 Geo. IV. c. 64, s. 2, gives express power to Justices of the Peace to take depositions on oath in cases of felony; but serious doubts have prevailed whether they have such a power in other cases within their general cognizance, where it has not been specially communicated to them. See Lambard's Eirenarcha, p. 213, and Burn's Justice, tit. Oaths. It seems desirable to obviate this difficulty, which may often occur in prosecutions for Perjury, by a general enactment, that in all cases within their cognizance Justices of the Peace shall have authority to examine upon oath. The recent statute, 5 and 6 Will. IV. c. 62, s. 13, restricts Magistrates from taking oaths respecting matters of which they have not cognizance by statute; but it does not increase or confirm the power of Magistrates to administer oaths where it is not expressly given to them. Oaths taken before persons acting in a private capacity, or before a Court or officer having authority to administer oaths in some respects, but having no jurisdiction respecting the subject to which the particular oath administered relates, cannot be the subject of Perjury.—Hawk. P. C. b. i. c. 69, s. 4.

(*u*) See the definitions of Perjury in 3 Inst. 164, Hawk. Book i. c. 69. According to all the definitions of this offence by the common law, the party must be lawfully sworn, the proceeding in which the oath is taken must relate to the administration of justice, the intention to swear falsely must be wilful, the assertion sworn to must be false, and the falsehood material to the matter in question. Promissory oaths, such as those taken by officers for the faithful performance of duties, cannot be the subject of Perjury, being wholly extra-judicial.—See 3 Inst. 165. See the observations of Mr. Livingstone on this subject in the Report on the Penal Code, prepared by him for the state of Louisiana, and inserted in the Appendix to this Report.

(*v*) All things irrelevant to the question at issue in a judicial proceeding are, in fact, no part of the proceeding, and it is wholly immaterial whether they be true or false. Falsely swearing to such matters, therefore, does not fall within the definition of Perjury. If the false statement respecting an immaterial point be made before a jury, who determine the fact upon such statement, it is clear that their finding is wholly inoperative, not being within their oath "to try the *issue* joined between the parties." If, on the other hand, it is made before a Court which adjudicates upon the immaterial fact falsely stated, the judgment as to that fact is wholly impertinent and void. Hobart, 53. But if the false statement goes to increase or extenuate damages, or to induce the judge or jury to give a readier credit to the substantial part of the evidence, it will be Perjury. 1 Hawk. P. C. c. 69, s. 8. In the first of these cases, the false statement *directly* affects the result of the judicial inquiry, because the jury are to assess the damages as well as to try the issue; and, in the latter case, it affects the issue circumstantially, by communicating an impression to the minds of the jury or Judge, which influences the decision of the main points at issue. The question of the materiality of the facts sworn to the issue or proceeding is often one of great difficulty; an attempt will be made under the head of Procedure, to remove this difficulty to a certain extent, by extracting the principles of the numerous cases which have occurred upon the subject.

(*w*) It was formerly considered that a person who swore only to his belief or remembrance could not, in respect of such oath, be convicted of Perjury. Lord Coke says, "The deposition must be direct and absolute, and not *ut putat*, nor *sicut meminit*, nor *ut credit*, &c." But a contrary doctrine has been established by various modern cases; and if a person swears that he believes a fact to be true which he knows to be false, he may be convicted of Perjury. See Miller's case, 3 Wils. 427, 2 W. Black. 881; Pedley's case, 1 Leach's C. C. 367; Hawk. P. C. book i. c. 69, note (a).

(*x*) In Rex *v.* Mawbey and others, 6 Term Reports 637, Mr. Justice Lawrence says, "If a man swear to a particular fact, without knowing at the time whether the fact be true or false, it is as much perjury as if he knew the fact to be false, and equally indictable."—See also 1 Hawkins's P. C. c. 69, s. 6.

The Prussian Code affixes the punishment of Perjury to "any person who upon his oath denies his knowledge of any matter or occurrence with which he is in truth acquainted." The same law also inflicts a penalty upon persons who, from thoughtlessness and want of care, swear falsely to facts, of the true state of which they might and ought to have been acquainted.

Art. 60.

Whosoever shall commit the crime of false swearing, shall incur the penalties of the class. False swearing.

ART. 61.

Definition of false swearing.

To the crime of false swearing it is essential,—

1st. That an oath be lawfully administered by competent authority to a party in some matter other than a judicial proceeding.

2d. That the party swear affirmatively or negatively to some material fact, or to his belief of such a fact, knowing that which he swears to be false, or not knowing it to be true.

ART. 62.

What are judicial proceedings.

Proceedings before the Queen in Council, or the Judicial Committee of the Privy Council; proceedings in the House of Lords, and in any courts whether of record or not; examinations before justices of the peace concerning matters judicially depending before them of which they have lawful cognizance; the execution of writs of trial, writs of inquiry, commissions, and rules or orders of reference issuing from or made by any court of record, or any judge thereof; and trials of controverted elections, or returns of members to serve in Parliament by Committees of the House of Commons, shall be deemed to be judicial proceedings.

ART. 63.

When a person shall be deemed to have been lawfully sworn.

Whosoever in any form which he admits to be binding on his conscience, shall have taken an oath to speak the truth, shall be deemed to have been lawfully sworn. (*y*)

(*y*) A person who believes in no religion whatever, or in no religion which binds his conscience to speak the truth, cannot be lawfully sworn. An oath implies a religious sanction, being, as Cicero defines it, "*religiosa affirmatio*," Off. Lib. iii. c. 29. See White's Case, 1 Leach C. C. 430; Wade's Case, 1 Moody's C. C. 86; Buller's N. P. 292.

ART. 64.

But it is immaterial in what form the oath is administered, (*z*) or what particular religion the party professes, provided he believe in a Divine Being, and believe that such Being will punish him either in this world or in a future state, if he swear falsely. (*a*)

(*z*) All persons are allowed to swear according to the ceremony of their particular faith, and in the form which they consider binding on their individual consciences. Thus a Jew is sworn upon the Books of Moses, a Mahometan upon the Koran, and a Gentoo and a Chinese according to the form of oath used on analogous occasions in their respective countries. Even a Christian, who scrupled to take an oath on the New Testament, but declared that he should feel himself bound in his conscience by an oath on the Old Testament, has been permitted to swear on the latter, Edmonds *v.* Rowe, Ryan, and Moody, 77.

(*a*) See the cases of Omichund *v.* Barker, Willes, 538; Morgan's Case, 1 Leach's C. C. 54; Taylor's Case, Peake's N. P. 11; the Queen's Case, 2 Brod. and Bing. 284.

ART. 65.

As regards the crimes of perjury and false swearing, a person shall be deemed to have admitted that an oath is binding on his conscience by having taken it in the ordinary form, without objection. (*b*)

(*b*) This rule is recognised in the case of Sells *v.* Hoare, 2 Brod. and Bing. 232; and it seems to be obviously founded upon necessity and common sense, as it could never be endured that a person should escape the punishment of Perjury, by showing that he was not bound in conscience by the oath he had sworn.

ART. 66.

No injury need result from the false swearing.

It shall not be essential to the crime of perjury or false swearing, that any deception or injury shall have been effected by the false swearing, or that any injury shall have resulted from it.

ART. 67.

Subornation of Perjury.

Whosoever shall commit the crime of subornation of perjury, shall incur the penalties of the class.

ART. 68.

Subornation of perjury consists in wilfully procuring any person to commit the crime of perjury, as hereinbefore defined. (*c*)

(*c*) Hawkins's P. C. c. 69, s. 10. "It seemeth clear that if the person incited to take such an oath, "do not actually take it, the person by whom he was so incited is not guilty of subornation of "perjury."

ART. 69.

Inciting person to commit perjury.

Whosoever shall persuade or incite any other person to commit the crime of perjury, as hereinbefore defined, shall incur the penalties of the class. (*d*)

(*d*) Mr. Serjeant Hawkins says, "It is certain that one who incites another to commit perjury, is "liable to be punished not only by fine, but also by infamous corporal punishment." 1 Hawkins's P. C. c. 69, s. 10. We have given in this and the preceding Article the distinction between subornation of perjury and the incitement to commit perjury, as drawn by the common law; but we have great doubts whether this distinction rests upon any rational principle,—the moral offence being complete upon the mere incitement, and quite independently of its effect.

ART. 70.

Inciting person to swear falsely.

Whosoever shall persuade or incite any other person to commit the crime of false swearing as hereinbefore defined shall incur the penalties of the class.

ART. 71.

Statutable perjury.

Whosoever shall, in any case other than a judicial proceeding, as defined in Article 62, take any false oath, where by any statute it is made perjury to take such oath, or where the penalties of perjury are imposed by any statute upon any person taking such oath, shall be deemed to be guilty of the crime of false-swearing, and incur the penalties of the class. (*e*)

(*e*) See the Prefatory Remarks, p. 25.

ART. 72.

False affirmation.

The declaration or affirmation of any person authorized by law to declare or affirm, instead of taking an oath, shall have the same effect as regards the incurring of any penalties in respect of perjury or false-swearing as if the person making such declaration or affirmation had been lawfully sworn.

ART. 73.

Acknowledging bail, &c., in another person's name.

Whosoever shall acknowledge any recognizance or bail before any court, judge, or other person lawfully authorized to take the same in the name of any other person not privy or consenting to the same, whether such recognizance or bail, in either case, be or be not filed; or shall, in the name of any other person not privy or consenting to the same, acknowledge any *cognovit actionem*, or judgment, or any deed to be enrolled, shall incur the penalties of the class. (*f*)

(*f*) 11 Geo. IV. and 1 Will IV. c. 66, s. 11. This statute also specifies Fines and Recoveries, which are now abolished by the St. 3 & 4 Will. IV. c. 74.

ART. 74.

Deceits of Pleaders.

Any serjeant pleader, or other, doing any manner of deceit or collusion in the Queen's Court, or to beguile the court or the party, shall incur the penalties of the class. (*g*)

(*g*) 3 Edw. I. c. 29. The punishment for this offence was imprisonment for a year and a day; and if the trespass required greater punishment, at the King's pleasure. See 2 Inst. p. 214, as to the persons to whom this statute applies; and also the Prefatory Remarks, p. 27, for some observations upon this law.

ART. 75.

Omission by Officers to arrest offenders.

If any officer, or other person, shall, contrary to his duty, wilfully omit, or through negligence fail, to arrest and detain any person in respect of any offence by him committed, or charged, or suspected to have been by him committed or meditated, such officer or other person so wilfully omitting, shall incur the penalties of the class; and such officer or other person so failing through negligence, shall incur the penalties of the class.

ART. 76.

Omission by Officers to arrest for felony.

If any officer, or other person (*h*) shall, contrary to his duty, wilfully omit, or through negligence fail to arrest and detain any person for felony, or upon any charge or suspicion of felony, or by reason of any indictment found against him, such officer or other person so wilfully omitting shall incur the penalties of the class; and such officer or other person so failing through negligence, shall incur the penalties of the class.

(*h*) Lord Hale says, "If the constable in pursuit of a felon requires the aid of J. S., he is bound by law to assist him, and is fineable for his neglect." 1 Hale's P. C., 588. In another passage he says, "Every man is bound to pursue and take a felon; and if he makes not pursuit he is fineable." Ibid, 593.

ART. 77.

Voluntarily suffering prisoners to escape.

Whosoever shall voluntarily suffer the escape of any prisoner who shall be in lawful custody for any offence, or upon any charge or suspicion of any offence, or

meditated offence, or by reason of any indictment against such prisoner for any offence, or after conviction of any offence, shall incur the penalties of the class. (*i*)

(*i*) 4 Black. Comm. 130; 1 Hale's P. C., 595. By the present law, a *voluntary* escape of a felon is a felony in the officer or other person who has lawful custody of the prisoner; a *negligent* escape in a case of felony is only a misdemeanor, punishable with fine and imprisonment.

ART. 78.

Negligently suffering prisoners to escape.

Whosoever shall negligently suffer the escape of any such prisoner, as in the last preceding Article is mentioned, shall incur the penalties of the class. (*j*)

(*j*) 4 Black. Comm. 130; 1 Hale's P. C., 595.

ART. 79.

Voluntarily suffering Felons to escape.

Whosoever shall voluntarily suffer the escape of any prisoner in lawful custody for felony, or upon any charge or suspicion of felony, or by reason of any indictment for felony, or after conviction of felony, shall incur the penalties of the class. (*k*)

(*k*) The authorities clearly justify the statement of the law in this general manner, as applicable as well to private persons as to constables, gaolers, or other officers. Lord Hale says, that "if A, a "mere private man, knows B. to have committed a felony, he may thereupon arrest him of felony; "and he is lawfully in the custody of A. till he be discharged of him by delivering him to the con- "stable or common gaol; and, therefore, if he voluntarily suffers him to escape out of his custody, "though he were no officer, nor B. indicted, it is felony in A. So it is if a felony be in fact commit- "ted, and A. hath a probable cause to suspect B., and accordingly suspects and arrests him, B. is "lawfully in the custody of A. for suspicion of felony; and if he voluntarily lets him escape, it is "felony in A. *in eventu*, viz., if B. proves really guilty of the felony; and accordingly, if A. delivers "the party so arrested to the constable's custody, he is lawfully in his custody, and if he suffers the "escape voluntarily, it is felony *in eventu*."

ART. 80.

Negligently suffering Felons to escape.

Whosoever shall negligently suffer the escape of any such prisoner, as in the last preceding Article is mentioned, shall incur the penalties of the class.

ART. 81.

General rule.

The last four preceding Articles, and all other Articles concerning escapes and rescues, shall be deemed to include every person to whom either as principal or agent or assistant, or either as an officer or a private person, or either solely or conjointly with others, the keeping, watching, or guarding of any prisoner, either within any prison or place of confinement, or otherwise, shall for the time being lawfully belong.

ART. 82.

Marshal of Queen's Bench allowing prisoners to wander out of prison.

Whosoever, being marshal of the Queen's Bench, shall suffer any prisoner indicted of felony, robbery, or theft, who shall have removed the same indictment before the queen, and there yielded himself, to wander out of prison by bail or without bail, shall incur the penalties of the class. (*l*)

(*l*) 5 Edw. III. c. 8. This offence is, according to this ancient statute, punishable with imprisonment for six months; we see no reason for excepting the marshal of the Queen's Bench from the operation of the general law.

ART. 83.

Officer of Milbank Penitentiary voluntarily permitting convicts to escape.

Whosoever, having the custody of any convict ordered to be confined within the Penitentiary at Milbank, or being employed by the person having such custody as a keeper, underkeeper, turnkey, assistant or guard, shall voluntarily permit such convict to escape, shall incur the penalties of the class. (*m*)

(*m*) 56 Geo. III. c. 63, s. 44. This offence is now punishable with seven years' transportation, &c. Should the general provisions above recommended be adopted, this special enactment, as well as those contained in the three next Articles, will become unnecessary.

ART. 84.

Officer of Milbank Penitentiary negligently allowing convicts to escape.

Whosoever, having the custody of such convict, or being employed as in the last preceding Article is mentioned, shall negligently permit any such convict to escape, shall incur the penalties of the class. (*n*)

(*n*) 56 Geo. III. c. 63, s. 44.

ART. 85.

Officer of Parkhurst Prison knowingly allowing prisoners to escape.

Whosoever, having the custody of any offender ordered to be confined in Parkhurst prison, or being employed by the person having such custody as a keeper, under-keeper, turnkey, assistant or guard, shall knowingly allow such offender to escape, shall incur the penalties of the class. (*o*)

(*o*) 1 & 2 Vic. c. 82, s. 13.

ART. 86.

Whosoever, having the custody of any such offender, or being employed as in the last preceding Article is mentioned, shall carelessly allow such offender to escape, shall incur the penalties of the class. (*p*)

Officer of Parkhurst Prison carelessly allowing prisoners to escape.

(*p*) 1 & 2 Vic. c. 82, s. 13.

ART. 87.

Whosoever, being a bailiff, shall not be ready and apparelled at the commandment and summons of sheriffs, and at the cry of the country, to sue and arrest felons, when any need is, as well within franchise as without, shall incur the penalties of the class. (*q*)

Bailiff not being ready to arrest felons.

(*q*) 3 Edw. I. c. 9. It is obvious that the provisions of this ancient statute, as contained in this and the next Article, are unsuitable to the modern habits of society in this country; and we see no advantage which can be derived from retaining them as part of the law.

ART. 88.

Whosoever, being other than a bailiff, shall not be so ready and apparelled as is mentioned in the last preceding Article, shall incur the penalties of the class. (*r*)

Any other person not being ready to arrest felons.

(*r*) 3 Edw. I. c. 9.

ART. 89.

Whosoever shall unlawfully resist and prevent, or endeavour to prevent, the lawful apprehension of himself or any other person, for any offence by him or such other person committed, or charged or suspected to have been committed, shall incur the penalties of the class.

Resistance to apprehension.

(*s*) The offence contained in Article 25 is aggravated by an assault.

ART. 90.

And every such offender shall, in case he or such other person, as in the last preceding article is mentioned, be liable to be arrested upon any warrant for felony, or upon any charge or suspicion of felony, or by reason of any indictment against him or such other person for felony, incur the penalties of the class. (*t*)

(*t*) Several statutes contain special enactments for the punishment of such as resist the execution of civil or criminal process within particular districts. By the 8 and 9 of King Will. III. c. 27, s. 15, it is a misdemeanor, punishable by fine or imprisonment, or both, "to oppose or resist the sheriffs of "London and Middlesex, head bailiff of the liberty of the duchy of Lancaster, high sheriff of the county "of Surrey, bailiff of the liberty of the borough of Southwark, for the time being, or their respective "deputy or deputies, officer or officers, or any of them, or any who shall be aiding or assisting to "them, or any of them, in the executing of any legal process, execution, or extent taken out by "any person having any debt or debts, sum or sums of money due or owing to him from any person "residing within the Whitefriars, Savoy, Salisbury-court, Ram-alley, Mitre-court, Fuller's-rents, "Baldwin's-gardens, Montague-close, or the Minories, Mint, Clink, or Deadman's-place."

By the 9 of King Geo. I. c. 28, s 1, it is made felony, punishable with seven years' transportation, for any person "within the place commonly called Suffolk-place, or the Mint, in the parish of St. George, "in the county of Surrey, or within any the limits or pretended limits thereof, knowingly and wilfully to "obstruct or oppose any person or persons serving, or endeavouring or attempting to serve or execute "any writ, or any rule or order of any court of law or equity, or other legal process whatsoever, or any "escape warrant, or any warrant or warrants of any justice or justices of the peace, or to assault or "abuse any person or persons serving or executing any such writ, rule, order, process, or warrant, or "for having so done, whereby any person or persons shall receive any damage or bodily hurt." And by the second section of the same Act it is a felony, punishable in the like manner, "to resist or oppose "any officer or officers of justice, or any person or persons who shall be aiding or assisting to such "officer or officers in the execution of any writ, or any escape warrant, or any warrant or warrants "of any justice or justices of the peace, or of any legal process, execution, or extent, within the said "place called Suffolk-place, or the Mint, or within any the limits or pretended limits thereof; or to "make rescues of any prisoner taken upon any such writ, process, execution, or extent, within the place "or limits aforesaid; or there knowingly to harbour or conceal any prisoner so taken, or any person "or persons who rescued any such prisoner; or anyways to contrive, or knowingly and willingly abet, "aid, or assist in resisting any such officer or officers, or in rescuing any such prisoner or prisoners "taken as aforesaid; or to presume to exercise any unlawful jurisdiction, or to make or execute, or "join in making or executing, any pretended rule, order, or ordinance for supporting any pretended "privilege within the said place called Suffolk-place, or the Mint, or any the limits or pretended limits "thereof, contrary to law, or for opposing or hindering the due execution of any legal process, or "any lawful warrant, or any rule, order, or decree of any court of law or equity."

And by the statute 11 of the same king's reign, c. 22, s. 1, it is a felony, transportable for seven years, for "any number of persons, not less than three, within the hamlet of Wapping, Stepney, or "any other place within the limits of the weekly bills of mortality of the cities of London and West-"minster, wherein persons shall unlawfully assemble and associate for the sheltering themselves from "their debtors, of which complaint shall have been made by a presentment of the grand jury at a "general or quarter sessions of the proper county, knowingly and wilfully to obstruct and oppose any "person or persons serving, or endeavouring or attempting to serve or execute any writ, or any rule "or order of any court of law or equity, or other legal process whatsoever, and in making such "obstruction or opposition to assault or abuse any person or persons serving or executing any such "writ, rule, order, or process, or for having so done, whereby any such person or persons shall "receive any bodily hurt." And further, by the 2d section of the last-mentioned Act, it is a felony,

similarly punishable, for any person "knowingly and wilfully to resist or oppose any officer or officers "of justice, or any person or persons who shall be aiding or assisting to such officer or officers in the "execution of any writ, or of any legal process, execution, or extent, within the said hamlet of Wapping, Stepney, and places adjacent, or elsewhere, within the said bills of mortality, wherein persons "shall unlawfully assemble and associate for the sheltering themselves from their debts, of which "complaint shall have been made by a presentment of the grand jury at a general or quarter sessions "of the proper county; or to make rescue of any prisoner taken upon any such process, execution, or "extent, within the places aforesaid, or knowingly to harbour or conceal any prisoner so taken, or "any person or persons who rescued any such prisoner, or anywise to contrive or knowingly and "wilfully to abet, aid, or assist in resisting any such officer or officers, or in rescuing any such "prisoner or prisoners taken as aforesaid."

See the Prefatory Remarks, p. 30, on the subject of these special offences.

ART. 91.

Escape by prisoner under charge of any offence.

Whosoever, being a prisoner in lawful custody for any offence committed or meditated, or upon any charge or suspicion of any offence, shall unlawfully break out of or escape from any prison, cell, or place wherein he shall be kept or confined, or shall unlawfully escape from any officer or other person in whose custody he shall lawfully be, shall incur the penalties of the class. (*u*)

(*u*) In ancient times it was held, at common law, that if a person imprisoned for a misdemeanor, and not felony, escaped and broke prison, he was guilty of felony. But this severe law was moderated by the statute 1 Edw. II. (*De frangentibus prisonam*) which enacted that no one thereafter should have judgment of life or members for breaking prison, unless the cause for which he was arrested and imprisoned justified such a sentence. 1 Hale's P. C. 607.

ART. 92.

Escape by prisoner in custody upon a charge of felony.

Whosoever, being a prisoner in lawful custody for any felony, or upon any charge or suspicion of felony, shall unlawfully break out of or escape from any prison, cell, or place wherein he shall be kept or confined, or shall unlawfully escape from any officer or other person in whose custody he shall lawfully be, shall incur the penalties of the class. (*v*)

(*v*) Escapes by traitors will be specifically provided for hereafter, under the head of Treason, although, as every treason includes a felony, a special provision is in strictness unnecessary.

ART. 93.

Escape by prisoner in custody under sentence of imprisonment.

Whosoever, being in lawful custody under any sentence or order for any term of imprisonment, shall unlawfully escape from such custody before the end of the term for which he shall be sentenced or ordered to be imprisoned, shall incur the penalties of the class. (*w*)

(*w*) See 1 & 2 Vic. c. 82, s. 12.

ART. 94.

Attempt by prisoners to break prison or escape.

Whosoever, being in lawful custody under any sentence or order for any term of imprisonment, shall attempt to break prison or escape from the place of his confinement, or shall forcibly break out of his cell, or shall make any breach therein with intent to escape therefrom, shall incur the penalties of the class. (*x*)

(*x*) This is an enactment extending generally the particular provisions of the statutes 59 Geo. III. c. 136, s. 17, and 1 & 2 Vict. c. 82, s. 12, as to attempts to escape from the Penitentiary at Milbank and Parkhurst Prison. The following are the provisions alluded to:—

"If any convict, who shall be ordered to be confined in the said penitentiary, shall at any time "during the term of such confinement attempt to break prison or escape from the place of his or her "confinement, or shall forcibly break out of his or her cell, or shall make any breach therein with "intent to escape therefrom, he or she so offending, being convicted thereof, shall be punished by "an addition not exceeding six calendar months to the term for which he or she at the time of committing any such offence was subject to be confined."

"If any offender who shall be ordered to be confined in the said prison shall at any time during the "term of such confinement attempt to break prison or escape from the place of his or her confinement, "or shall forcibly break out of his or her cell, or shall make any breach therein with intent to "escape, he or she so offending, being convicted thereof, shall be punished by imprisonment for a "term not exceeding 12 calendar months, in addition to the punishment to which he or she at the "time of committing any such offence was subject."

It is observable that such an attempt to escape from Milbank Penitentiary is punishable with an addition of imprisonment not exceeding six calendar months, whilst the like offence by one confined in Parkhurst Prison is punishable with twelve months additional imprisonment. A specific law against such an offence is unnecessary, inasmuch as the attempt to escape is a crime by the existing law, and we propose to continue it as such.

ART. 95.

Second escape.

Whosoever, being a convict in custody under any sentence or order of imprisonment, and having been convicted in respect of any escape from custody under such sentence or order, shall afterwards escape, shall incur the penalties of the class. (*y*)

(*y*) Several special provisions are made by statutes for punishing a second escape from particular places and prisons.

The statute 59 Geo. III. c. 136, s. 17 (an Act for the better regulation of the General Penitentiary for convicts at Millbank) enacts, "That if any convict, who shall be ordered to be confined in the said "penitentiary, shall at any time during the term of such confinement, break prison, or escape from "the place of his or her confinement, or in his or her conveyance to such place of confinement, or "from the person or persons having the lawful custody of such convict, he or she so breaking prison "or escaping shall be punished by an addition not exceeding three years to the term for which he or "she at the time of his or her breach of prison or escape was subject to be confined; and if such "convict so punished by such addition to the term of confinement shall afterwards be convicted of a "second escape or breach of prison, he or she shall be adjudged guilty of felony without benefit of "clergy" (since reduced to transportation for life, &c., by the 7 Will. IV. and 1 Vic. c. 91, ss. 1 and 2).

And by the 1 & 2 Vic. c. 82, s. 12 (an Act for establishing a prison for young offenders), it is enacted, "That if any offender who shall be ordered to be confined in Parkhurst prison shall at any "time during the term of such confinement break prison or escape from the place of his or her con-"finement, or in his or her conveyance to such place of confinement, or from any lands belonging to "the prison, or from the person or persons having the lawful custody of such offender, he or she so "breaking or escaping shall be punished, if under sentence of imprisonment, by an addition not "exceeding two years to the term for which he or she at the time of his or her breach of prison or "escape was subject to be confined; and, if under sentence of transportation, in such manner as "persons under sentence of transportation escaping from or breaking out of any other prison or place "of confinement are liable to be punished; and if an offender so punished by such addition to the "term of confinement shall afterwards be convicted of a second escape or breach of prison, he or "she shall be adjudged guilty of felony" (and as the Act provides no punishment is punishable under the 7 & 8 Geo. IV. c. 28, s. 8, with transportation for seven years, &c.).

These enactments vary very much as to the maximum of punishment to be inflicted. In respect of a second escape from Parkhurst prison, the offender is liable to seven years' transportation at the most, whilst in the case of Millbank penitentiary such an offender may be punished with transportation for life. We see no reason either for so great a disparity in the two cases, or for confining the penalty exclusively to escapes from those prisons, and we have accordingly proposed a more general provision.

Art. 96.

Escape by prisoner under sentence of transportation.

Whosoever, being a prisoner in lawful custody, under sentence of transportation, shall, at any time previously to such transportation, unlawfully escape from such custody, shall incur the penalties of the class.

Art. 97.

Whosoever, having been sentenced, or ordered to be transported, or banished, or having agreed to transport or banish himself on certain conditions, either for life or any number of years, under the provisions of an Act passed in the fifth year of the reign of King George the Fourth, intituled "An Act for the Transportation of Offenders from Great Britain," or any former Act, shall afterwards, contrary to such sentence, order, or agreement, be at large within any part of Her Majesty's dominions, without some lawful cause, shall incur the penalties of the class. (*z*)

(*z*) 5 Geo. IV. c. 84, s. 22; 4 and 5 Will. IV. c. 67.

Art. 98.

Being at large after sentence and order of banishment, under the provisions of the Catholic Relief Act.

Whosoever, after having been sentenced and ordered to be banished, under the provisions of an Act passed in the tenth year of the reign of King George the Fourth, entitled, "An Act for the Relief of His Majesty's Roman Catholic Subjects," shall be at large within any part of the United Kingdom, without some lawful excuse, after the end of three calendar months from the time such sentence and order have been pronounced, shall incur the penalties of the class. (*a*)

(*a*) 10 Geo. IV. c. 7, s. 36.

Art. 99.

Rescuing or aiding escape of prisoner charged with treason.

Whosoever shall rescue, or endeavour to rescue, any prisoner, being in lawful custody, by virtue of any warrant of commitment for treason, or for suspicion of treason, or shall aid or assist any such prisoner in escaping, or endeavouring to escape, from any lawful custody, shall incur the penalties of the class. (*b*)

(*b*) We insert this article here, although connected with Treason, the offence being, by the 16 Geo. II. c. 31, s. 3, a felony simply.

Art. 100.

Rescuing or aiding the escape of prisoner in custody for felony.

Whosoever shall rescue, or endeavour to rescue, any prisoner being in lawful custody for felony, or upon any charge or suspicion of felony, or being in lawful custody, under any sentence or order of imprisonment, transportation, or banishment, or shall aid or assist any such prisoner in escaping or endeavouring to escape from any lawful custody, shall incur the penalties of the class.

Art. 101.

In custody for any other cause.

Whosoever shall rescue, or endeavour to rescue, any prisoner, being in lawful custody for any other cause than is specified in Articles 99 and 100, or shall aid

or assist any such prisoner in escaping or endeavouring to escape from any lawful custody, shall incur the penalties of the class. (*c*)

(*c*) It is proposed by the general enactments (Art. 99, 100, and 101) to supersede the provisions of the statutes 16 Geo. II. c. 31, s. 3; 56 Geo. III. c. 63, s. 44; 1 and 2 Geo. IV. c. 88, s. 1; 4 Geo. IV. c. 64, c. 43; 5 Geo. IV. c. 84, s. 22; and 1 and 2 Vic. c. 82, s. 13.

The statute 16 Geo. II. c. 31, s. 3, enacts, "That if any person shall aid or assist any prisoner to "attempt to make his or her escape from the custody of any constable, headborough, tithingman, or "other officer or person who shall then have the lawful charge of such prisoner, in order to carry him "or her to gaol, by virtue of a warrant of commitment for treason or any felony (except petty larceny), "expressed in such warrant; or if any person shall be aiding or assisting to any felon to attempt to "make his escape from on board any boat, ship, or vessel carrying felons for transportation, or from "the contractor for the transportation of such felons, his assigns or agents, or any other person to "whom such felon shall have been lawfully delivered in order for transportation, every person so "offending, and being convicted, shall be deemed guilty of felony, and be transported for seven "years."

The statute 56 Geo. III. c. 63, s. 44 (an Act to regulate the General Penitentiary for convicts at Milbank, in the county of Middlesex), enacts, "That if any person shall rescue any convict who shall "be ordered to be confined within the said Penitentiary, either during the time of his or her convey-"ance to the said Penitentiary, or whilst such convict shall be in the custody of the person or persons "under whose care and charge he or she shall be so confined; or if any person shall be aiding or "assisting in any such rescue, every such person so rescuing, aiding, or assisting, shall be guilty of "felony, and may be ordered to be confined in the said Penitentiary for any term not less than one "year, nor exceeding five years."

The statute 1 and 2 Geo. IV. c. 88, s. 1, enacts, "That if any person shall rescue, or aid and assist "in rescuing, from the lawful custody of any constable, officer, headborough, or other person whom-"soever, any person charged with, or suspected of, or committed for any felony, or on suspicion "thereof, then if the person or persons so offending shall be convicted of felony, and be entitled to the "benefit of clergy, and beliable to be imprisoned for any term not exceeding one year, it shall be "lawful for the Court, by or before whom any such person or persons shall be convicted, to order and "direct, in case it shall think fit, that such person or persons, instead of being so fined and imprisoned "as aforesaid, shall be transported beyond the seas for seven years, or be imprisoned only, or be "imprisoned and kept to hard labour in the common gaol, House of Correction, or Penitentiary House "for any term not less than one and not exceeding three years."

This enactment, it is observable, is confined to rescues of prisoners apprehended for felony whilst in the personal custody of a constable or other person. The statute regards the offender in such case as an accessory after the fact, and, therefore, guilty of felony, and enables the Court to transport him for seven years.

The statute 4 Geo. IV. c. 64, s. 43 (an Act for consolidating and amending the laws relating to the building, repairing, and regulating certain gaols and houses of correction in England and Wales) enacts as follows: "That if any person shall, by any means whatever, aid and assist any prisoner to "escape from any prison, every person so offending, whether an escape be actually made or not, shall "be guilty of felony, and, being convicted thereof, shall be transported beyond the seas for any term "not exceeding fourteen years."

This statute, therefore, makes the offence of aiding and assisting *any* prisoner to escape from *any* prison within the scope of the Act, punishable with transportation for fourteen years, that being the maximum of punishment.

The statute 5 Geo. IV. c. 84, s. 22, enacts as follows: "That if any person shall rescue or attempt "to rescue, or assist in rescuing or attempting to rescue, any offender (who shall have been sen-"tenced or ordered to be transported or banished, or who shall have agreed to transport or banish "himself or herself on certain conditions, either for life or any number of years) from the custody of the "superintendent or overseer, or of any sheriff, or gaoler, or other person, conveying, removing, trans-"porting, or reconveying him or her, every such offence shall be punishable in the same manner as "if such offender had been confined in a gaol or prison, in the custody of the sheriff or gaoler, for "the crime of which such offender shall have been convicted."

The statute 1 and 2 Vic. c. 82, s. 13, enacts, "That every person who shall rescue any offender "who shall be ordered to be confined within Parkhurst Prison, either during the time of his or her "conveyance to the said prison, or whilst such offender shall be in the custody of the person or persons "under whose care and charge he or she shall be so confined, and also every person who shall aid in "any such rescue, shall be guilty of felony" (and no punishment being provided by the Act, punish-able under the 7 and 8 Geo. IV. c. 28, s. 8, with transportation for seven years, &c.)

The general clauses above proposed will, it is presumed, include all the offences comprised in the several statutes above cited.

It is to be observed, that the 4 Geo. IV. c. 64, s. 43, fixes the maximum punishment at trans-portation for fourteen years in all cases, without regard to the magnitude or degree of the crime in respect of which the prisoner is confined; whilst the 16 Geo. II. c. 31, s. 3, fixes the maximum at seven years' transportation, but is applicable only to rescues of prisoners from the personal custody of officers and others. It seems to us that there is little room, in point of principle, for distinguishing between the rescue of an offender from the custody of an officer and the aiding an escape from prison; for, although the latter offence is no doubt aggravated, usually at least, by a violent breaking of the prison, yet the rescuing of prisoners from mere personal custody is often more easy and more likely to be attempted than the procuring of an illegal escape from prison, and is likely to be attended with more mischievous consequences in occasioning personal and fatal conflicts between offenders and ministers of justice. We do not, therefore, hesitate in recommending that the maximum punishment, in case of rescue for treason or felony, should be made equal to the maximum punishment for aiding an escape from an actual prison. But we think that in both cases a distinction ought to be made in respect of the offence with which the party rescued or liberated is charged. According to the prin-ciple of the ancient law, the party guilty of rescuing or liberating the offender incurred the same degree of guilt with the party liberated. By rescuing a traitor, felon, or misdemeanant, the deliverer was also guilty of treason, felony, or misdemeanor. In the case of felony, however, he was liable only to the ordinary punishment for felony, even although the principal offender would have been

ousted of his clergy. In analogy to the ancient practice, we think it proper that the punishment of a party so offending against the administration of justice should depend upon the magnitude of the offence committed by, or charged against, the original offender.

We conceive, also, that the several enactments against the rescuing of persons ordered to be confined in Parkhurst Prison and in the Penitentiary at Milbank, as well as those against the aiding of escapes from either of those prisons, would be superseded by the Articles above proposed.

Art. 102.

Conveying instruments into prison to facilitate the escape of a prisoner.

Whosoever shall convey into any gaol, house of correction, or other prison, wherein any prisoner shall be lawfully confined for any offence, or upon any charge or suspicion of any offence, or by reason of any indictment for any offence, or after conviction of any offence, any article or thing for the purpose of disguise, or any instrument or arms, with intent to procure or facilitate the escape of any prisoner therein; or shall deliver or cause to be delivered to any prisoner being in lawful custody for any offence, or upon any charge or suspicion thereof, any article or thing for the purpose of disguise, or any instrument or arms, with intent to procure or facilitate the escape of such prisoner, shall incur the penalties of the class. (*d*)

(*d*) The 4 Geo. IV. c. 64, s. 43, contains the following provision:—"If any person shall convey "or cause to be conveyed into any prison to which this Act shall extend, any mask, vizor, or other "disguise, or any instrument, or arms proper to facilitate the escape of any prisoner, and the same "shall deliver or cause to be delivered to any prisoner in such prison, or to any other person there "for the use of any such prisoner, without the consent or privity of the keeper of such prison, every "such person shall be deemed to have delivered such vizor or disguise, instrument, or arms, with "intent to aid and assist such prisoner to escape, or attempt to escape; and if any person shall, by "any means whatever, aid and assist any prisoner to escape or in attempting to escape from any "prison, every person so offending, whether an escape be actually made or not, shall be guilty of "felony, and being convicted thereof, shall be transported beyond the seas for any term not exceeding "14 years."

We recommend the adoption of a more general form as comprehending all places in which a prisoner is lawfully confined for any offence, or upon any charge or suspicion of offence, and not restricted to the gaols, &c., specified in the Stat. 4 Geo. IV. c. 64. It seems to be unnecessary to limit the offence to the case where the disguise, instrument or arms are delivered either *to* the prisoner, or to *some other* for his use; a fact, the proof of which may sometimes be difficult, although the act of introducing such articles into the prison for the purpose of facilitating the prisoner's escape may be perfectly clear. It seems also to be unnecessary to make the want of privity on the part of the keeper essential to an offence, the mischief of which may possibly be effected even with the privity of a colluding keeper.

The Stat. 5 Geo. IV. c. 84, s. 22, enacts that, "If any person shall convey or cause to be con-"veyed any disguise, instrument for effecting escape, or arms, to any offender (who shall have been "or shall be sentenced or ordered to be transported or banished, or who shall have agreed or shall "agree to transport or banish himself or herself on certain conditions either for life or any number of "years, under the provisions of that or any former Act), such offence shall be punishable in the same "manner as if such offender had been confined in a gaol or prison in the custody of the sheriff or "gaoler, for the crime of which such offender shall have been convicted."

It is, we think, expedient that the enactment of the statute against supplying any instruments, arms, or means of disguise, should not be confined to the case of a prisoner under sentence of transportation. And, in conclusion, we think it desirable that the offence should be punished directly, as a substantive offence, and not indirectly by means of a declaratory enactment.

Art. 103.

Aiding escape of convicts from New South Wales or Van Diemen's Land.

Whosoever shall in any manner contrive, aid, abet, or assist in the escape or intended escape from any part of New South Wales or Van Diemen's Land, or the dependencies thereof, of any person or persons there being under or by virtue of any judgment or sentence of transportation for any term not then expired, or of any judgment or sentence pronounced in any court of competent jurisdiction in the said colony or its dependencies, shall incur the penalties of the class. (*e*)

(*e*) 9 Geo. IV. c. 83, s. 34.

Art. 104.

Rescuing murderer.

Whosoever shall by force set at liberty, or attempt to rescue or set at liberty any person out of prison who shall be committed for or found guilty of murder, or shall rescue or attempt to rescue any person convicted of murder going to execution, or during execution, shall incur the penalties of the class. (*f*)

(*f*) 25 Geo. II. c. 37, s. 9; 7 Will. IV. & 1 Vic. c. 91. s. 1 & 2.

Art. 105.

Rescuing body of murderer after execution.

Whosoever, after execution had of a person convicted of murder, shall by force rescue or attempt to rescue the body of such offender out of the custody of the sheriff or his officer previous to the interment of such body, shall incur the penalties of the class. (*g*)

(*g*) See 25 Geo. II. c. 37, s. 9 & 10; 9 Geo. IV. c. 31; 2 & 3 Will. IV. c. 75. The last mentioned Act has abolished the sentence to be pronounced on a convicted murderer as relates to the dis-

section of his body after execution, and consequently s. 9 & 10, of the 25 Geo. II. c. 37, are incidentally repealed. The 2 & 3 Will. IV. c. 75, however, directs that the body of such murderer shall be buried within the precincts of the prison in which he was confined after conviction.

ART. 106.

General rule.

Every one shall be deemed to be a prisoner in lawful custody from the time of the arrest, surrender, detention, or retaking of such prisoner, so long as he shall continue to be under lawful restraint of his personal liberty, to the time when he shall be lawfully delivered by due course of law, and whether he shall be, during the whole or any portion of that time in the personal custody of any officer of justice, or any other person, or confined within any gaol, house of correction, penitentiary, building, or other place of confinement, by virtue of any lawful authority; and every prisoner under any sentence or order of transportation shall be deemed to be a prisoner in lawful custody so long as he shall be in the custody of any superintendent or overseer, sheriff, gaoler, or other officer, or person keeping, conveying, removing, transporting, or reconveying such prisoner, and until such sentence or order shall have been completely executed.

ART. 107.

Rules as to escape.

Any offence committed by any prisoner in escaping or attempting to escape from lawful custody, shall be deemed to be a substantive and distinct offence, the punishment whereof, so far as the same may consist of imprisonment or transportation, shall be suffered at any time after the expiration of any term of imprisonment, or of any term of transportation short of transportation for life, to which the offender may be liable at the time of his so escaping or attempting to escape.

ART. 108.

Any freedom from custody for any space of time whatsoever unlawfully obtained by a prisoner, shall be deemed to constitute an escape from custody.

ART. 109.

Misprision of treason.

Whosoever shall conceal or keep secret any treason which shall have been committed, or shall be intended to be committed, shall be guilty of misprision of treason, and incur the penalties of the class. (*h*)

(*h*) 1 & 2 Phil. and Mary, c. 10, s. 8. It may hereafter be proper to transfer this Article to the head of Offences against the State.

ART. 110.

Misprision of other offences.

Whosoever shall conceal or keep secret any crime punishable with which shall have been committed or shall be intended to be committed by any other person, shall incur the penalties of the class. (*i*)

(*i*) See the Prefatory Remarks, p. 31, which explain our views in respect of this offence, and our reasons for doubting whether it ought to extend to the concealment of *all* felonies, as now constituted.

ART. 111.

Misprision by sheriffs, &c.

Whosoever, being a sheriff, coroner, or any other bailiff within franchise or without, shall, for reward, or for prayer, or for fear, or for any manner of affinity, conceal, or consent or procure to conceal the felonies done in their liberties, or otherwise not attach or arrest such felons there as they may, or shall otherwise not do their office for favour borne to such misdoers, shall incur the penalties of the class. (*j*)

(*j*) 3 Edw. I. c. 9. Perhaps this provision is rendered unnecessary by the Articles, one of which (Art. 8) subjects officers to punishment for neglect of duty, and the other of which (Art. 110) makes concealment by any person whatsoever criminal. It is, however, to be observed, that the offence contained in this Article is a misprision aggravated by its being committed by an officer of justice.

ART. 112.

Concealment of Offenders.

Whosoever, knowing any other person to be liable to apprehension in respect of any offence by him committed, or by virtue of any warrant to arrest him for any offence or upon any charge or suspicion of any offence, or by reason of any indictment found against him, shall, by concealing or aiding the flight of such other person, or by any other means whatsoever prevent, or endeavour to prevent, the arrest of such other person, shall incur the penalties of the class. (*k*)

(*k*) See the Prefatory Remarks, p. 30, where our reasons are given for not confining this law to offences of the degree of felony. It may hereafter, with a view to the apportionment of punishment, be deemed necessary to constitute two degrees of this offence.

ART. 113.

Compounding penal actions.

Whosoever shall offend (except in the case of clerks of the Court only for making out of process otherwise than as is appointed by an Act passed in the

eighteenth year of the reign of Queen Elizabeth, intituled an Act to redress disorders in common informers) in suing out of process, making of composition, or other misdemeanor, contrary to the true intent and meaning of that Act, or by colour or pretence of process, or without process, upon colour or pretence of any matter of offence against any penal law, shall make any composition, or take any money, reward, or promise of reward for himself, or to the use of any other, without order or consent of some of Her Majesty's Courts at Westminster shall incur the penalties of the class. (*l*)

(*l*) 18 Eliz. c. 5, s. 4; 27 Eliz. c. 10.

ART. 114.

Compounding offences.

Whosoever shall unlawfully and without the licence of any Court, or other competent authority, compound any indictable offence, shall incur the penalties of the class. (*m*)

(*m*) See the Prefatory Remarks, p. 32.

ART. 115.

Definition of compounding an offence.

Compounding an offence consists in any agreement or promise, for any reward, restitution, or other consideration, to forbear to prosecute or to further prosecute an offender in respect of any offence.

ART. 116.

Taking reward for helping to stolen goods.

Whosoever shall corruptly take, *or agree to take*, (*n*) any money or reward, directly or indirectly, under pretence or on account of helping any person to any property, which shall by any felony or misdemeanor have been stolen, taken, detained, or converted, shall (unless the person so taking, *or agreeing to take*, such money or reward as aforesaid shall cause the offender to be apprehended and brought to trial for the same), incur the penalties of the class. (*o*)

(*n*) The words in italics are not in the statute from which this Article is taken, but ought, we think, to be included.

(*o*) 7 & 8 Geo. IV. c. 29, ss. 4 and 58.

ART. 117.

Preventing the discovery, &c., of things unlawfully obtained from vessels in the Thames.

Whosoever, for the purpose of preventing the seizure or discovery of any materials, furniture, stores, or merchandize belonging to, or having been part of, the cargo of any ship, boat, or vessel lying in the river Thames, or the docks or creeks adjacent thereto, or of any other articles unlawfully obtained from any such ship or vessel, shall wilfully let fall or throw into the river, or in any other manner convey away from any ship, boat, or vessel, wharf, quay, or landing-place, any such article, shall incur the penalties of the class. (*p*)

(*p*) 2 and 3 Vic. c. 47, s. 28. This offence is declared by the above section of the statute to be a misdemeanor, but no specific punishment is appointed. By the 73d section of the same statute it is enacted that, for every misdemeanor or other offence against that Act, for which no special penalty was therein appointed, the offender should be liable to a penalty of five pounds, or imprisonment for one month, upon summary conviction. If this clause is not to be considered as qualified by what follows, it would seem to exclude a prosecution by indictment; but the 74th section contains an express proviso that nothing in the Act contained shall be construed to prevent any person from being indicted for any indictable offence thereby made punishable on summary conviction. Notwithstanding this proviso, it may still be questionable whether the prosecution by indictment is not to be restrained to offences made summarily punishable under the Act, but also indictable either at common law, or by the enactments of some other statute. We are unable, however, to discover any offences in that predicament.

ART. 118.

Oppression by judicial officers.

If any judicial officer shall, in violation of his oath of office, where such oath shall be required by law, or otherwise, in violation of his duty as such officer, corruptly or maliciously do, or omit to do, any act to the oppression or injury of any other person, he shall incur the penalties of the class. (*q*)

(*q*) See the Prefatory Remarks, p. 22. The 18 Edw. III. St. 4 (see Art. 41) includes only the queen's justices, and not inferior judges or magistrates.

Of this offence Mr. Just. Blackstone, 4 Comm. 140, observes,—"There is yet another offence against public justice which is a crime of deep malignity; and so much the deeper, as there are many opportunities of putting it in practice, and the power and wealth of offenders may often deter the injured from a legal prosecution; this is the oppression and tyrannical partiality of judges, justices, and other magistrates, in the administration, and under colour of their office."

Several ancient statutes make specific provision for the punishment of those guilty of abuses of authority in particular instances.

The stat. 52 Hen. III. c. 4, enacts that, "none from henceforth shall cause any distress that he hath "taken to be driven out of the county where it was taken; and if one neighbour do so to another of "his own authority, and without judgment, he shall make fine (as above is said) as for a thing done "against the peace; nevertheless if the lord presume so to do against his tenant, he shall be grievously punished by amerciament. Moreover distresses shall be reasonable, and not too great. And "he that taketh great and unreasonable distresses shall be grieviously amerced for the excess of such "distresses."

The 3 Edw. I. c. 23, enacts, that "In no city, borough, town, market, or fair there be no foreign "person, which is of this realm, distrained for any debt wherefore he is not debtor or pledge; and "whosoever doth it shall be grievously punished, and without delay the distress shall be delivered "unto him by the bailiffs of the place, or by the King's bailiffs, if need be."

Again, the statute 3 Edw. I. c. 35, is as follows: "Of great men and their bailiffs and other (the "King's officers only excepted, unto whom especial authority is given) which at the complaint of some "or by their own authority attach others passing through their jurisdiction with their goods, com- "pelling them to answer afore them upon contracts, covenants, and trespasses done out of their "power and their jurisdiction, where indeed they hold nothing of them, nor within the franchise "where their power is, in prejudice of the King and his Crown, and to the damage of the people. It "is provided that none from henceforth do so, and if any do he shall pay to him that by this occasion "shall be attached his damages double, and shall be greviously amerced to the King."

The 1 Rich. II. c. 13, enacts: "Item, the prelates and clergy of this realm do greatly complain "them, for that the people of holy church pursuing in the spiritual court for their tithes and their "other things, which of right ought and of old times were wont to pertain to the same spiritual court; "and that the judges of holy church having cognizance in such cases, and other persons thereof med- "dling according to the law, be maliciously and unduly for this cause indicted, imprisoned, and by "secular power horribly oppressed, and also enforced with violence by oaths and grievous obligations, "and many other means unduly compelled to desist and cease utterly of the things aforesaid against "the liberties and franchises of holy church. Wherefore it is assented, that all such obligations made "or to be made by duress or violence shall be of no value; and as to those that by malice do procure "such indictments, and to be the same indictors, after the same indictors be so acquit, such procurers "shall have and incur the same pain that is contained in the statute of Westminster, the second of "those which procure false appeals to be made; and the justices of assizes or other justices before "whom such indictees shall be acquit, shall have power to inquire of such procurers and indictors, and "duly to punish them according to their desert."

By the 7 Rich. II. c. 4, it is enacted, "That no man be taken nor imprisoned by any officer of the "forest, without due indictment or being taken with the mainour or trespassing in the forest, nor "shall be constrained to make any obligation or ransom to any officer of the forest in any sort against "their agreement and the assize of the forest; and if any do against this ordinance in any point, and "thereof be attainted, he shall pay to the party damnified their double damages, and fine and ransom, "to the King for his offence."

The statute 8 Elizabeth, c. 2, s. 4, enacts that "If any person or persons shall by any way or mean "maliciously, or for vexation and trouble, cause or procure any other person or persons to be arrested "or attached, to answer in any of the courts or places aforesaid, at the suit or in the name of any per- "son or persons, where indeed there is no such person or persons known, or without the assent, con- "sent, or agreement of such person or persons at whose suit and in whose name such arrest or "attachment is or shall be so had and procured, that then every such person and persons who shall so "cause or procure any such arrest or attachment of any other person or persons, to be had or made "for vexation or trouble as aforesaid, and shall thereof be convicted or lawfully accused by indictment, "presentment, or by the testimony of two sufficient witnesses or more, or other due proof, shall for "every such offence by him or them committed, done, or procured, have and suffer imprisonment of "his or their body or bodies, by the space of six months, without bail or mainprize, and before he or "they shall be delivered out of prison shall pay unto the party or parties so arrested or attached, by "his or their means or procurement, treble the costs, charges, damages, and expenses that he or they "shall be put unto by reason or occasion of such arrest or attachment so had, and shall also forfeit "and pay unto such person or persons, in whose name or at whose suit he or they shall so procure "such arrest or attachment to be had or made, if then there shall be any such person known, the sum "of ten pounds for every such offence."

We have thought it proper to cite the above enactments, with a view to the consideration whether it may be deemed more convenient to dispense with them so far as they concern and define indictable offences, or still to retain them. Those relating to arrests and attachments, made within limited local jurisdictions for malicious purposes, are now of little importance even in respect of civil suits for damages. Those relating to distresses, however material they may still be as regards actions for damages, may in reference to criminal prosecutions be deemed obsolete, and the latter observation is also applicable to the offence of maliciously preferring indictments against ecclesiastical judges for taking cognizance of suits for tithes.

Art. 119.

Fabricating false evidence.

Whosoever shall fraudulently and deceitfully cause any fact or circumstance to exist, in order that such fact or circumstance may afterwards be proved in evidence against any other person, with intent to procure such other person to be unjustly charged with or convicted of any offence, shall incur the penalties of the class. (*r*)

(*r*) See the Prefatory Remarks, p. 26; and see the Penal Code prepared by the Indian Law Commissioners, note G.

Art. 120.

Conspiring to charge with any crime.

If several persons shall conspire falsely to charge any other with having committed any crime, every person so offending shall incur the penalties of the class. (*s*)

(*s*) The conspiring to make such a charge is criminal, although it be not prosecuted.—2 Russ. 573.

Art. 121.

Extortion by gaoler.

Whosoever, being a gaoler, shall extort from any prisoner any fee or gratuity for or on account of the entrance, commitment, or discharge of such prisoner, or

shall detain any prisoner in custody for non-payment of any fee or gratuity, shall incur the penalties of the class. (*t*)

(*t*) 55 Geo. III. c. 50, s. 13.

ART. 122.

Judges, &c., of the Court of Bankruptcy taking undue fees.

Whosoever, being a judge, commissioner, registrar, deputy-registrar, clerk, messenger, assignee, or any other officer or person whatsoever, who shall fraudulently and wilfully demand or take or appoint or allow any person whatsoever to take for him, or on his account, or for or on account of any person by him named, or in trust for him or any other person by him named, any fee, emolument, gratuity, sum of money, or anything of value whatsoever for anything done or pretended to be done under an Act passed in the 1st & 2d years of the reign of King Will. IV., intituled (an Act to establish a Court in bankruptcy), or any other Act relating to bankrupts, or under colour of doing anything under that Act, or any other such Acts other than is allowed by that Act and any other such Act as aforesaid, shall incur the penalties of the class. (*u*)

(*u*) 1 & 2 Will. IV. c. 56, s. 58. This Article may afterwards be properly transferred to the class of offences against the Bankrupt Laws.

ART. 123.

Officers of the Court of Chancery taking undue fees.

Whosoever being a Master in ordinary of the High Court of Chancery, or a person holding any office, situation, or employment in any office of the said Court, or under any of the judges or officers thereof, shall wilfully take, demand, receive, or accept, or appoint, or allow any person whatsoever to take for him or on his account, or for or on account of any person by him named, or in trust for him or for any other person by him named, any fee, gift, gratuity, or emolument, or anything of value, other than what is allowed or directed to be taken by him for anything done or pretended to be done relating to his office, situation, or employment, or under colour of doing anything relating to his office, situation, or employment, shall incur the penalties of the class. (*v*)

(*v*) 3 & 4 Will. IV. c. 94, s. 41.

ART. 124.

Justices' marshals taking money wrongfully.

Whosoever, being a justices' marshal, shall take money wrongfully of such as recover seisin of land, (*w*) or of them that obtain their suits, or of jurors, prisoners, or of others attached upon pleas of the Crown, otherwise than they ought to do, shall incur the penalties of the class. (*x*)

(*w*) By the statute 3 and 4 Will. IV. c. 27, s. 36, all real actions were abolished from the 31st December, 1834; and, therefore, as seisin cannot be recovered in any case not now pending, this part of the above ancient law (if not already obsolete, as stated in the next note) will shortly become wholly inoperative. In ejectment, the party recovers only the possession.

(*x*) 3 Edw. I. c. 30. The above provision appears to be obsolete, as it seems to have been confined exclusively to the marshals of the Justices in Eyre.

ART. 125.

Sheriff, &c., taking money wrongfully.

Whosoever, being a sheriff, or other ministerial queen's officer, shall take any reward to do his office beyond that which he takes of the queen, shall incur the penalties of the class. (*y*)

(*y*) 3 Edw. I. c. 26. The provisions contained in this and the next article appear to be superseded by the more general law.

ART. 126.

Extortion by sheriff.

Whosoever, being a sheriff, shall do any extortion to the people shall incur the penalties of the class. (*z*)

(*z*) 1 Hen. IV. c. 11. See the note to the last preceding Article.

The following enactment, 2 & 3 Edw. VI. c. 6, may, we think, be regarded as obsolete:—"Neither "the admiral, nor any officer or minister, officers or ministers of the Admiralty for the time being, shall "in anywise hereafter exact, receive, or take by himself, his servant, deputy, servants or deputies, of "any merchant or fisherman using and practising the adventures and journeys into Iceland, New-"foundland, Ireland, and other places commodious for fishing and the getting of fish, in or upon the "seas or otherwise, by way of merchandize in those parts, any sum or sums of money, doles or "shares of fish, or any other reward, benefit, or advantage, whatsoever it be, for any licence to pass "this realm to the said voyages or any of them; or upon any respect concerning the said voyages or "any of them upon pain to forfeit for the first offence treble the sum or treble the value of the reward, "benefit, or advantage that any such officer or minister shall hereafter have or take of any such "merchant or fisherman, and for the second offence not only to forfeit his office, but also to make "fine and ransom at the king's will and pleasure."

ART. 127.

Officers exacting fees from prisoners on acquittal, &c.

Whosoever, being clerk of assize, clerk of the peace, clerk of the court, or any of their deputies or other officer, shall exact fees from any prisoner against whom no bill of indictment shall be found by the grand jury, or who on his trial shall be

acquitted, or who shall be discharged by proclamation for want of prosecution, for or in respect of his discharge, shall incur the penalties of the class. (*a*)

(*a*) 55 Geo. III. c. 50, s. 9.

ART. 128.

Barretry.

Whosoever shall be a common barretor, shall incur the penalties of the class. (*b*)

(*b*) See the Prefatory Remarks, p. 33, for the definition of a common barretor. We have not thought it necessary to insert any Article on the subject, as we recommend the repeal of the law relating to Barretry; and, for the same reason, we have not made any detailed digest of the existing law as to maintenance and champerty.

ART. 129.

Maintenance.

Whosoever shall unlawfully intermeddle in a suit that no way belongs to such person, by maintaining or assisting either party to such suit, with money or otherwise, to prosecute or defend the same, shall be guilty of maintenance, and incur the penalties of the class. (*c*)

(*c*) 4 Black. Com. 134. See the Prefatory Remarks, p. 34.

ART. 130.

Champerty.

Whosoever shall bargain with either party to a suit to prosecute or defend the same at his own expense, on condition that such party will divide with him the land, or other matter sued for, if successful in such suit, shall be guilty of champerty, and incur the penalties of the class. (*d*)

(*d*) 4 Black. Comm. 134. This offence is included in that of maintenance. See the Prefatory Remarks, p. 38.

FORGERY.

Prefatory Remarks.

THE characteristic of the crime of forgery is the false making of some written or other instrument for the purpose of obtaining credit by deception. The relation which this offence bears to the general system may be thus briefly established. In most affairs of importance the intentions, assurances, or directions of men are notified and authenticated by means of written instruments. Upon the authenticity of such instruments the security of many civil rights, especially the right of property, frequently depends; it is, therefore, of the highest importance to society to exclude the numerous frauds and injuries which may obviously be perpetrated by procuring a false and counterfeited written instrument, to be taken and acted on as genuine. In reference to frauds of this description, it is by no means essential that punishment should be confined to cases of actually accomplished fraud; the very act of falsely making and constructing such an instrument with the intention to defraud is sufficient, according to the acknowledged principles of criminal jurisprudence, to constitute a crime,—being in itself part of the endeavour to defraud, and the existence of the criminal intent is clearly manifested by an act done in furtherance and in part execution of that intention. The limits of the offence are immediately deducible from the general principle already adverted to. As regards the subject matter, the offence extends to every writing used for the purpose of authentication; as in the case of a will, by which a testator signifies his intentions as to the disposition of his property, or of a certificate by which an officer or other authorised person assures others of the truth of any fact, or of a warrant by which a magistrate signifies his authority to arrest an offender. The crime is not confined to the falsification of mere writings; it plainly extends to seals, stamps, and all other visible marks of distinction by which the truth of any fact is authenticated, or the quality or genuineness of any article is warranted; and, consequently, where a party may be deceived and defrauded from having been, by false signs, induced to give credit where none was due. With respect to the false making of any such instrument, the offence extends to every instance where the instrument is, under the circumstances, so constructed as to induce a party to give credit to it as genuine and authentic in a point where it is false and deceptive. And in this respect a forged instrument differs from one which is merely false and untrue in stating facts which are false. Where the instrument is forged, as where a certificate purporting to be signed by an authorised officer was not in truth signed by him, a party to whom it is shown is deceived in being induced to suppose that the fact certified is accredited by the officer whose certificate it purports to be, and he is deceived in that respect, whether the fact certified be true or false. If, on the other hand, such a certificate be in truth signed by the officer whose name it bears, the *instrument* is not forged, although the fact certified be falsely certified, for here the party receiving the certificate is deceived, not by being falsely induced to believe that the officer had accredited the instrument by his signature, but from the officer having falsely certified the fact. The instrument may, therefore, be forged, although the fact authenticated be true. The instrument may be genuine, although the fact stated be false. Where money or other property is obtained by an instrument of the latter description, that is, where it is false merely, as containing a false statement or representation, the offence belongs to the class of obtaining money or other property by false pretences.

Consistently with the principles which govern the offence of forgery, an instrument may be falsely made, although it be signed or executed by the party by whom it purports to be signed or executed. This happens where a party is fraudulently induced to execute a will, a material alteration having been made in the writing without his knowledge; for in such case, although the signature be genuine, the instrument is false, because it does not truly indicate

the testator's intentions, and it is the forgery of him who so fraudulently caused such will to be signed, for he made it to be the false instrument which it really is. Upon similar grounds an offender may be guilty of a false making of an instrument, although he sign or execute it in his own name, in case it be false in any material part, and calculated to induce another to give credit to it as genuine and authentic where it is false and deceptive. This happens where one, having conveyed land, afterwards, for the purpose of fraud, executes an instrument, purporting to be a prior conveyance of the same land. Here again the instrument is designed to obtain credit by deception as purporting to have been made at a time earlier than the true time of its execution. Other rules concerning the false making of an instrument within the scope of this offence are easily deducible from the same general principles. It can make no difference whether the whole instrument be false, or whether it be merely false in the material part by which the fraud is to be effected, or whether it be false by reason of some addition or omission, or by the obliteration of some material part. Whatsoever scheme or device be resorted to, the instrument is falsely made if it be calculated in its construction to obtain credit which does not belong to it, not being that which it purports or seems to be.

As regards the particular fraudulent intent with which an instrument is falsely made, the offence seems in principle to extend to every attempt to violate any right, whether it be of a public or private nature. There seems to be no other proper limit to the treating as criminal a fraud endeavoured to be executed by means so dangerous to rights of every description.

We now proceed to make some observations upon the law of England respecting this offence. The common law offence of forgery which constitutes the basis of a great variety of aggravated offences created by the statute law, has, from time to time, undergone some alterations; but we do not deem it necessary on this occasion to notice them, as the present law seems to be governed by the principles, and to be subject to the general limits to which we have already adverted

In early times few transactions, except such as were of a public nature, were conducted in writing, and the crime of forgery was, consequently, of rare occurrence. It has been doubted,* indeed, whether written instruments which were neither of a public nature, nor records, deeds, or wills, could be the subject of forgery at common law. It is probable, that on account of the much greater publicity and solemnity which formerly attended the execution of such instruments, that forgery was difficult of perpetration; and it may be inferred, that it was not of frequent occurrence, or that no great inconvenience was experienced from its commission, as at common law it was a misdemeanor only. When, however, the art of writing had became more common, and our extended commerce, in conjunction with the advancement of our political institutions, had introduced a system of credit previously unknown, so that writing became the ordinary medium for expressing and evidencing the intentions and contracts of parties, the importance of the crime and the injuries resulting from it increased, and it was then considered necessary to enhance the penalties denounced against those by whom it was committed. The statute 5th of Queen Elizabeth, c. 14, accordingly raised the crime to the degree of felony, without benefit of clergy, in the case of a second conviction for forging deeds, wills, court-rolls, &c.; and so many statutes were afterwards made that Sir W. Blackstone observes, "I believe, through the number of these general and special provisions, there is now hardly a case possible to be conceived, wherein forgery, that tends to defraud, whether in the name of a real or fictitious person, is not made a capital crime."† Since the publication of the Commentaries many other statutable provisions have been made applicable to particular cases; but the punishment of death is now no longer inflicted for any forgery, having been finally abolished by an Act of the 1st year of Your Majesty's reign, which substituted transportation for life, or not less than seven years, or imprisonment not exceeding four nor less than two years, in lieu of it. The greater number of special forgeries is now, therefore, liable to this substituted punishment. There are many others variously punished, but in most cases more severely so than the common law offence.

Such observations as we think it necessary to make concerning the particular provisions of the statute law will be more conveniently introduced in the notes to the Digest. We deem it, however, proper to premise a few observations as to the

* 1 Hawk. P. C. c. 70, s. 10.

† 4 Black. Comm. 250.

course which we have taken in executing this part of it. We have, in the first place, proceeded to define the common law offence. The general definition of the offence is in substance that which is given by Sir W. Blackstone, which we have adopted, and which is recommended by its conciseness, accuracy, and generality. We have, however, for the sake of comparison, stated those of several other very eminent judges. We have also introduced various Articles for the purpose of more particularly defining and explaining the nature and extent of the offence. Having thus disposed of the common law offence, we have next proceeded to deal with the statute law upon this subject. The statute book presents a mass of enactments made from time to time, inflicting a great variety of punishments on various modifications of the general crime. The great multitude of specific enactments applicable to various subject matters raises a question of some difficulty as to the course which ought to be taken with a view to digest these provisions. After defining the common law offence, the natural course would be to distinguish such instances of the offence as by reason of the greater degree of mischief likely to result, would require more exemplary punishment; and for this purpose instruments the subject of forgery would be classed in order, according to their greater or lesser degree of importance. The statute law of England concerning forgery has not, however, been constructed on any such principles; its provisions are in numerous instances too minute and particular to admit of general extension without an entire remodelling of this branch of the law.

There can be no doubt that the crime of forgery is capable of being defined nad expressed in a manner much more general and concise than that in which it now exists according to the law of England. Several foreign codes clearly show that this is practicable. As a specimen of what has been done in this respect we have added in the Appendix the Chapter on Forgery from the New York Revised Statutes. We have not, however, considered ourselves to be warranted in making alterations which would amount to an entire reconstruction of this branch of the law; and we have upon much consideration, after defining the general rules applicable to the common law offence of forgery, proceeded to arrange and classify the several statutory enactments relating to the offence, taking care as we proceeded to reject as much as possible what appeared to be redundant, and to compress the provisions of the existing law so far as was consistent with its identity.

There is, however, another and important consideration which, with respect to several very special and circumstantial enactments, renders the exclusion of general and extensive provisions strictly necessary. Many of the statutory enactments constituting offences for the protection of particular interests, especially such as concern the Bank of England, are of a very severe and arbitrary character, and such as cannot well be reconciled with sound and enlightened principles of criminal jurisprudence. For instance, by the statute 11 of King George IV. & 1 of King William IV., c. 66, s. 12, it is made highly criminal for a man to have a forged Bank note in his possession without lawful excuse, the proof whereof lies on the party accused. This law inverts the general principle of criminal jurisprudence, that a man is presumed to be innocent till his guilt be proved. A man may, therefore, be dealt with as an offender, not because he is really guilty, but because from accident, or otherwise, he cannot prove his innocence,—death or accident having precluded him from explaining the real circumstances of the transaction. Offences of this nature require to be most specifically stated and defined, and they must retain their arbitrary character, being incapable of generalization, as they are not founded upon principle.

Although, as we have already observed, many of the forgeries punishable by various statutes must be regarded as particular aggravations of the common law offence, yet, as the description of such aggravations involves that of the particular instrument, (the more severely punishing of the forgery of which was the object of the statute,) we have found it impossible to effect such a reduction of these enactments as we could have wished to have done without recommending the repeal of existing distinctions and gradations of punishment to a greater extent than appeared to us to be advisable. In some instances in consequence of the repeal of the capital punishment, the forging of any particular instrument, clearly falling within the description of some more general offence, has, by reason of its having become punishable in the same degree as the general offence, enabled us to get rid of the special enactment. We have, under the power delegated to us "to make such partial alterations as we might consider necessary or expedient

for more simply and completely defining crimes and punishments," embodied in the Digest such decisions as have arisen upon any branch of the common or statute law; and wherever the decisions have appeared to us to establish opposite principles, we have removed the discrepancy by the enunciation of that which appeared to us to be the preferable rule.

The Digest, so far as the statute law is concerned, consists of a great variety of special provisions left unrepealed by the statute 11th of King Geo. IV. & 1st of King Will. IV. c. 66, (the Forgery Consolidation Act,) of the larger number of the clauses of the last mentioned Act, and of the different forgery enactments passed since that Act. The clauses of the Forgery Consolidation Act which have been omitted relate to offences coming more appropriately under the head of Cheats, and in which division of the Digest they will be included.

The statute 11 King Geo. IV. & 1 King Will. IV. c. 66, although it repealed the statute 5 Queen Eliz., c. 14, together with a long list of the other capital forgeries mentioned by Sir W. Blackstone, yet, with respect to a considerable number, it only enacted that no person should suffer death for the same, unless the same should be made punishable with death by that Act; and that otherwise he should, on conviction, be transported for life or for any term not less than seven years, or be imprisoned for any term not exceeding four nor less than two years. It is of this latter class of offences that the Digest, exclusively of the provisions of the Forgery Consolidation Act, principally consists.

We have experienced some difficulty in cases where a statute makes it an offence to forge an instrument of a special nature, (the description of which is given in the statute, and occupies nearly all its sections,) whether we should include in the Digest the various clauses directing the form of such instrument, the mode of its execution, and the conditions to be fulfilled by the parties executing it, (which would, in many instances, be, in fact, to transcribe the whole statute,) or whether we should merely declare it to be an offence to forge "a certain instrument," (describing it by the general name given to it in the statute,) "particularly "mentioned in a certain Act, &c." After much hesitation we have concluded to adopt the latter mode, as being the more simple, and, at the same time, in more strict conformity with the description which we have given in our Fourth Report of the legitimate objects of the adjective or criminal branch of the law.

With respect to the offence of uttering forged instruments, knowing the same to be forged, the common law definition of forgery, strictly speaking, includes that crime as well as the false making of written instruments; but, as the act of uttering is distinct from the act of forgery, and as most modern statutes punish it as a substantive offence, we have thought it more convenient to omit it from the definition of forgery, and to constitute it a separate crime. This is, in point of fact, a merely formal alteration, as, in practice, the indictment always charges the prisoner with the uttering as well as with the forgery. In defining the acts in which an uttering consists, we have adopted the language of the Forgery Consolidation Act, and have rejected the string of other synonymous terms to be found in the statutes,—such, for instance, as "make use of," "pay away," "tender," "exhibit," "vend," "present for payment," "barter," "deliver," "produce," and "give,"—all of which are sufficiently comprised by the words "offer," "utter," "publish," "dispose of or put off," which we have made use of. Indeed this diversity of language for the expression of the same acts can only be accounted for by the fact of the different statutes in which they exist having been passed from time to time without reference to the law of forgery generally.

By the statute 12 of King Charles II., c. 22, s. 4, it was made felony to forge the seals of the Dutch Bay Hall, at Colchester; we have ascertained, however, that that corporation no longer exists, and it has consequently become unnecessary to continue that provision in the Digest.

FORGERY,

AND OTHER OFFENCES CONNECTED THEREWITH.

SUMMARY OF CONTENTS.

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Art. 1.

Forgery consists in the false and fraudulent making of an instrument with intent to prejudice any public or private right. (*a*) Definition of Forgery.

(*a*) The following are some of the definitions of forgery to be found in the authorities:—

Mr. Justice Blackstone: forgery is "the fraudulent making or alteration of a writing to the prejudice of another's right." 4. Comm. 247.

Mr. Justice Buller: "The making a false instrument with intent to deceive." Rex *v.* Coogan, Leach, 448.

Mr. Baron Eyre: "A false signature made with intent to deceive." Rex *v.* Taylor, 2 East's P. C., c. 19, s. 47.

Mr. Justice Grose, in delivering the opinion of the twelve judges: "The false making a note or other instrument with intent to defraud." Parkes and Brown's Case, 2 Leach, 775.

Mr. Baron Eyre: "The false making an instrument which purports on the face of it to be good and valid for the purposes for which it was created, with a design to defraud." Jones and Palmer's Case, 1 Leach, 366.

Sir E. H. East: "Forgery, at common law, denotes a *false* making, (which includes every alteraof or addition to a true instrument,) a making, *malo animo*, of any written instrument for the purpose of fraud and deceit."

It is said by Lord Coke in the 3rd Inst. 169, "To forge is metaphorically taken from the smith who beateth upon his anvil, and forgeth what fashion or shape he will: the offence is called *crimen falsi*, and the offender *falsarius*, and the Latin word to forge is *falsare* or *fabricare*."

Art. 2.

The term "instrument" shall be deemed to comprehend any written instrument, (*b*) and any character, figure, impression, device, or other visible mark of distinction (whether it be made to appear upon any material, or in the substance thereof), and also any type, die, seal, stamp, plate, or other instrument for making, upon any material whatsoever, any mark or impression used as a mean for authenticating the truth or genuineness of any fact or thing whatsoever. "Instrument."

(*b*) As it is essential to the criminal forgery of a written instrument that the act be done with intent to defraud or injure some other person, (see Art. 19,) it is incidentally essential that the instrument be such as is calculated to obtain false credit, and thereby to defraud or injure. The term "instrument," in its original popular sense, seems to signify any material thing constructed to produce a mechanical result. As applied to writing generally, the term must mean a writing constructed for the immediate purpose of effecting some moral result, such as belief or knowledge;

in a legal and technical sense it means a writing by which some such moral result is to be effected for a legal purpose. Thus, a bond is a legal instrument, because it notifies that a party is bound for the legal purpose of the obligation being enforced. A will is a legal instrument, because it is the mean of notifying the testator's intention, and has a legal operation in carrying that intention into effect.

ART. 3.

"Written." The term "written," as used in the last preceding Article, shall be deemed to apply, whether the words or figures of the instrument, or any of them, be expressed at length or abridged, and whether they be so expressed by means of writing, printing, or otherwise.

ART. 4.

What constitutes a false making. An instrument shall be deemed to be falsely made when it is not really the instrument or mean of authentication for which it is intended to be taken, but is fraudulently made with intent to obtain that credit which would be due to it if it were genuine.

ART. 5.

A written instrument, or other thing, the subject of forgery, shall be deemed to be falsely made, where it is falsely made in any material part. (*c*)

(*c*) 2 East's P. C. 855; 3 Inst. 171.

ART. 6.

Any fraudulent alteration of a written instrument in any material part, (*d*) whether it be by addition, diminution, erasure, transposition, or any combination of any of these acts, or any other device or means whatsoever, (*e*) shall be deemed to be a false making of the written instrument so altered.

(*d*) Teague's Case, 2 East's P. C. c. 19, s. 55, p. 979; 1 Hawk. c. 70, s. 2; Rex *v.* Elsworth, 2 East's P. C. 986; Rex *v.* Treble, 2 Taunt. 328; 2 Leach, 1040; 2 East's P. C. 853; Rex *v.* Birkett, Russ. and Ryan's C. C. 251; Per Ld. Ellenborough, 5 Esp. 100; Rex *v.* Marsh, 3 Mod. 66.

(*e*) Rex *v.* Bigg, 3 P. Wms. 419.

ART. 7.

If several persons shall make distinct parts of, or shall otherwise contribute to the making of a false written instrument or other thing the subject of forgery, each of such persons shall be deemed to have falsely made such written instrument or other thing. (*f*)

(*f*) Rex *v.* Kirkwood and others, 1 Moody's Crown Cases, 304; Rex *v.* Dade, *Ib.* 307. This Article will be afterwards superseded by a more general rule.

ART. 8.

If any person, being deceived as to the contents of any written instrument, shall by reason of such deception be fraudulently induced to sign or otherwise execute the same, the party by whom he was so induced to sign or execute it shall be deemed to have falsely made it. (*g*)

(*g*) The wilful insertion of a legacy in another's will unknown to him prior to and at the time of its execution is a forgery. 1 Hawk. P. C. c. 70, s. 2; 2 East's P. C. 856; cit. Moor, 760; Noy, 101.

ART. 9.

If a person fraudulently make or execute in his own name any written instrument which is false in respect of the date, or any other material part, it shall be deemed to be a false making of such instrument. (*h*)

(*h*) As when a person makes a subsequent deed of feoffment, as of a date prior to a former deed of his own, conveying the same lands, thereby giving to the last deed an operation which in justice it ought not to have, in order to defraud his own feoffee. 2 East's P. C. 855; 1 Hawk. P. C. c. 70, s. 2; 3 Inst. 169; Foster, 117; 1 Hale's P. C. 683; Moor, 655; Pulton, 47 b.

ART. 10.

It shall be deemed to be a false making of a written instrument if the offender falsely make it in the name of any other person, real or supposed, although such name be the offender's own name. (*i*)

(*i* 2 East's P. C. 962; Rex *v.* Dunn, 1 Leach, 57; Rex *v.* Hadfield, 6 Evans's Coll. St. pt. v. cl. xii. p. 579. 2 East's P. C. 957; Rex *v.* Lewis, Fost. 116; Rex *v.* Wilks, 2 East's P. C. 958; Rex *v.* Bolland, 1 Leach, 83; Rex *v.* Lockett, 1 Leach, 94; Rex *v.* Abraham, 2 East's P. C. 940.

By the case of Rex *v.* Brown, 2 Leach, 775; (2 East's P. C. 965); it seems to have been considered that the making of an instrument in the offender's own name, and afterwards pretending that it was the name of some other person, was also a false making; but this seems to be very doubtful. Suppose a party to make a note in his own name, without false description, or with an honest intention; such note not being false or forged, a misrepresentation at the time of uttering it cannot make it so. In Brown's case the note itself was false, not being made by a Brown resident at Rington, as it purported to be.

ART. 11.

No fraud consti- No fraud in respect of a written instrument or other thing will constitute forgery,

unless there be a false making of such instrument or other thing within the meaning of the preceding Articles. (*j*)

tutes forgery unless th re be a false making, within the preceding Article.

(*j*) 2 East's P. C. 856. It is not forgery to personate one whose name is indorsed on a bill and thereby to obtain credit in the name of another. Hevey's Case, 2 East's P. C. 856.

ART. 12.

In the case of a written instrument it is not essential that the forged instrument, should be such an instrument as would be valid if it were genuine, provided it be not illegal in its very frame. (*k*)

What is a sufficient written instrument.

(*k*) This is the language of the decided cases on this subject.—See them cited below, in the note to Art. 14.

ART. 13.

Where a statute prescribes a particular form as essential to a written instrument, the false making of an instrument in a different form is not a forgery of an instrument within such statute. (*l*)

(*l*) Moffat's Case, 2 East's P. C. 954; 1 Leach, 431.

ART. 14.

If a statute prescribe the form of a written instrument already in use, but without making that form essential, the false making of such an instrument according to the ordinary, although not according to the prescribed form, is a forgery of an instrument within such statute. (*m*)

(*m*) Rex *v.* Lyon, 2 Russ. 443; Rex *v.* Chisholm, Russ. and Ryan's Crown Cases, 297.

ART. 15.

It is not essential in any case where the forging of any thing is an offence, that the thing so forged should bear an exact resemblance to the thing which it is intended to represent, provided it so far resemble it as to be likely to be mistaken for it by any common observer. (*n*)

What resemblance, of the forged thing to some genuine thing sufficient.

(*n*) Rex *v.* Murphy, 2 East's P. C. 949; Rex *v.* Sterling, 1 Leach, 99; Rex *v.* Coogan, 1 Leach. 449; 2 East's P. C. 948; Rex *v.* Hawkeswood, 1 Leach, 257; 2 East's P. C. 955, 956; Rex *v.* Pateman, Russ. and Ryan's Crown Cases, 455; Rex *v.* Wall, 2 East's P. C. 953. Rex *v.* Callicott, 2 Leach, 1048; 4 Taunt. 300; Russ. and Ryan's Crown Cases, 212.

ART. 16.

Whosoever shall offer, utter, publish, dispose of, or put off any forged written instrument or thing, knowing the same to be forged, and with such criminal intent as is by law essential to constitute the false making of such written instrument or thing a forgery, shall incur the like penalties as if he had forged such written instrument or thing, with the same intent. (*o*)

Uttering, &c. forged things.

(*o*) See Prefatory Remarks. Strictly speaking, the offence of uttering a forged instrument knowing it to be forged, is included within the definition of the common law offence of forgery; but as the act of uttering is distinct from the act of forgery, and as most modern statutes make it a substantive offence, we have thought it more convenient to omit it from the definition of forgery, (see Art. 1,) and to constitute it a distinct crime.

ART. 17.

Whosoever, knowing any written instrument to be forged, shall, with intent to defraud any other person, claim, demand payment of, receive, or endeavour to have, any money mentioned in or supposed or pretended to be due upon such instrument, or any part thereof, shall incur the like penalties as if such offender had forged such instrument with the same intent.

Demanding, &c. money on forged instruments.

ART. 18.

The term "person," as used in the last preceding or any other Article under the present head, by which any act done with intent to defraud or injure any other person is made an offence, shall be deemed to include Her Majesty, or any foreign prince or state, or any body corporate, or any company or society of persons not incorporated, or any person or number of persons whatsoever who may be intended to be defrauded, whether such body corporate, company, society, person, or number of persons, shall reside or carry on business in England or elsewhere, in any place or country, whether under the dominion of Her Majesty or not; and it shall be sufficient in any indictment to name one person only of such company, society, or number of persons, and to allege the offence to have been committed with intent to defraud the person so named, and another or others, as the case may be. (*p*)

Definition of "person" where the committing any crime with intent to defraud or injure any person is an offence.

(*p*) 11 Geo. IV. and 1 Will. IV. c. 66, s. 28.

ART. 19.

Whosoever, with intent to defraud or injure any other person, (*q*) shall forge any written instrument, shall incur the penalties of the class.

Forgery of written Instruments.

(*q*) It is not essential that any person should be actually defrauded, nor that any particular person

should be intended to be defrauded. 2 East's P. C. 854. A general intention to defraud is sufficient. 3 Term Rep. 176; 1 Leach, 216 Note (*a*); Rex *v.* Mazagora, Russ. and Ryan's Crown Cases, 291.

Some doubt has been expressed whether written instruments, which were neither of a public nature, nor records, deeds, or wills, could be the subjects of forgery at common law. It is said by Serjeant Hawkins, that it seems to have been generally laid down that the counterfeiting writings of an inferior nature to public documents, records, deeds, and wills, is not forgery; and that it is safer to proceed against offences of this nature as cheats than as forgeries. (1 Hawk. P. C. c. 70, s. 10.) There does not appear, however, to be any solid ground for such a distinction; and in the case of R. *v.* Ward, 2 Ld. Raym. 1461, 2 Stra. 747, it was determined that the crime extended to all written instruments, by the forgery of which a party might be prejudiced.

At common law the crime of forgery was a misdemeanor only, and punishable as other misdemeanors; but so many Acts of Parliament have been passed, making the forgery of particular written instruments felony, that indictments for forgery at common law are very rarely resorted to.

ART. 20.

Forging written instruments of justice, muniments of title, and testamentary instruments.

Whosoever, with intent to defraud any other person, shall forge any written instrument of justice, or any office copy thereof, or any muniment of title, or testamentary instrument, shall incur the penalties of the class. (*r*)

(*r*) This Article is new, except in respect of forging testamentary instruments, court rolls and copies of court rolls, which offences are now respectively punishable under the 11 Geo. IV., and 1 Will. IV. c. 66, ss. 3 and 10, and the 7 Will. IV., and 1 Vic. c. 84, ss. 2 and 3, with transportation for life, &c.; and except so far as the forging of a few documents, coming under the denomination of written instruments of justice, is provided for by the 12 Geo. I. c. 32, s. 9; 53 Geo. III. c. 151, s. 12; and 1 Geo. IV. c. 35, s. 27 (see Art. 37). We have had no hesitation, since the repeal of the punishment of death for forgery, in introducing the above Article, which extends the same degree of punishment to the forgery of *all* instruments of justice and muniments of title.

ART. 21.

Forging an Exchequer bill, Exchequer debenture, East India bond, bank note, bill of exchange, promissory note or undertaking, warrant or order for the payment of money.

Whosoever, with intent to defraud any other person, shall forge any Exchequer bill, or Exchequer debenture, or any indorsement on or assignment of any Exchequer bill or Exchequer debenture, or any note or bill of exchange of the governor and company of the Bank of England, commonly called a bank note, a bank bill of exchange, or a bank post bill, or any indorsement on or assignment of any bank note, bank bill of exchange, or bank post bill, or any bill of exchange, or any promissory note for the payment of money, or any indorsement on or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, or order for the payment of money, or any indorsement on or assignment of any undertaking, warrant, or order for the payment of money, shall incur the penalties of the class. (*s*)

(*s*) 11 Geo. IV. and 1 Will. IV. c. 66, s. 3.

In the case of Rex *v.* Arscott, 6 Car. and Payne, 408, it was held to be no offence within the meaning of the 11 Geo. IV., and 1 Will. IV. c. 66, s. 3, to forge an indorsement upon an order for the payment of money; we have therefore included that case, as also that of forging an *assignment* of any undertaking, warrant, or order for the payment of money, within the above article, as there appears to be no reason, especially since the repeal of the capital punishment, for making any distinction between the forgery of indorsements or assignments of bills of exchange and promissory notes, and indorsements or assignments of undertakings, warrants, or orders for the payment of money. This addition, also, renders it unnecessary to mention specially, in the Digest, the offence of forging indorsements on warrants of the South Sea Company, for the dividend to be made from time to time to the proprietors of the stock in that company (6 Geo. I. c. 11, s. 50). For the same reason we have omitted, in Article 50, so much of the 9th Geo. I. c. 12, s. 4, as relates to the forging assignments of the orders (for the payment of money) therein mentioned.

We have omitted from this article the forging of testamentary instruments, as belonging more properly to Article 20. It was mixed up in the same clause (s. 3) with the various instruments above specified by the 11 Geo. IV., and 1 Will. IV. c. 66, on account of that enactment being appropriated to such forgeries as it was intended to retain as capital. That reason no longer applying, we have made the transposition we have mentioned.

ART. 22.

The last preceding article shall be deemed to include the forgery of every instrument or writing, by whatsoever special name or description designated, which is in law a bill of exchange, or a promissory note for the payment of money, or an indorsement on or assignment of a bill of exchange or promissory note for the payment of money, or an acceptance of a bill of exchange, or an undertaking, warrant, or order for the payment of money, or an indorsement on or assignment of an undertaking, warrant, or order for the payment of money. (*t*)

(*t*) 11 Geo. IV. and 1 Will. IV. c. 66, s. 4.

ART. 23.

What is sufficient to constitute an indorsement.

That which would, if written on the back of any written instrument, be an indorsement within the meaning of the last two preceding articles, shall be deemed to be an indorsement within the meaning of those two Articles or either of them, although it be written on the face of any such instrument. (*u*)

(*u*) Rex *v.* Bigg, 1 Strange, 18. 3 P. Wms. 419.

ART. 24.

To constitute a warrant or order for the payment of money within the meaning of Articles 21 and 22, it is necessary that such warrant or order should purport to be made by some person having or claiming to have authority to direct the payment of the money therein mentioned or referred to. (*v*)

What is sufficient to constitute a warrant or order for the payment of money.

(*v*) Lockett's Case, 1 Leach, 94; 2 East's P. C. c. 19, s. 38, p. 940.

ART. 25.

It is not necessary that such warrant or order should purport to authorize the payment of any specific sum of money. (*w*)

(*w*) Rex *v.* M'Intosh, 3 East's P. C. c. 19, s. 39, p. 942.

ART. 26.

Whosoever, with intent to defraud any other person, shall wilfully make any false entry in or wilfully alter any word or figure in any of the books of account kept by the governor and company of the Bank of England, or by the governor and company of merchants of Great Britain trading to the South Seas and other parts of America, and for encouraging the fishery, commonly called the South Sea Company, in which books the accounts of the owners of any stock, annuities, or other public funds which now are or hereafter may be transferable at the Bank of England or at the South Sea House, shall be entered and kept; or shall in any manner wilfully falsify the accounts of such owners in any of the said books; or shall wilfully make any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England or at the South Sea House, in the name of any person not being the true and lawful owner of such share or interest, incur the penalties of the class. (*x*)

Making false entries in the books in which the accounts of public stock are kept, or transfer of public stock in any other name than the true owner's.

(*x*) 11 Geo. IV. and 1 Will. IV. c. 66, s. 5.

ART. 27.

Whosoever, with intent to defraud any other person, shall forge any transfer of any share or interest of or in any stock, annuity, or other public fund, which now is or hereafter may be transferable at the Bank of England, or at the South Sea House, or of or in the capital stock of any body corporate, company, or society, which now is or hereafter may be established by charter, or Act of Parliament; or shall forge any power of attorney, or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock, as is hereinbefore mentioned, or to receive any dividend payable in respect of any such share or interest; or shall demand or endeavour to have any such share or interest transferred, or to receive any dividend payable in respect thereof, by virtue of any such forged power of attorney or other authority, knowing the same to be forged, shall incur the penalties of the class. (*y*)

Forging a transfer of any public stock, or of certain other stock, or a power of attorney to transfer the same, or to receive dividends thereon.

(*y*) 11 Geo. IV. and 1 Will. IV. c. 66, s. 6.

ART. 28.

It is not necessary to constitute a transfer within the meaning of the last preceding article, that the person whose share or interest it purports to transfer should have formally accepted the share or interest so purported to be transferred, nor that he should actually own such share or interest: it is sufficient if the transfer imports that he owns it: (*z*)

What constitutes a transfer.

(*z*) Gade's Case, 2 East's P. C., c. 19, s. 9, p. 874; 2 Leach, 732.

ART. 29.

Nor that such transfer should purport to be attested by witnesses. (*a*)

(*a*) Gade's Case, 2 East's P. C., c. 19, s. 9, p. 874; 2 Leach, 732.

ART. 30.

Whosoever shall forge the name or handwriting of any person, as or purporting to be a witness attesting the execution of any power of attorney, or other authority, to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock, as is mentioned in Article 27, or to receive any dividend payable in respect of any such share or interest, or shall utter any such power of attorney, or other authority, with the name or handwriting of any person forged thereon as an attesting witness, knowing the same to be forged, shall incur the penalties of the class. (*b*)

Forging the attestation to any power of attorney to transfer stock, &c.

(*b*) 11 Geo. IV. and 1 Will. IV. c. 66, s. 8.

ART. 31.

Whosoever, being a clerk, officer, or servant of, or other person employed or

Clerks of the bank

wilfully making out dividend warrants for a greater or less sum than what is really due.

intrusted by the governor and company of the Bank of England, or the governor and company of merchants, commonly called the South Sea Company, shall, with intent to defraud any other person, knowingly make out or deliver any dividend warrant for a greater or less amount than the person or persons on whose behalf such dividend warrant shall be made out is or are entitled to, shall incur the penalties of the class. (*c*)

(*c*) 11 Geo. IV. and 1 Will. IV. c. 66, s. 9.

ART. 32.

Forging deeds, bonds, receipts, and orders for the delivery of goods, &c.

Whosoever, with intent to defraud any other person, shall forge any deed, bond, or writing obligatory, or any acquittance or receipt either for money or goods, or for any valuable security, (*d*) or any scrip-receipt either with or without the name of any person being inserted therein as a contributor or payer, (*e*) or any accountable receipt either for money or goods, or for any valuable security, (*f*) or any warrant, order, or request, for the delivery or transfer of goods, or for the delivery of any valuable security, shall incur the penalties of the class. (*g*)

(*d*) It was decided in Harrison's Case, 1 Leach, 180; 2 East's P. C., c. 19, s. 36, p. 926, that a receipt for Bank notes was not a receipt for money or goods: these words have, therefore, been introduced to meet this case, and upon the same principle to include receipts for all other valuable securities.

(*e*) These words have been inserted to meet the case of forging a scrip-receipt, where the name of the subscriber has not been filled in by the cashier of the Bank; under which circumstances it was held in Lyon's Case, 2 East's P. C., 933; 2 Leach, 597, that such receipt was not a receipt for money within the meaning of the 2 Geo. II. c. 25, which was in the same words as the 11 Geo. IV. and 1 Will. IV. c. 66, s. 10. This addition renders it unnecessary to insert in the Digest the enactments in Loan Acts making it punishable to forge the receipts for contributions to loans with or without the name of any contributor being inserted therein.

(*f*) The only valuable securities specified in the 11 Geo. IV. and 1 Will. IV. c. 66, s. 10, are notes, bills, or other securities *for payment of money;* but having extended the previous branch of the Article to receipts for *any* valuable security whatever, we have considered the principle of that extension to require that the different branches of the Article should be uniform throughout.

(*g*) 11 Geo. IV. and 1 Will IV. c. 66, s. 10. We have omitted from the above Article the forging of court-rolls, and copies of court-rolls, as being superseded by that branch of Article 20 which relates to the forging of muniments of title.

ART. 33.

What is sufficient to constitute a receipt.

It is essential to a receipt within the meaning of the last preceding Article, that it should import an acknowledgment by the person on whose behalf it purports to be made or given of his having received the money, goods, valuable securities, or other property therein specified or referred to: it is not sufficient that it merely imports the payment or delivery of such money, goods, valuable securities, or other property, to such person. (*h*)

(*h*) Rex *v.* Harvey, Russ. and Ry. C. C. 227; Harrison's Case, 1 Leach, 180; 2 East's P. C., c. 19, s. 36, p. 926.

ART. 34.

What is sufficient to constitute a warrant or order for the delivery of goods, &c.

To constitute a warrant or order within the meaning of Article 32, it is necessary that such warrant or order should purport to be made by a person having authority to command the delivery or transfer of the goods or other property therein mentioned or referred to. (*i*)

(*i*) Harvey's Case, Russ. and Ryan's Crown Cases, 227.

ART. 35.

What is sufficient to constitute a request.

It is not necessary to constitute a request within the meaning of Article 32, that it should be addressed to any person by name or description. (*j*)

(*j*) Rex *v.* Ross Carney, Moody's C. Cases, 351.

ART. 36.

Nor is it necessary that such request, or such warrant or order, should specify by name the particular goods or other property authorized or requested to be delivered or transferred; provided such request, warrant, or order be expressed in terms intelligible to the person addressed. (*k*)

(*k*) Jones's Case, 1 Leach, 53; 2 East's P. C., c. 19, s. 39, p. 941. Cullin's Case, 1 Moody's C. C. 300.

ART. 37.

Forging the handwriting of officers of the Courts of Chancery, Exchequer, and Admiralty to certain instruments.

Whosoever, with intent to defraud any other person, shall forge the name or handwriting of the Accountant-General, Registrar, or Clerk, of the Report Office, respectively, of the Court of Chancery, of the Accountant-General, Clerk of the Reports, Lord Chief Baron, or any of the Barons, respectively, of the Court of Exchequer, of the Registrar of the High Court of Admiralty, and High Court of Appeals for Prizes, or his deputy, or of any of the cashiers of the Governor and Company of the Bank of England, or any officer of any other body politic, or

corporate, or company, whom it may concern, to any certificate, report, entry, indorsement, transfer, declaration of trust, note, direction, authority, instrument or writing whatsoever, for or in order to the receiving or obtaining any of the money or effects of any of the suitors of the said courts respectively; or shall forge any instrument or writing in form of a certificate, report, entry, indorsement, transfer, declaration of trust, note, direction, authority, instrument, or writing, made or given by any such officer as aforesaid, shall incur the penalties of the class. (*l*)

(*l*) This Article is compounded of the 12 Geo. I. c. 32, s. 9; 53 Geo. III. c. 151, s. 12; and 1 Geo. IV. c. 35, s. 27. The punishment, however, inflicted by the 53 Geo. III. c. 151, s. 12, is of a less degree (transportation for seven years, &c.,) than that (transportation for life, &c.) inflicted by the first and last of the before-mentioned Acts; but, as there seems to be no reason for this distinction, the offences being of a similar kind, we have consolidated them in one article, with the same punishment.

We should also observe that some of the terms which we have used in the above Article, such, for instance, as "or any officer of any body politic or corporate or company whom it may concern," "transfer," "or given," is, by the present law, peculiar to the offence contained in the 1 Geo. IV. c. 35, s. 27; but, as it seems equally appropriate to the other crimes above enumerated, we have also applied it to them.

ART. 38.

And office copies thereof.

It is not essential, within the meaning of the last preceding Article, that the forged instrument, or writing, should purport to be the original of any of the instruments or writings therein specified: it is sufficient if it purport to be an office copy of any such instrument or writing. (*m*)

(*m*) Rex *v.* Gibson, 2 East's P. C., c. 19, s. 22, p. 899; 1 Leach, 61.

ART. 39.

Forging the handwriting of officers of the Ordnance, Stamps and Taxes, Excise, Post-office, Customs, and Woods, Forests, &c., to certain instruments.

Whosoever, with intent to defraud any other person, shall forge the name or handwriting of the Treasurer of the Ordnance for the time being, or of his deputy, or of the Receiver-General of Stamps and Taxes for the time being, or of his clerk, or of either of the Commissioners of Stamps and Taxes, or of the Receiver-General of Excise, or of any Excise Comptroller of the Cash, or of the Receiver-General for the time being of the General Post-Office, or of any person employed by or under him, or of any Receiver-General of the Customs, or of any Comptroller-General of the Customs, or of any person acting for them respectively, or of the Commissioners for the time being of Her Majesty's Woods, Forests, Land Revenues, Works, and Buildings, or of any or either of such Commissioners, or of any person or persons duly authorized, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining any of the money, bills, notes, drafts, checks, or orders for the payment of money, respectively, in the hands or custody of the Governor and Company of the Bank of England, or of any private banker, on account of the Treasurer of the Ordnance, the Receiver-General of Stamps and Taxes, the Receiver-General of Excise, the Receiver-General of the Post-Office, the Receiver-General of the Customs, and the Commissioners of Her Majesty's Woods, Forests, Land Revenues, Works and Buildings, respectively; or shall forge any draft, instrument or writing in form of a draft, instrument or writing made by any such officer as aforesaid, shall incur the penalties of the class. (*n*)

(*n*) The above Article is compounded of the 46 Geo. III. c. 45, s. 9, and c. 76, s. 9; 7 & 8 Geo. IV. c. 53, s. 56; 10 Geo. IV. c. 50, s. 124; 3 & 4 Will. IV. c. 51, s. 27; and 7 Will. IV. and 1 Vic. c. 36, s. 33. By all these enactments, except the 10 Geo. IV. c. 50, s. 124, the punishment is transportation for life, &c.; but by it transportation for seven years, &c. only. There appears, however, to be no foundation in principle for this distinction, and we have, therefore, consolidated it with the other enactments. Some of the terms, also, of the above Article, viz., "bills, notes, drafts, checks, or orders for the payment of money," "or of any private banker," are used in the description of some only of the offences as described in the existing statutes, and not in others; but in consolidating these offences we have disregarded these distinctions which seem to be unwarranted in principle.

ART. 40.

Forging writings relating to army pensions and prize money.

Whosoever, with intent to defraud any other person, shall forge the name or handwriting of any officer, non-commissioned officer, soldier, or other person entitled, or supposed to be entitled, to any pension, wages, pay, prize-money, relief, grant, bounty-money, share or other allowance of money due or payable, or supposed to be due or payable, for or on account of any service performed, or supposed to have been performed, by any officer, non-commissioned officer, soldier, or other person in Her Majesty's Army, or other military service, or of any officer, under-officer, clerk, or servant, of or in the employ of the Commissioners of the Royal Hospital for soldiers at Chelsea, or of any officer or person in any way concerned in the paying or the ordering, directing, or causing the payment of any such pension, wages, pay, prize-money, relief, grant, bounty-money, share, or other allowance of money due or payable, or supposed to be due or payable, as aforesaid, or any instrument or writing whatsoever relating to or in anywise concerning the payment

of or the obtaining or claiming any such pension, wages, pay, prize-money, relief, grant, bounty-money, share, or other allowance of money due or payable, or supposed to be due or payable, as aforesaid, in order to receive, obtain, or claim, or to enable any other person to receive, obtain, or claim any such pension, wages, pay, prize-money, relief, grant, bounty-money, share or other allowance of money due or payable, or supposed to be due or payable, as aforesaid, shall incur the penalties of the class. (*o*)

(*o*) 7 Geo. IV. c. 16, s. 38; 2 Will. IV. c. 53, s. 49.

ART. 41.

Whosoever, with intent to defraud any other person, shall forge any authority or certificate made by the cashier or other proper officer in the Army Pay Office for drawing a bill of exchange for half-pay or pension, under the authority of an Act passed in the second and third years of the reign of His late Majesty King William the Fourth, entitled, "An Act to enable the officers in His Majesty's army and their representatives, and the widows of officers and persons on the compassionate list, and also civil officers on retired and superannuation allowances, payable by the paymaster-general of His Majesty's forces, to draw for and receive their half-pay and allowances," shall incur the penalties of the class. (*p*)

(*p*) 2 and 3 Will. IV. c. 106, s. 3.

The forging of the bill of exchange under the authority of this Act is omitted here, as there appears to be no reason why the forgery of such bills should be punished differently from that of other bills of exchange.

ART. 42.

Forging instruments relating to navy pay and prize-money.

Whosoever, with intent to defraud any other person, shall forge any ticket, pay-list, extract from any ship's books, or any certificate whatever, authorized or required by an Act passed in the eleventh year of King George the Fourth, and the first year of King William the Fourth, entitled, "An Act to amend and consolidate the laws relating to the pay of the Royal Navy," or any inspector's or other check; or any letter of attorney, assignment, power or authority, in order to obtain, or to enable any other person to receive, any wages, pay, half-pay, prize-money, bounty-money, or other allowance of money due, or supposed to be due, in respect of the services of any commission, warrant or petty officer, or seaman, or any commission or non-commissioned officer of marines, or marine, or any other person, performed, or supposed to be performed, in the Royal Navy, or shall forge any purser's, or other certificate to a bill of exchange, or any approval of any such bill, respectively, required by the beforementioned Act, shall incur the penalties of the class. (*q*)

(*q*) 11 Geo. IV. and 1 Will. IV. c. 20, s. 83; 2 Will. IV. c. 40, s. 35.

ART. 43.

Whosoever, with intent to defraud any other person, shall forge(*r*) any paper writing, purporting to be an extract from any register of marriage, baptism, or burial, or any certificate of marriage, baptism, or burial, in order to sustain any claim to any wages, prize-money, or other monies due or payable in respect of the services of any officer, seaman, or marine in Her Majesty's navy, or to sustain any claim to any half-pay payable to any officer of the Royal Navy or Marines, or to any pension as the widow of an officer, or to any payment or allowance from the Compassionate Fund of the Navy, or to any gratuity or bounty of Her Majesty given to the relatives of persons slain in fight with the enemy; or shall make any false affidavit, or shall utter or exhibit any false affidavit, certificate, or other voucher or document, in order fraudulently to procure any person to be admitted a pensioner as the widow of an officer of the Royal Navy, or in order to sustain any claim to any wages, prize-money, or other monies, or to any half-pay, or pension, or arrears thereof, or any allowance from the Compassionate Fund of the Navy, or to any gratuity or bounty as aforesaid, shall incur the penalties of the class. (*s*)

(*r*) The words of the 11 Geo. IV. and 1 Will. IV. c. 20, s. 87, are "forge, utter, offer, or *exhibit*, knowing the same to be forged." Although the introduction of the word "exhibit" makes the description to vary from most, if not all other statutes, we conceive that no construction can be put upon that word which would not be equally comprised within the terms of Article 16. The offences of uttering or exhibiting are specifically set out in the latter branch of the above Article, because they relate to documents the forging of which is not an offence within that Article, and as Article 16 only relates to cases of uttering, &c., things, the forging of which is an offence.

(*s*) 11 Geo. IV. & 1 Will. IV. c. 20, s. 87. The forging of extracts from registers of marriage, baptism, or burial, and of certificates of marriage, baptism, or burial, under the circumstances mentioned in the foregoing Article, is punishable with transportation for any term not exceeding fourteen nor less than seven years. So far as relates to certificates of marriage, that offence appears to have been incidentally repealed by the 6 & 7 Will. IV. c. 86, s. 43 (the Act for Registering Births, Deaths,

and Marriages), see Art. 66: but as regards extracts from registers of marriage, baptism, and burial, and certificates of baptism and burial, it appears to be still in force, neither the 6 & 7 Will. IV. c. 86, nor the 11 Geo. IV. and 1 Will. IV. c. 66, s. 20 (the Forgery Consolidation Act), see Art. 63, containing any such offence. The 11 Geo. IV. and 1 Will. IV. c. 66, s. 20, provides for the *uttering* of forged copies of entries or copies of forged entries in registers, but says nothing about the forging of such copies or entries. The punishment inflicted by the 11 Geo. IV. and 1 Will. IV. c. 66, s. 20, is transportation for life; and that imposed by the 6 and 7 Will. IV. c. 86, s. 43, is transportation for seven years only; and, further, by the 10 Geo. IV. c. 24, s. 41 (for enabling the Commissioners for the Reduction of the National Debt to grant certain annuities), see Art. 52, it is transportation for life to forge registers of birth, or baptism, or death, or burial, or copies or certificates thereof, for the purposes therein mentioned, and as regards copies of such registers and certificates of baptism and burial, that offence appears to be unrepealed; also, by the 5 & 6 Will. IV. c. 24, s. 3, see Art. 45, it is only a misdemeanor to forge extracts from baptismal registers under that Act. From all this it will be seen that the law relating to registers is in a very unsatisfactory state, and we would recommend the adoption of some general provision on the subject.

Art. 44.

Forging certificates of the purchase or sale of naval or victualling stores.

Whosoever shall forge any certificate to be given under the authority of an Act passed in the second year of the reign of His late Majesty King Will. IV. entitled, "An Act to amend the laws relating to the business of the civil departments of the navy, and to make other regulations for more effectually carrying on the duties of the said departments," by the commissioners for executing the office of lord high admiral, or any of them, or by any superintendent, of the purchase or sale of any naval or victualling stores, shall incur the penalties of the class. (*t*)

(*t*) 2 Will. IV. c. 40, s. 32.

Art. 45.

Forging protections from Her Majesty's naval service, &c.

Whosoever shall forge any certificate of service in Her Majesty's navy, or any instrument purporting to be a protection from such service, or any extract from a baptismal register; or shall knowingly utter any false affidavit, certificate, or other document in order to obtain from the Admiralty Office a protection from Her Majesty's naval service for himself or any other person; or, being in possession of a protection, shall lend, sell, or dispose thereof to any other person, in order fraudulently to enable such other person to make an unlawful use of the same; or shall produce, utter, or make use of as a protection for himself any protection which shall have been made out or issued for any other individual, shall incur the penalties of the class, and such protection shall be thenceforward null and void. (*u*)

(*u*) 5 and 6 Will. IV. c. 24, s. 3. As to the forgery of extracts from baptismal registers, see note to Art. 43.

Art. 46.

Forging Mediterranean passes.

Whosoever shall, within this kingdom or without, forge any pass for any ship whatsoever, commonly called a Mediterranean Pass, or the seal of the office of Lord High Admiral of Great Britain and Ireland, or the handwriting of the Lord High Admiral, or of any Commissioner for executing the said office, respectively, for the time being, to any such pass, shall incur the penalties of the class. (*v*)

(*v*) 4 Geo. II. c. 18, s. 1.

Art. 47.

Forging instruments relating to the redemption of the land-tax.

Whosoever, with intent to defraud any other person, shall forge any contract, assignment, certificate, or attested copy of any certificate made out, or purporting to be made out, by any person authorized to make out the same by any Act of Parliament, touching the redemption or sale of the land tax, or of any part thereof, shall incur the penalties of the class. (*w*)

(*w*) 52 Geo. III. c. 143, s. 6.

Art. 48.

Forging seals of courts of record.

Whosoever shall forge the seal of any court of record shall incur the penalties of the class. (*x*)

(*x*) This offence is at present punishable (if at all) as a misdemeanor only at common law; but it appears to us to be an offence of much aggravation, and ought therefore to be liable to an exemplary punishment.

Art. 49.

Forging the seals of companies established by charter or Act of Parliament.

Whosoever, with intent to defraud any other person, shall forge the common seal of any body corporate, company, or society, which now is or hereafter may be established by charter or Act of Parliament, or any writing under any such seal, shall incur the penalties of the class. (*y*)

(*y*) The only bodies the forging of whose seals is an offence by any express statutable provision, seem to be the South Sea Company (6 Geo. I. c. 4, s. 56), the London and Royal Exchange Assurance Company (6 Geo. I. c. 18, s. 13), the English Linen Company (4 Geo. III. c. 37, s. 15), the Globe Insurance Company (39 Geo. III. c. 83, s. 22), and the British Society for extending the

Fisheries and improving the Sea Coasts of the Kingdom (26 Geo. III. c. 106, s. 26). The forgery of the seal of the last-mentioned society is punishable with transportation for a term not exceeding seven years only, whilst in the case of the other bodies the like offence is punishable with transportation for life, &c. There appears, however, to be no reason for this distinction, nor why the offence should be limited to the forging the seals of the above-mentioned societies; we have, therefore, introduced a general clause with respect to the seals of all companies established by charter or Act of Parliament.

We should here observe that the offences of forging the great seal, privy seal, privy signet, royal sign manual, seals of Scotland, and great or privy seal of Ireland, are not included in the digest of the law of forgery, because by the 11 Geo. IV. and 1 Will. IV. c. 66, s. 2, these offences were expressly continued as treasons; and although the capital punishment has been since taken away by the 2 and 3 Will. IV. c. 123, that Act did not affect the quality of the offence. When we consider the law of treason, we shall submit some suggestions respecting the propriety of continuing these offences as treasons.

Art. 50.

Forging the assignment of standing orders for annuities transferable at the Exchequer.

Whosoever shall forge any assignment of the annuities (*z*) payable on any order (*a*) made forth, or to be made forth, in pursuance of an Act passed in the sixth year of the reign of King Geo. I. (for laying a duty on wrought plate and other purposes therein mentioned), or of another Act passed in the same year, entitled "An Act for appointing commissioners to examine, state, and determine the debts due to the army, and to examine and state the demands of several foreign princes and states, for subsidies during the late war;" or of an Act passed in the seventh year of the same reign, entitled "An Act for appointing commissioners to examine, state, and determine the debts due to the army;" or of an Act passed in the eighth year of the same reign (for paying off and cancelling one million of Exchequer bills, and other purposes therein mentioned); or of an Act passed in the ninth year of the same reign, entitled "An Act for the more easy assigning or transferring certain redeemable annuities, payable at the Exchequer, by indorsements on the standing orders for the same," (*b*) or of any letter of attorney or other authority or instrument to transfer, assign, alien, or convey any such order, or to receive the annuities due or to grow due thereon, or any part thereof, or shall forge the name of any of the proprietors of any such order in or to any such pretended assignment, letter of attorney, instrument or authority, shall incur the penalties of the class. (*c*)

(*z*) The order here mentioned is an order for the payment of money: the forgery of such order and of any assignment thereof is consequently omitted, as being included within the general clause, *ante*, Art. 21.

(*a*) 9 Geo. 1. c. 12, s. 4.

(*b*) The assignment of these annuities (payable at the Exchequer) does not appear to be within the 6 sec. of the 11 Geo. IV. and 1 Will. IV. c. 66, as that section relates only to annuities transferable at the *Bank of England or South Sea House*, or to the capital stock of any *body corporate*, *company*, or *society*, then or thereafter to be established by *charter or Act of Parliament*.

(*c*) We are not aware if these annuities are still in existence, or, if they are, whether they continue to be payable at the Exchequer; but as we find the statute 9 Geo. I. c. 12, s. 4, regulating their assignment to be unrepealed, we have inserted the above Article. The 2 and 3 Will. IV. c. 59, transferred the management of certain annuities on lives from the receipt of the Exchequer to the management of the Commissioners for the reduction of the National Debt, but does not appear to have affected the annuities mentioned in the 9 Geo. I. c. 12.

Art. 51.

Forging certain certificates directed to be used under certain Acts of Parliament.

Whosoever, with intent to defraud any other person, shall forge any certificate or appointment made or to be made under an Act passed in the third year of the reign of King Geo. IV., entitled "An Act to amend an Act passed in the 50th year of his late Majesty for directing that accounts of increase and diminution of public salaries, pensions, and allowances shall be annually laid before Parliament, and for regulating and controlling the granting and paying such salaries, pensions, and allowances," (*d*) or any certificate or duplicate certificate required by an Act passed in the fifth year of the same reign, entitled "An Act to permit the mutual transfer of capital in certain public stocks or funds transferable at the Banks of England and Ireland respectively;" (*e*) or any certificate of the commissioners for executing two Acts, the one passed in the second and third years of the reign of His late Majesty King Will. IV., and entitled "An Act for enabling his Majesty to direct the issue of Exchequer Bills to a limited amount for the purposes and in the manner therein mentioned, and for giving relief to Trinidad, British Guiana, and St. Lucie," (*f*) and the other passed in the fifth and sixth years of the same reign, and entitled "An Act for granting relief to the Island of Dominica, and to amend an Act of the second and third years of His present Majesty, for enabling His Majesty to direct the issue of Exchequer Bills to a limited amount for the purposes therein mentioned;" (*g*) or any certificate or other instrument issued or to be issued by the commissioners for the reduction of the national debt, in pursuance of an Act passed in the last mentioned years of the same reign, entitled "An Act to carry into further execution the provisions

of an Act passed in the third and fourth years of His present Majesty, for compensating owners of slaves upon the abolition of slavery;" (*h*) or any certificate of the commissioners for the execution of an Act passed in the first and second years of the reign of Her present Majesty, entitled "An Act to authorize a further issue of Exchequer Bills for public works and fisheries, and employment of the poor, and to amend the Acts (*i*) relating thereto;" (*j*) and of the Acts in such last mentioned Act recited, or any of them, shall incur the penalties of the class. (*k*)

(*d*) 3 Geo. IV. c. 113, s. 23.
(*e*) 5 Geo. IV. c. 53, s. 22.
(*f*) 2 and 3 Will. IV. c. 125, s. 65.
(*g*) 5 and 6 Will. IV. c. 51, s. 5.
(*h*) 5 and 6 Will. IV. c. 45, s. 12.
(*i*) See two of these Acts, viz., 57 Geo. III. c. 34, and 3 Geo. IV. c. 86, which contain the forgery enactments, and which enactments are declared to be applicable to the Exchequer bills directed to be issued by the 1 and 2 Vic. c. 88.
(*j*) 1 and 2 Vic. c. 88, ss. 16 and 17.
(*k*) Several of the Acts consolidated in the above Article make it an offence to wilfully *deliver* the forged certificates therein mentioned to the Auditor of the Receipt of the Exchequer for the time being, or to any officer appointed by him, or to the Commissioners by those Acts appointed, or any of them, or to any officer or officers appointed by them, or any of them, in the execution of the powers of those Acts, and then go on to make it punishable to utter those certificates knowing them to be forged. We conceive that it is unnecessary to notice *specially* the wilful delivering of these certificates to the officers before referred to, as that offence is included within the more general one of uttering the same certificates, or at all events is comprised within the terms of Article 16.

Art. 52.

Forging certificates, &c., as to annuities granted by the Commissioners for the reduction of the national debt.

Whosoever, with intent to defraud any other person, shall forge any register or registers of the birth or baptism, or death or burial, of any person to be appointed a nominee under the provisions of an Act passed in the tenth year of the reign of King Geo. IV., entitled "An Act to enable the commissioners for the reduction of the national debt to grant life annuities and annuities for terms of years," or any copy or certificate of any such register or the name of any witness to any such certificate, or any affidavit or affirmation required to be taken for any of the purposes of that Act, or any certificate of any justice of the peace or magistrate, or of any officer acting under the said commissioners for the reduction of the national debt, of any such affidavit or affirmation having been taken before him, or any certificate of any governor or person acting as such, or minister or counsel, or chief magistrate of any province, town, or place, or other person authorized by that Act to grant any certificate of the life or death of any nominee; or with such intent as aforesaid shall forge any certificate of any officer of the commissioners for the reduction of the national debt, or of any cashier or clerk of the Bank of England, or the name of any person in or to any acceptance of any Bank Annuities or Long Annuities, or any annuity purchased under the provisions of that Act in the books of the governor and company of the Bank of England, or in or to any letter of attorney, or other authority or instrument, to authorize or purporting to authorize the acceptance of any Bank Annuities or Long Annuities, or any life annuity or any annuity for years, of whatsoever kind, under the provisions of that Act, shall incur the penalties of the class. (*l*)

(*l*) 10 Geo. IV. c. 24, s. 41. As to the forgery of the registers mentioned in the above article, see the note to Art. 43. The 10 Geo. IV. c. 24, s. 41, contains the words, "or deliver or produce, knowing the same to be forged," as well as the word "utter;" but as we are not aware that any construction can be put upon the former which would not equally be comprised within the terms of Article 15, we have not thought it necessary to mention those offences particularly. We have also omitted from the above Article the offences of forging the name of any person to any transfer of the annuities there mentioned, or to any power of attorney to transfer those annuities, or authorizing the receipt of them, as being provided for by the general Article (No. 27), relating to the transfers of annuities and powers of attorney to transfer and receive the same.

Art. 53.

Whosoever, with intent to defraud any other person, shall forge any declaration or other instrument, or any affidavit or affirmation, required to be made by an Act passed in the second and third years of the reign of His late Majesty King Will. IV., entitled "An Act to transfer the management of certain annuities on lives, from the receipt of His Majesty's Exchequer to the management of the commissioners for the reduction of the national debt, and to amend an Act for enabling the said commissioners to grant life annuities and annuities for terms of years," or by the commissioners for the reduction of the national debt, under any of the provisions of the said Act, or under any authority given to them for that purpose, or shall forge any certificate or order of any officer of the commissioners for the reduction of the national debt, or the name of any person in or to any accept-

ance of any annuity, in the books of the commissioners for the reduction of the national debt, or in or to any letter of attorney, or other authority or instrument, to authorize, or purporting to authorize, the acceptance of any annuities or any life annuity of whatsoever kind, shall incur the penalties of the class. (*m*)

(*m*) 2 and 3 Will. IV. c. 59, s. 19. See the note to the last preceding Article, which equally applies to this, both as regards the words "deliver or produce," and the omissions there noticed.

ART. 54.

Forging public records, &c.

Whosoever, being a person belonging to or employed in the Public Record Office, shall certify any writing as a true and authentic copy of a record in the custody of the Master of the Rolls, knowing the same to be false in any material part, and whosoever shall forge the signature of any assistant record-keeper for the purpose of counterfeiting a certified copy of a record, or the seal of the Public Record Office, shall incur the penalties of the class. (*n*)

(*n*) 1 and 2 Vic. c. 94, s. 19.

ART. 55.

Forging policies of insurance.

Whosoever, with intent to defraud any other person, shall forge any (*o*) policy of insurance shall incur the penalties of the class.

(*o*) This offence is at present limited to the forging of policies under the common seals of the London, Royal Exchange, and Globe Insurance Companies; but there appears to us to be no foundation in principle for this limitation, and we have, therefore, extended it to *all* policies.

ART. 56.

Forging declarations of the return of premiums on policies.

Whosoever, with intent to defraud Her Majesty, her heirs or successors, shall forge the name or handwriting of any underwriter on any policy of insurance or contract of insurance, to any declaration of any return of the premium on such policy or contract, or any part thereof, or shall fraudulently alter any such declaration after the same shall have been signed by any such underwriter, or shall make use of any such declaration knowing the same to have been fraudulently altered, or the name or handwriting of any underwriter to have been forged thereon, shall incur, in respect of a first offence, the penalties of the class, and, in respect of any subsequent offence, the penalties of the class. (*p*)

(*p*) 54 Geo. III. c. 133, s. 10.; 54 Geo. III. c. 144, s. 11. The 54 Geo. III. c. 133, s. 10, has the words "make use of," as well as the word "utter;" but we don't conceive that a making use of anything can constitute a criminal act, unless it be by some of the means specified in Art. 16. However, as we find it in the Act, we insert it for the present.

ART. 57.

Forging stamps.

Whosoever, with intent to defraud Her Majesty, her heirs or successors, of any stamp duty, or of any part thereof, shall forge any stamp which shall have been provided, made, or used in pursuance of any Act relating to any stamp duty, or shall forge or resemble the impression, or any part of the impression, of any such stamp upon any material or thing which shall be at any time liable to such stamp duty, or shall stamp or mark any such material or thing with any such stamp as aforesaid, or shall forge the name, handwriting, or signature of any sealing officer or other officer of stamps and taxes to or upon any material in which any dice shall be actually inclosed, or shall forge any mark or name, or any part of any mark or name, which shall be used in pursuance of any Stamp Act to distinguish the maker of any playing cards or dice respectively, and printed and marked on or affixed to or making part of the wrapper, label, or paper, in which any playing cards or dice shall be actually inclosed; or shall fraudulently cut, tear, get off, transpose, or remove the impression of any stamp from any article which shall be at any time liable to any stamp duty, with intent to use the same for or upon any other article, whether of the like or any other material; or shall utter, sell, or expose to sale any material or thing (or, in the case of gold or silver plate, or any vessel or ware of base metal, shall also export the same out of the kingdom, or, in the case of any card, die, ace of spades, label, wrapper, or jew, shall also part with the same for use in play) having thereupon respectively the impression of any such forged stamp, or any such forged impression or part of impression as aforesaid, or the impression of any such stamp which shall have been cut, torn, got off, transposed, or removed from any other article as aforesaid, or any such forged mark, name, handwriting, or signature as aforesaid, knowing the same respectively to be forged; or shall wilfully and without lawful excuse have or be possessed of any such forged stamp as aforesaid; or shall fraudulently, privately, or secretly use any stamp which shall have been so provided as aforesaid shall incur the penalties of the class. (*q*)

(*q*) 52 Geo. III. c. 143, s. 7; 55 Geo. III. c. 184, s. 7; 55 Geo. III. c. 185, s. 7; 9 Geo. IV. c. 18, s. 35.

ART. 58.

Definition of the term "stamp."

In respect of offences against the law contained in the last preceding article, the term "stamp" shall be deemed to signify any type, die, seal, stamp, mark, plate, device appointed for the ace of spades to be used with any playing cards, or any other device, or any part thereof respectively.

ART. 59.

Forging assay marks on gold and silver plate.

Whosoever shall forge any mark or stamp appointed by any Act of Parliament to be used for assaying wrought plate of gold or silver, or any mark, stamp, or impression, in imitation of or to resemble any mark, stamp, or impression made or to be made by or with any mark or stamp so appointed to be used as aforesaid; or shall mark or stamp any wrought plate of gold or silver, or any wares of silver or base metal, respectively gilt or silvered over, and resembling gold or silver plate, with any mark or stamp which shall have been forged in imitation of or to resemble any mark or stamp so appointed to be used as aforesaid; or shall transpose or remove from one piece of wrought plate of gold or silver to another, or to any wares of gold or silver or base metal, any mark, stamp, or impression which shall have been made by or with any mark or stamp so appointed to be used as aforesaid; or shall sell, exchange, or expose to sale, or export out of the kingdom, any wrought plate of gold or silver, or any wares of gold or silver or base metal, respectively having thereon any such forged mark, stamp, or impression, or any mark, stamp, or impression which shall have been transposed or removed from any other piece of gold or silver plate, knowing such mark, stamp, or impression to be forged, or to have been transposed or removed as aforesaid; or shall wilfully or knowingly have or be possessed of any mark or stamp which shall have been forged in imitation of or to resemble any mark or stamp so appointed to be used as aforesaid, shall incur the penalties of the class. (*r*)

(*r*) 13 Geo. III. c. 52, s. 14; 13 Geo. III. c. 59, s. 2; 38 Geo. III. c. 69, s. 7; 5 Geo. IV. c. 52, s. 1.; 5 Geo. IV. c. 52, s. 22. By the 13 Geo. III. cc. 52 and 59, the punishment is transportation for 14 years, but by the former Act the offence is only a misdemeanor. By the 38 Geo. III. c. 69, and the 5 Geo. IV. c. 52, the punishment is transportation for seven years. But it has appeared to us that the forging of assay marks should be in all cases punished alike: in that view they have been consolidated here. The punishment may be either the fourteen or seven years' transportation, as may be thought expedient.

ART. 60.

Forging Excise marks, permits, &c.

Whosoever, with intent to defraud Her Majesty, her heirs or successors, of any Excise duty, shall forge any stamp or seal provided or appointed, or hereafter to be from time to time provided or appointed, according to law, by the Commissioners of Excise, for the marking or stamping of any commodities chargeable with any Excise duty; or shall forge the impression of any such stamp or seal on any such commodities, ; or shall utter, sell, or expose to sale any such commodities with such forged stamp, seal, or impression thereupon, knowing such stamp, seal, or impression to be forged; and whosoever shall forge any permit, or any impression, stamp, or mark, figure or device, provided or appointed, or to be hereafter from time to time provided or appointed by the said Commissioners to be put on such permit; or shall utter, give, or make use of any permit with any such forged impression, stamp, mark, figure, or device thereupon, knowing the same to be forged; or shall knowingly or willingly accept or receive any forged permit, or any permit with any such forged impression, stamp, or mark, figure or device thereon, knowing the same to be forged, shall incur the penalties of the class. (*s*)

(*s*) 9 Ann, c. 11; 10 Ann, c. 19; 5 Geo. I. c. 2, s. 9; 4 Geo. III. c. 37, s. 26; 52 Geo. III. c. 143, s. 1; 13 Geo. III. c. 56, s. 5; 2 Will. IV. c. 16, s. 4.

The offence of forging permits, or the impression of any stamp thereon, or knowingly receiving forged permits, is a *misdemeanor* only, punishable with seven years' transportation, &c.; the other offences above enumerated are also punishable with seven years' transportation, &c., but are *felonies*. However, as it is intended to abolish the distinction between felonies and misdemeanors, so far as penal consequences are concerned, we have consolidated the above offences.

ART. 61.

Forging Excise debentures, &c.

Whosoever, with intent to defraud Her Majesty, her heirs or successors, shall forge any debenture, or any certificate for the payment or return of any money, or any part of any such debenture or certificate, or any signature thereon, in any case in which such debenture or certificate is by any Act or Acts of Parliament, relating to the duties of Excise required or directed to be given or granted, shall incur the penalties of the class. (*t*)

(*t*) 52 Geo. III. c. 143, s. 10. This Act contains the words "make use of," as well as the word "utter." See observation on these words in the note to Art. 56.

ART. 62.

Forging hackney and stage carriage plates, and drivers' and watermen's tickets.

Whosoever shall forge the Stamp-Office plate, by an Act passed in the first and second years of the reign of His late Majesty, King William the Fourth, entitled "An Act to amend the laws relating to hackney carriages, and to waggons, carts, and drays, used in the metropolis; and to place the collection of duties on hackney carriages, and on hawkers and pedlars in England, under the Commissioners of Stamps," directed to be provided for the purpose of being fixed upon every hackney carriage, or any numbered plate directed to be provided, or which shall have been provided, made, or used, in pursuance of an Act passed in the second and third years of the same reign, entitled "An Act to repeal the duties under the management of the Commissioners of Stamps on stage carriages, and on horses let for hire in Great Britain, and to grant other duties in lieu thereof; and also to consolidate and amend the laws relating thereto," or of any former Act relating to the duties payable in respect of stage carriages; or shall wilfully fix or place upon any hackney carriage, stage carriage, or other carriage, any such forged plate; or shall forge any licence or ticket, by an Act passed in the first and second years of her present Majesty's reign, entitled "An Act for the better regulation of hackney carriages, and of metropolitan stage carriages, and of waggons, carts, and drays, used in and near the metropolis, and of the drivers and attendants thereof," directed to be provided for the driver of a hackney carriage, or for the driver or conductor of a metropolitan stage-carriage, or for any waterman; or shall knowingly, and without lawful excuse, (the proof whereof shall lie on the person accused,) have or be possessed of any such forged plate, licence, or ticket, as aforesaid, knowing such plate, licence, or ticket, to be forged, shall incur the penalties of the class. (*u*)

(*u*) 1 & 2 Will. IV. c. 22, s. 25; 2 & 3 Will. IV. c. 120, s. 32; 1 & 2 Vic. c. 79, s. 12. The enactments consolidated in the above Article make it an offence to sell, exchange, or expose to sale, as well as to utter the things therein mentioned, knowing them to be forged. But as we conceive that the terms "offer, publish, dispose of, or put off," contained in Art. 16, are sufficient to comprise those acts, we have not thought it necessary to notice them specially. The offences described in this Article are misdemeanors punishable by fine and imprisonment generally, and may be superseded by a general clause, enacting that "Whosoever shall forge any written instrument, stamp, plate, or other matter or thing directed by any Act of Parliament, or any competent official authority to be used for any public purpose, or, knowing the same to be forged, shall make use of for such purpose, or knowingly and without lawful excuse, (the proof whereof shall lie on the person accused,) have or be possessed of any such forged written instrument, stamp, plate, or other matter or thing, shall incur the penalties of the class."

ART. 63.

Forging registers of baptisms and burials.

Whosoever shall knowingly and wilfully insert, or permit to be inserted, in any register of baptisms or burials, which hath been or shall be made or kept by any rector, vicar, curate, or officiating minister of any parish, district parish, or chapelry, in England, any false entry of any matter relating to any baptism or burial; or shall forge in any such register any entry of any matter relating to any baptism or burial; or shall utter any writing as and for a copy of any entry in any such register of any matter relating to any baptism or burial, knowing such writing to be forged, or shall utter any copy of such entry, knowing such entry to be forged, or shall forge any licence of marriage, shall incur the penalties of the class. (*v*)

(*v*) 11 Geo. IV. and 1 Will. IV. c. 66, s. 20. The above offences are, by the 11 Geo. IV. and 1 Will. IV. c. 66, s. 20, now punishable with transportation for *life*, &c.; but similar offences, with respect to registers of *marriages*, *births*, *and deaths*, are, by the 6 & 7 Will. IV. c. 86, s. 43, punishable with transportation for seven years, &c., only: it may be deemed proper that the punishment of the above offences be reduced to that inflicted by the subsequent statute, which has incidentally, indeed, substituted the less punishment in the case of forging *marriage* registers.

The offences contained in the above Article are only some of several offences relating to registers of baptisms and burials, on which account it may be considered expedient to arrange them hereafter under more specific heads relating to the particular subject matter. This remark applies also in other cases.

ART. 64.

Provided always, that no rector, vicar, curate, or officiating minister, of any parish, district parish, or chapelry, who shall discover any error in the form or substance of the entry in the register of any baptism or burial, respectively by him solemnized, shall be liable to any of the penalties hereinbefore mentioned, if he shall, within one calendar month after the discovery of such error, in the presence of the parent or parents of the child baptized, or in the presence of two persons

who shall have attended at any burial, or in the case of the death or absence of the respective parties aforesaid, then, in the presence of the churchwardens or chapelwardens, correct the entry which shall have been found erroneous, according to the truth of the case, by entry in the margin of the register wherein such erroneous entry shall have been made, without any alteration or obliteration of the original entry, and shall sign such entry in the margin, and add to such signature the day of the month and year when such correction shall be made, and such correction and signature shall be attested by the parties in whose presence the same are directed to be made as aforesaid; and that in the copy of the register which shall be transmitted to the registrar of the diocese, the rector, vicar, curate, or officiating minister, shall certify the correction so made by him as aforesaid. (*w*)

(*w*) 11 Geo. IV. and 1 Will. IV. c. 66, s. 21.

ART. 65.

Whosoever shall knowingly and wilfully insert, or permit to be inserted, in any copy of any register of baptisms or burials directed by law to be transmitted to the registrar of the diocese within which any parish, district parish, or chapelry, in England, where the ceremonies of baptism and burial may lawfully be performed, may be situated, any false entry of any matter relating to any baptism or burial, or shall forge any copy of any register so directed to be transmitted as aforesaid, or shall knowingly and wilfully sign or verify any copy of any register so directed to be transmitted as aforesaid, which copy shall be false in any part thereof, knowing the same to be false, shall incur the penalties of the class. (*x*)

(*x*) 11 Geo. IV. and 1 Will. IV. c. 66, s. 22. This offence is now punishable with transportation for seven years, &c.; but as compared with forging the register itself, it is a less offence, that crime being punishable by the present law with transportation for life, &c.: if it is to be continued with a punishment less than that for forging the register, and if the suggestions made in the note to Art. 63 for reducing the punishment for forging the register to seven years be adopted, the punishment for this offence must be fixed below seven years' transportation.

ART. 66.

Forging registers of births, deaths, and marriages.

Whosoever shall forge any part of any register book, provided in pursuance of an Act passed in the sixth and seventh years of the reign of His late Majesty, King William the Fourth, entitled "An Act for registering births, deaths, and marriages, in England," or any certified copy thereof; or shall wilfully insert in any register book, or certified copy thereof, any false entry of any birth, death, or marriage, or wilfully give any false certificate, or certify any writing to be a copy or extract of any register book, knowing the same register to be false in any part thereof, or shall forge the seal of the register office, shall incur the penalties of the class. (*y*)

(*y*) 6 & 7 Will. IV. c. 86, s. 43, in part.

ART. 67.

Provided always, that no person charged with the duty of registering any birth, death, or marriage, who shall discover any error to have been committed in the form or substance of any such entry, shall be therefore liable to any of the penalties aforesaid, if, within one calendar month next after the discovery of such error, in the presence of the parents of the child whose birth may have been so registered, or of the parties married, or of two persons attending upon any person in his or her last illness whose death may have been so registered, or in case of the death or absence of the respective parties aforesaid, then in the presence of the superintendent-register, and of two other credible witnesses who shall respectively attest the same, he shall correct the erroneous entry according to the truth of the case, by entry in the margin, without any alteration of the original entry, and shall sign the marginal entry, and add thereunto the day of the month and year when such correction shall be made: provided also that, in the case of a marriage register, he shall make the like marginal entry, attested in like manner in the duplicate marriage register book to be made by him, and in every case shall make the like alteration in the certified copy of the register book to be made by him, or in case such certified copy shall have been already made, provided he shall make and deliver in like manner a separate certified copy of the original erroneous entry, and of the marginal corrections therein made. (*z*)

(*z*) 6 & 7 Will. IV. c. 86, s. 44.

ART. 68.

Forgeries connected with the abolition of the slave trade.

Whosoever, with intent to defraud any other person, shall forge any certificate, certificate of valuation, sentence or decree of condemnation or restitution, copy of

sentence or decree of condemnation or restitution, mentioned in an Act passed in the fifth year of the reign of King George the Fourth, entitled "An Act to amend and consolidate the laws relating to the abolition of the slave trade," or any part thereof, respectively, shall incur the penalties of the class. (*a*)

(*a*) 5 Geo. IV. c. 113, s. 10.

ART. 69.

Forging memorials of deeds, &c.

Whosoever shall forge any memorial already or hereafter to be registered under the provisions of any Act of Parliament, of any deed, conveyance, will, devise in writing, judgment, statute or recognizance of or concerning any honors, manors, lands, tenements, or hereditaments, in the North, East, and West Ridings, respectively, of the county of York, or in the town and county of the town of Kingston-upon-Hull; or any entry of the acknowledgment of any memorial already or hereafter to be registered under the provisions of any Act of Parliament, of any deed, conveyance, will, devise in writing, judgment, statute, or recognizance of or concerning any honors, manors, lands, tenements, or hereditaments, in the county of Middlesex; or any certificate or indorsement of the registry of any such memorial as aforesaid, shall incur the penalties of the class. (*b*)

(*b*) 2 & 3 Ann, c. 4, s. 19; 5 Ann, c. 18, s. 8, in part; 6 Ann, c. 35, s. 26, in part; 7 Ann, c. 20, s. 15; 8 Geo. II. c. 6, s. 31, in part.

ART. 70.

Forging entries of the acknowledgments of bargainors in bargains and sales directed to be inrolled.

Whosoever shall forge any entry of the acknowledgment of any bargainor in any bargain and sale, now or hereafter to be enrolled under the provisions of any Act of Parliament, of any manors, lands, tenements, or hereditaments, situate, lying and being within the North, East, and West Ridings, respectively, of the county of York, or the town and county of the town of Kingston-upon-Hull; or any certificate or indorsement of the inrolment of any such bargain and sale as aforesaid, shall incur the penalties of the class. (*c*)

(*c*) 5 Ann, c. 18, s. 8, in part; 6 Ann, c. 35, s. 26, in part; 8 Geo. II. c. 6, s. 31, in part.

ART. 71.

Officers of court certifying, as true, false copies of indictments, &c.

Whosoever, being clerk of the court, or other officer having the custody of the records of the court, or being the deputy of such clerk or officer, shall certify or utter as true, knowing the same to be false, any false copy or certificate of any indictment or conviction of a previous offence, in any case where by law a person being subsequently convicted of the like or any other offence would be liable to a heavier punishment by reason of such previous offence; and whosoever, other than such clerk, officer, or deputy, shall sign or certify any such copy or certificate as such clerk, officer, or deputy; or shall utter any such copy or certificate with a false or forged signature thereto, knowing the same to be false or forged, shall incur the penalties of the class. (*d*)

(*d*) 7 and 8 Geo. IV. c. 28, s. 11. 2 Will. IV. c. 34, s. 9.

The punishment by the former of the above Acts is transportation for seven years, &c.; by the latter is transportation for a term not exceeding 14 nor less than seven years. The former Act relates to *felonies* generally; the latter to *coining* only. We see no sufficient reason for the distinction, and recommend that these provisions should be consolidated.

ART. 72.

Framing false bill of parcels in order to prevent things being seized within the Metropolitan Police District.

Whosoever, for the purpose of protecting or preventing anything whatsoever from being seized within the Metropolitan Police District on suspicion of its being stolen, or otherwise unlawfully obtained, or of preventing the same from being produced, or made to serve as evidence concerning any felony or misdemeanor committed, or supposed to be committed, within the Metropolitan Police District, shall frame any bill of parcels containing any false statement in regard to the name or abode of any alleged vender, the quantity or quality of anything, the place whence, or the conveyance by which, the same was furnished, the price agreed upon or charged for the same, or any other particular, knowing such statement to be false, shall incur the penalties of the class. (*e*)

(*e*) 2 & 3 Vic. c. 47, s. 29. See note to Art. 115, of Offences against the Executive Power.

ART. 73.

Forging the superscription of post letters.

Whosoever, with intent to avoid the payment of the duty of postage, shall forge the handwriting of any person in the superscription of a post letter, or shall write or send by the post a letter the superscription whereof, in whole or in part, shall be

forged, knowing the same to be forged, with intent in either of those cases to avoid the payment of the duty of postage, shall incur the penalties of the class. (*f*)

(*f*) 1 Vic. c. 36, s. 34.

ART. 74.

Forging quarantine certificates.

Whosoever shall forge any certificate directed or required to be granted by any order of Her Majesty, her heirs or successors, in council, now in force or hereafter to be made, touching quarantine, or shall utter any such certificate, with intent to obtain the effect of a true certificate to be given thereto, knowing the contents of such certificate to be false, shall incur the penalties of the class. (*g*)

(*g*) 6 Geo. IV. c. 78, s. 25.

ART. 75.

Inserting false recitals in renewed ecclesiastical leases.

Whosoever shall execute any renewed lease of any house, land, tithes, or other hereditaments, parcel of the possessions of any see, chapter, dignitary, canonry, prebend, benefice, or hospital, under the provisions of an Act intituled "An Act for imposing certain restrictions on the renewal of leases by ecclesiastical persons," or any counterpart thereof, knowing the recital or statement required by the said Act to be contained in such lease, or any part thereof, to be false; or shall wilfully introduce any such recital or statement into any such lease, knowing the same, or any part thereof, to be false; or shall prepare or engross any lease, or counterpart of a lease, containing any such false recital or statement as aforesaid, knowing the same, or any part thereof, to be false, shall incur the penalties of the class. (*h*)

(*h*) 6 & 7 Will. IV. c. 20, s. 3.

ART. 76.

Having in possession forged bank notes, &c.

Whosoever shall, without lawful excuse, (the proof whereof shall lie upon the party accused) purchase, or receive from any other person, or have in his custody or possession, any forged bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, knowing the same respectively to be forged, shall be liable to the penalties of the class. (*i*)

(*i*) 11 Geo. IV. and 1 Will. IV. c. 66, s. 12. See the Prefatory Remarks.

ART. 77.

Making or having, without lawful authority, instruments for making paper with the words "Bank of England" visible in the substance, &c., or selling such paper.

Whosoever shall, without the authority of the governor and company of the Bank of England, to be proved by the party accused, make or use, or shall, without lawful excuse, to be proved by the party accused, knowingly have in his custody or possession any frame, mould, or instrument for the making of paper with the words "Bank of England" visible in the substance of the paper, or for the making of paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount expressed in a word or words in Roman letters, visible in the substance of the paper; or shall, without such authority, to be proved as aforesaid, manufacture, use, sell, expose to sale, utter, or dispose of, or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession any paper whatsoever with the words "Bank of England" visible in the substance of the paper, or any paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount, expressed in a word or words in Roman letters, appearing visible in the substance of the paper; or shall without such authority, to be proved as aforesaid, by any art or contrivance cause the words "Bank of England" to appear visible in the substance of any paper, or cause the numerical sum or amount of any bank note, bank bill of exchange, or bank post bill, blank bank note, blank bank bill of exchange, or blank bank post bill, in a word or words in Roman letters, to appear visible in the substance of the paper whereon the same shall be written or printed, shall incur the penalties of the class. (*k*)

(*k*) 11 Geo. IV. and 1 Will. IV. c. 66, s. 13.

ART. 78.

Proviso as to paper used for bills of exchange, &c.

Provided always, that nothing in the last preceding Article contained shall prevent any person from issuing any bill of exchange or promissory note having the amount thereof expressed in guineas, or in a numerical figure or figures, denoting the amount thereof in pounds sterling, appearing visible in the substance of the paper upon which the same shall be written or printed, nor shall prevent any person from making, using, or selling any paper having waving or curved lines, or any other devices in the nature of water-marks, visible in the substance of the paper, not being bar lines or laying wire lines, provided the same are not so contrived as to form the

groundwork or texture of the paper, or to resemble the waving or curved laying wire lines or bar lines, or the water-marks of the paper used by the governor and company of the Bank of England. (*l*)

(*l*) 11 Geo. IV. and 1 Will. IV. c. 66, s. 14.

ART. 79.

Engraving bank notes, &c. without authority.

Whosoever shall engrave or in anywise make upon any plate whatever, or upon any wood, stone, or other material, any promissory note or bill of exchange, or blank promissory note or blank bill of exchange, or part of a promissory note or bill of exchange, purporting to be a bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, or part of a bank note, bank bill of exchange, or bank post bill, without the authority of the governor and company of the Bank of England, to be proved by the party accused; or shall use such plate, wood, stone, or other material, or any other instrument or device for the making or printing any bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, or part of a bank note, bank bill of exchange, or bank post bill, without such authority, to be proved as aforesaid; or shall, without lawful excuse, the proof whereof shall lie on the party accused, knowingly have in his custody or possession any such plate, wood, stone, or other material, or any such instrument or device; or shall, without such authority, to be proved as aforesaid, knowingly offer, utter, dispose of, or put off any paper upon which any blank bank note, blank bank bill of exchange, or blank bank post bill, or part of a bank note, bank bill of exchange, or bank post bill, shall be made or printed; or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession any such paper, shall incur the penalties of the class. (*m*)

(*m*) 11 Gen. IV. and 1 Will. IV. c. 66, s. 15.

ART. 80.

Engraving any part of a bank note, &c. without authority.

Whosoever shall engrave, or in anywise make upon any plate whatever, or upon any wood, stone, or other material, any word, number, figure, character, or ornament, the impression taken from which shall resemble, or apparently be intended to resemble, any part of a bank note, bank bill of exchange, or bank post bill, without the authority of the governor and company of the Bank of England, to be proved by the party accused; or shall use any such plate, wood, stone, or other material, or any other instrument or device, for the making upon any paper or other material the impression of any word, number, figure, character, or ornament which shall resemble, or apparently be intended to resemble, any part of a bank note, bank bill of exchange, or bank post bill, without such authority, to be proved as aforesaid; or shall, without lawful excuse, the proof whereof shall lie on the party accused, knowingly have in his custody or possession any such plate, wood, stone or other material, or any such instrument or device; or shall, without such authority, to be proved as aforesaid, knowingly offer, utter, dispose of, or put off, any paper or other material upon which there shall be an impression of any such matter as aforesaid; or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession any paper or other material upon which there shall be an impression of any such matter as aforesaid, shall incur the penalties of the class. (*n*)

(*n*) 11 Geo. IV. and 1 Will. IV. c. 66, s. 16.

ART. 81.

Making or having instruments for making paper with the name of any bankers other than the Bank of England appearing in the substance without authority &c.

Whosoever shall make or use any frame, mould, or instrument for the manufacture of paper, with the name or firm of any person or persons, body corporate, or company carrying on the business of bankers, (other than and except the Bank of England,) appearing visible in the substance of the paper, without the authority of such person or persons, body corporate or company, the proof of which authority shall lie on the party accused; or shall, without lawful excuse, the proof whereof shall lie on the party accused, knowingly have in his custody or possession any such frame, mould, or instrument; or shall, without such authority, to be proved as aforesaid, manufacture, use, sell, expose to sale, utter, or dispose of, or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession any paper in the substance of which the name or firm of any such person or persons, body corporate, or company carrying on the business of bankers shall appear visible; or shall, without such authority,

to be proved as aforesaid, cause the name or firm of any such person or persons, body corporate, or company carrying on the business of bankers, to appear visible in the substance of the paper upon which the same shall be written or printed, shall incur the penalties of the class. (*o*)

(*o*) 11 Geo. IV. and 1 Will. IV. c. 66, s. 17.

ART. 82.

Engraving the notes, &c. of any bankers other than the Bank of England, or any part thereof, without authority.

Whosoever shall engrave or in anywise make upon any plate whatever, or upon any wood, stone, or other material, any bill of exchange or promissory note for the payment of money, or any part of any bill of exchange or promissory note for the payment of money, purporting to be the bill or note, or part of the bill or note, of any person or persons, body corporate, or company carrying on the business of bankers (other than and except the Bank of England), without the authority of such person or persons, body corporate, or company, the proof of which authority shall lie on the party accused; or shall engrave or make upon any plate whatever, or upon wood, stone, or other material any word or words resembling, or apparently intended to resemble, any subscription subjoined to any bill of exchange or promissory note for the payment of money issued by any such person or persons, body corporate, or company carrying on the business of bankers, without such authority, to be proved as aforesaid; or shall, without such authority, to be proved as aforesaid, use or shall, without lawful excuse, to be proved by the party accused, knowingly have in his custody or possession, any plate, wood, stone, or other material upon which any such bill or note, or part thereof, or any word or words resembling, or apparently intended to resemble, such subscription, shall be engraved or made; or shall, without such authority, to be proved as aforesaid, knowingly offer, utter, dispose of, or put off, or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession any paper upon which any part of such bill or note, or any word or words resembling, or apparently intended to resemble, any such subscription shall be made or printed, shall incur the penalties of the class. (*p*)

(*p*) 11 Geo. IV. and 1 Will. IV. c. 66, s. 18.

ART. 83.

Engraving foreign bills or notes, &c. or any part thereof, without authority, &c.

Whosoever shall engrave or in anywise make upon any plate whatever, or upon any wood, stone, or other material, any bill of exchange, promissory note, undertaking, or order for payment of money, or any part of any bill of exchange, promissory note, undertaking, or order for payment of money, in whatever language or languages the same may be expressed, and whether the same shall or shall not be or be intended to be under seal, purporting to be the bill, note, undertaking, or order, or part of the bill, note, undertaking, or order of any foreign prince or state, or of any minister or officer in the service of any foreign prince or state, or of any body corporate, or body of the like nature, constituted or recognized by any foreign prince or state, or of any person or company of persons resident in any country, not under the dominion of Her Majesty, without the authority of such foreign prince or state, minister or officer, body corporate or body of the like nature, person or company of persons, the proof of which authority shall lie on the party accused; or shall, without such authority, to be proved as aforesaid, use or shall without lawful excuse, to be proved by the party accused, knowingly have in his custody or possession any plate, stone, wood, or other material upon which any such foreign bill, note, undertaking, or order, or any part thereof, shall be engraved or made; or shall, without such authority, to be proved as aforesaid, knowingly offer, utter, dispose of, or put off, or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession any paper upon which any part of such foreign bill, note, undertaking, or order shall be made or printed, shall incur the penalties of the class. (*q*)

(*q*) 11 Geo. IV. and 1 Will. IV. c. 66, s. 19.

ART. 84.

Having forged stamps in possession, &c.

Whosoever shall, knowingly, and without lawful excuse, (the proof whereof shall be on the person accused,) have in possession any forged die, plate, or other instrument, or part of any such die, plate, or instrument, resembling, or intended to resemble, either wholly or in part, any die, plate, or other instrument, which at any time whatever hath been or shall or may be provided, made, or used, by or under the direction of the Commissioners of Stamps and Taxes, for the purpose of expressing or denoting any stamp-duty whatever; or shall knowingly, and without

lawful excuse, (the proof whereof shall lie on the person accused,) have in possession any vellum, parchment, or paper, having thereon the impression of any such forged die, plate, or other instrument, or part of any such die, plate, or other instrument as aforesaid, or having thereon any forged mark or impression, resembling or representing, either wholly or in part, or intended or liable to pass, or be mistaken for the mark or impression of any such die, plate, or other instrument which hath been, or shall or may be so provided, made, or used as aforesaid, knowing such forged mark or impression to be forged; or shall fraudulently use, join, fix, or place for, with or upon any vellum, parchment or paper, the mark or impression of any such die, plate, or other instrument as last aforesaid, which shall have been cut, torn, or gotten off or removed from any other vellum, parchment, or paper; or shall fraudulently erase, cut, scrape, discharge, or get out of or from any stamped vellum, parchment or paper, any name, sum, date, or other matter or thing thereon written, printed, or expressed, with intent to use any mark or impression of any such die, plate, or other instrument as last aforesaid, then being upon such vellum, parchment, or paper, or that the same may be used for any deed, instrument, matter, or thing, in respect whereof any stamp-duty is, or shall, or may be or become payable; or shall knowingly, and without lawful excuse, (the proof whereof shall lie on the person accused,) have in possession any stamped vellum, parchment, or paper, from or off, or out of which any such name, sum, date, or other matter or thing as aforesaid, shall have been fraudulently erased, cut, scraped, discharged, or gotten as aforesaid, shall incur the penalties of the class. (*r*)

(*r*) 3 & 4 Will. IV. c. 97, s. 12. This Article appears to supersede so much of Art. 57 as relates to having any forged stamp in possession.

ART. 85.

Licensed vendors having forged stamps in possession, &c.

Whenever any vellum, parchment, or paper shall be found in the possession of any person licensed to vend or deal in stamps, or who shall have been so licensed at any time within six calendar months then next preceding, such vellum, parchment, or paper having thereon any forged mark or impression, resembling or representing, or intended or liable to pass, or be mistaken for any mark or impression of any die, plate, or other instrument, which at any time whatever hath been or shall or may be provided, made or used, by or under the direction of the Commissioners of Stamps and Taxes, for the purpose of expressing or denoting any stamp duty whatever, then and in every such case the person in whose possession such vellum, parchment, or paper shall be so found, shall be deemed and taken to have so had the same in his possession with intent to vend, use, or utter the same with such forged mark or impression thereon, unless the contrary shall be satisfactorily proved; and such person shall also be deemed and taken to have such vellum, parchment, or paper so in his possession, knowing the mark or impression thereon to be forged, and such person shall be liable to all penalties and punishments by law imposed or inflicted upon persons vending, using, uttering, or having in possession any vellum, parchment, or paper with such forged mark or impression thereon, knowing the same to be forged, unless such person shall in every such case satisfactorily prove that such vellum, parchment, or paper was procured by or for such person from some distributor of stamps appointed by the said commissioners, or from some person licensed to deal in stamps, under the authority of an Act passed in the 3d and 4th years of the reign of his late Majesty King Will. IV., intituled "An Act to prevent the selling and uttering of forged stamps, and to exempt from stamp duty artificial mineral waters in Great Britain, and to allow a drawback on the exportation of gold and silver plate manufactured in Ireland." (*s*)

(*s*) 3 and 4 Will. IV. c. 97, s. 11.

ART. 86.

Having in possession instruments for making paper with the words "Excise Office," &c., appearing in the substance, without authority, &c.

Whosoever shall make, or knowingly have in custody or possession, not being authorized by the Commissioners of Excise, and without lawful excuse (the proof whereof shall lie on the person accused), any mould or frame, or other instrument having therein the words "Excise Office," or any other words, figures, marks, or devices, peculiar to and appearing in the substance of the paper used by the said commissioners for permits, or with any or part of such words, figures, marks, or devices, or any of them, intended to imitate or pass for the same; or shall except as before excepted, make any paper, in the substance of which the words "Excise Office," or any other words, figures, marks, or devices, peculiar to or appearing in the substance of the paper used by the Commissioners of Excise

for permits, or any part of such words, figures, marks,or devices, or anyof them, intended to imitate and pass for the same, shall be visible; or shall, except as as before excepted, knowingly have in custody or possession, without lawful excuse (the proof whereof shall lie on the person accused), any paper whatever, in the substance of which the words "Excise Office," or any other words, figures, marks, or devices, peculiar to and appearing in the substance of the paper used by the Commissioners of Excise for permits, or any part of such words, figures, marks, or devices, or any of them, intended to imitate and pass for the same, shall be visible; or shall, except as before excepted, by any art, mystery, or contrivance, cause or procure the words "Excise Office," or any other words, figures, marks, or devices, peculiar to and appearing in the substance of the paper used by the Commissioners of Excise for permits, or any or part of such words, figures, marks, or devices, or any of them, intended to imitate and pass for the same, to appear visible in the substance of any paper whatever; or shall, not being authorized or appointed as aforesaid, engrave, cast, cut, or make any plate, type, or other thing, in imitation of or to resemble any plate or type made or used by the direction of the Commissioners of Excise, for the purpose of marking or printing the paper to be used for permits; or shall, except as before excepted, knowingly have in custody or possession, without lawful excuse (proof whereof shall lie on the person accused), any such plate or type, shall, for every such offence, incur the penalties of the class. (*t*)

(*t*) 2 Will. IV. c. 16, s. 3.

ART. 87.

Rule of interpretation as to criminal possession.

Where the having any thing in the custody or possession of any person shall be an offence, within any article under the present head, if any person shall have any such thing in his personal custody or possession, or shall knowingly and wilfully have any such thing in any dwelling-house, or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such thing shall be so had for his own use, or for the use or benefit of another, every such person shall be deemed and taken to have such thing in his custody or possession within the meaning of such article. (*u*)

(*u*) 11 Geo. IV. and 1 Will. IV. c. 66, s. 28.

ART. 88.

In cases where the forged instrument purports to be made out of England, or has been made out of England, &c.

Where the forging, or the offering, uttering, publishing, disposing of, or putting off, knowing the same to be forged, of any writing or thing whatsoever, shall be an offence within any article under the present head, if any person shall, in that part of the United Kingdom called England, forge, or offer, utter, publish, dispose of, or put off, knowing the same to be forged, any such writing or thing, in whatsoever place or country out of England, whether under the dominion of Her Majesty or not, such writing or thing may purport to be made or may have been made, and in whatever language or languages the same or any part thereof may be expressed, every such person shall be deemed to be an offender within the meaning of such article, and shall be punishable thereby in the same manner as if the writing or thing had purported to be made or had been made in England; and if any person shall in England forge, or offer, utter, publish, dispose of, or put off any bill of exchange, or promissory note for the payment of money, or any indorsement on or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any indorsement or assignment of any undertaking, warrant, or order for the payment of money, or any deed, bond, or writing obligatory for the payment of money, (whether such deed, bond, or writing obligatory shall be made only for the payment of money, or for the payment of money together with some other purpose,) in whatever place or country out of England, whether under the dominion of Her Majesty or not, the money payable or secured by such bill, note, undertaking, warrant, order, deed, bond, or writing obligatory may be or may purport to be payable, and in whatever language or languages the same respectively, or any part thereof, may be expressed, and whether such bill, note, undertaking, warrant, or order be or be not under seal, every such person shall be deemed to be an offender within the meaning of such article, and shall be punishable thereby in the same manner as if the money had been payable, or had purported to be payable, in England. (*v*)

(*v*) 11 Geo. IV. and 1 Will. IV. c. 66, s. 30.

OFFENCES AGAINST THE PUBLIC PEACE.

Prefatory Remarks.

A LARGE class of crimes may in strictness be denominated Offences against the Public Peace, as all forcible violations of the rights of persons or property may without impropriety be comprehended under this division. The French Code includes under the general term of Offences against the Public Peace, coining, some kinds of forgery, corruption and abuses of authority by public officers, and inflammatory discourses and writings by ministers of religion, and also rebellion, and seditious and tumultuous meetings. We have thought it convenient to use the term for our present purpose in a more restricted sense, and to apply it, according to its literal and popular meaning, to those offences only which, by being committed by numbers of persons, or attended with actual and open violence, directly tend to endanger the public peace, distinguishing this class of offences from crimes against the state on the one hand, and from crimes against the persons and property of individuals on the other hand.

The principles upon which penal laws for the preservation of the public peace in this sense are founded are obvious. "Peace," as Mr. Justice Blackstone observes,* "is the very end and foundation of civil society;" and it is manifest that all specific laws for the security of persons or property would be unavailing, unless the due operation of such laws were protected by imposing efficient restraints upon forcible violations of public order.

Tumultuous assemblies have justly been considered as the most dangerous infringements of the public peace; and in all countries, where the subject of criminal jurisprudence has been judiciously considered, such meetings have been subjected to restriction by means of penal laws. On this important subject, however, the provisions of the law of England appear to us to be defective; many of its rules as derived from the manners of feudal times, being unsuitable to the habits of a civilized people, and frequently founded upon forced constructions of the ancient statute law, quite inconsistent with modern rules of interpretation.

I. The line of distinction drawn by our law between the crime of high treason and riots, routs, and unlawful assemblies, is the cause of much inconvenience in practice, and is suggested by obsolete doctrines respecting the royal prerogative and offences against the state, which are unsupported by reason or principle. By the common law of England the injury or grievance complained of and intended to be remedied by those who are parties to a riot, rout, or unlawful assembly, must relate to some *private* quarrel only,—that is, to cases in which the interests or disputes of individuals only, or of distinctly limited classes, are concerned. It is stated as the reason for this doctrine, that wherever the object of the tumultuous assembly is to redress public grievances, such as to reform religion, or to remove evil counsellors from the King, the attempt with numbers and force to execute such an object amounts to high treason in the article of levying war, under the Stat. 25 Edw. III., stat. 5. c. 3, and therefore as the misdemeanor merges in the higher offence, it is not punishable as a mere riot. This distinction is countenanced by the words of the statute of treasons, and may possibly have existed before that enactment. The statute declares that if "any man ride openly or secretly with "men of arms against any other to slay or to rob him, and to take and keep him "till he make fine for his deliverance, it is not the mind of the king nor his "council, that in such case it shall be judged treason; but it shall be judged felony "or trespass according to the law of the land of old time used, and according as "the case requireth." Mr. Justice Foster says,† that the cases of assembling to

* Commentaries, vol. i. p. 349. † Foster's Discourses, p. 209.

kill, rob, or imprison, are put by way of example only, and will not exclude others which may be brought within the same rule, that is, all cases which are of the like private nature. The distinction, therefore, between enterprises of a *public* nature, and those whose object is *private*, is derived from very early times, and, from the cases alluded to in the statute of treasons, seems to have been established when acts of violence by bodies of armed men against individuals, arising from private malice, were matters of common occurrence.

In more recent times, however, this refined and technical rule, that a riotous assembly may be high treason or a misdemeanor only, according as the intention of those engaged in it is to effect a *particular* or a *general* object, is founded upon the doctrine of constructive treason, which is still the unrepealed law of the land. Sir Edward Coke thus states the law upon this subject:—"There is," says he,* "a diversity between levying of war and committing a great riot, a rout, or an "unlawful assembly. For example, as if three or four, or more, do rise to burn "or put down an inclosure in Dale, which the lord of the manor of Dale hath made "there in that particular place, this or the like is a riot, a rout, or an unlawful "assembly, and no treason. But if they had risen of purpose to go from town to "town generally, and to cast down inclosures, this is a levying of war, because the "pretence is public and general, and not private in particular." Mr. Justice Foster, who has considered those parts of the criminal law upon which he treats with much more attention to principle than any other practical writer, says,† "Insurrections in order to throw down *all* enclosures, to alter the established law "or change religion, to enhance the price of *all* labour, or to open *all* prisons,— "all risings in order to effect these innovations of *a public and general concern* "*by an armed force* are, in construction of law, high treason, within the clause of "levying war: for though they are not levelled at the person of the king, they are "against *his royal majesty;* and, besides, they have a direct tendency to dissolve "all the bonds of society, and to destroy all property and all government too by "numbers and an armed force. Insurrections, likewise, for redressing *national* "grievances, or for the expulsion of foreigners in general, or, indeed, of any single "nation living here under the protection of the King, or for the reformation of real "or imaginary evils *of a public nature, and in which the insurgents have no special* "*interest*,—risings to effect these ends by force and numbers are, by construction of "law, within the clause of levying war, for they are levelled at the King's crown "and royal dignity." In this passage Mr. Justice Foster distinctly treats of these offences as crimes against the person and authority of the Sovereign; and the language in which he describes and justifies the doctrine laid down by him nearly resembles the language which was used in early times when the direct power of the Crown was the only spring of government, and when all acts of state and internal economy proceeded immediately from the King. In those times, the phrases of *accroaching*, usurping, or assuming royal power, were employed to denote a large class of crimes which were then deemed invasions of the prerogatives of the Crown; but the use of them is quite inapplicable to the modern state of our constitution. The doctrine, however, thus laid down by Coke and Foster is adopted as the law upon this subject by Hale, Hawkins, Blackstone, and East; and the principle, that the generality of the design alone will constitute the act of assembling an overt act of levying war against the King, is as firmly established by authority as any principle in the law of England. The opinion of Sir Edward Coke, formed in times when high prerogative doctrines prevailed, might have been liable to suspicion and question; but the unanimous resolution of all the judges upon a special verdict in the case of Dammaree and Purchase,‡ since the Revolution, seems to have confirmed the proposition as it is stated not only by Coke, but by Foster and all the modern writers on Criminal Law. The prisoners in that case were part of a mob which, during the excited period of Dr. Sacheverel's trial, became riotous in the support of his cause and party, and, among other acts of violence, proceeded in great numbers to pull down the meeting-houses of the Dissenters. In this manner several meeting-houses were destroyed by them, the prisoners being present and active in the violent demolition of the buildings. Chief Justice Parker, in delivering the judgment of the court upon a special verdict given in one of the cases, said, "It was the unanimous opinion of all the judges, that "the prisoners were guilty of high treason; and that the species of that treason "was levying war against the Queen. For when a multitude is assembled and

* 3 Inst. p. 9. † Foster's Discourses, p. 211. ‡ Howell's State Trials, vol. 15, p. 521.

" force used, not for any private end or revenge, but upon a pretence which is " public and general, it has in all ages been adjudged a levying war against the " Crown, and high treason."

The distinction thus deduced from rude times antecedent to the Statute of Treasons, and continued through five centuries, notwithstanding the total change of our national circumstances, is wholly inapplicable to the present state of society. The manners and habits of social life have been so entirely changed by advancing civilization, that large assemblies of people and acts of violence against individuals for private objects are now extremely rare; whereas tumultuous and dangerous meetings, the object of which is some political or supposed public grievance, are of much more frequent occurrence; and such meetings, if attended with any act of violence, according to the doctrine above mentioned, would constitute high treason. If this doctrine were strictly applied at the present day, it would, we think, materially affect the power of the law to protect the public peace from the danger of riots. We conceive that public opinion would be so strongly opposed to the severity of a law which should declare all tumultuous assemblies, directed to a public and general object, to be high treason, that it would be difficult to procure convictions, or to carry the sentence of the law into execution, even if convictions by juries should be obtained.

But besides the practical inexpediency of such a state of the law, we consider the principle upon which it is founded to be fundamentally erroneous. That principle is the doctrine of constructive treason in its most obnoxious shape;—it is interpreting the actions of men by technical rules, and inferentially imputing to parties accused of crimes motives and objects, which, in truth, they never entertained, in order to enhance the quality of the offence and extend the measure of punishment. In this respect it is repugnant to all just notions of criminal law.

It has resulted, we apprehend, from the pressure of these objections in practice, as well as from the prevalence of more enlightened views of the objects of penal laws, that in recent times this doctrine has not been strictly applied in cases of tumultuous assemblies. On the various occasions of popular disturbances which have occurred during the present century, many instances have occurred of trials and convictions for riots and unlawful meetings, in which the character of the assemblies and the objects of the offenders brought them, according to the authorities, within the law of high treason.

We reserve the full discussion of this most important subject to the more appropriate head of Offences against the State; and we merely allude to it here in order to point out that the law of tumultuous assemblies and the law of high treason are, upon the existing system, entirely dependent upon each other. Where the law of high treason ends, the law of tumultuous assemblies begins; and if the limits of the former are restricted so as to exclude all constructive treasons (which we think ought to be the case), it is obvious that the boundaries of the latter must be proportionately extended. On this account we have thought it proper, on the present occasion, to give the law in the Digest nearly as we find it laid down by the most approved authorities; merely omitting the distinction between *private* and *public* enterprizes, in conformity with the modern practice and for the reasons we have above suggested. In that part of the Digest which will contain the law of treason we shall distinctly define those tumultuous assemblies which we think ought to be classified as offences against the sovereign or the state.

II. It appears to us that the division of the subject matter of these offences into three distinct degrees, as riots, routs, and unlawful assemblies, is unnecessary and inconvenient. To constitute a *riot*, there must be a joint design which must be *executed*, or at least some act must be done in part execution of it: the character of a *rout* is complete, as soon as some act has been done *moving towards the execution* of the joint design; and it is an *unlawful assembly* where three or more persons meet together for any unlawful purpose, or *intending to execute* any purpose with force, and with such circumstances as tend to excite alarm, but do no act moving towards its execution. There is no doubt an obvious distinction between these three degrees of criminality; but the point of the offence in all is the unlawful assembly. The difference between a part execution of a design, and an act moving towards such execution is extremely subtle, and might often lead to difficulties in practice; and it seems to be a simpler and more intelligible principle of arrangement to consider the unlawful assembly as the groundwork of the offence, and the part execution of the joint design or the motion towards it as aggravations. Notwithstanding these objections to the present mode of classification, we have

thought it advisable to continue it in the Digest, as representing the existing law; but should our views upon this point be adopted, it will be easy to effect the requisite alteration by means of the rules and definitions we have given.

III. Another circumstance which we think worthy of notice is the distinction which is drawn in the present law between the assembly of numbers and force, for defending the possession of a dwelling-house, or for the protection of the person in a dwelling-house, and the same acts when employed for the protection of any other kind of property. The law upon this subject is thus stated by Mr. Serjeant Hawkins:* "An assembly of a man's friends in his own house for the defence of the possession thereof against those who threaten to make an unlawful entry thereinto, or for the defence of his person against those who threaten to beat him therein, is indulged by law; for a man's house is looked upon as his castle." On the other hand, it has been expressly held that a man is not justified in arming himself, and assembling his friends in defence of his close.† This distinction seems to be unnecessary and improper. Even homicide may be justified by the law when it happens in defence of the person, or in the protection of any kind of property, real or personal; and it is difficult to see any good reason why a similar justification should not apply to the employment of numbers and force for the same objects. In feudal times, when this doctrine originated, every man's dwelling-house was literally his castle, and the law justified him in defending it against hostile attacks by means of armed retainers. In such a state of things it may have been reasonable and proper to distinguish between the defence of a castle or dwelling-house, and the defence of a piece of land, and also between the defence of a man's person in his castle, and his defence in the highway. But at the present day we can see no reason for such a distinction; and if it be proper that the law should allow a man to defend his dwelling-house, or his person in his dwelling-house, by numbers and arms, it must be equally so to give him the same means of retaining possession of his lands, when threatened with an unlawful entry, and of his goods, when they are about to be taken from him, and also of protecting his person when he has reason to apprehend an unlawful assault, wheresoever it may occur.

IV. Besides the offences of riot, rout, and unlawful assemblies at common law, the law of England contains some statutory provisions upon the subject of tumultuous meetings, which require particular notice. The most important of these are the provisions of the statute popularly termed the Riot Act, 1 King George I., stat. 2, c. 5, s. 1. The period at which this statute was passed was one of unusual political excitement. During the last years of the reign of Queen Anne, the vehemence of party spirit produced a perpetual succession of popular tumults, and the causes of disquietude were aggravated upon the accession of King George I. Possibly, therefore, the provisions of the statute may have been affected in some degree by temporary circumstances; but it appears to us that, in general, they are founded upon judicious policy and sound principles of penal law. It is perhaps worthy of remark, that the enactment was not new in the law of England, as temporary statutes to the same effect, and from which some of the clauses are obviously copied, were passed at the beginning of the reigns of King Edward VI. and Queen Mary, and continued, by the statute 1 Queen Elizabeth, c. 16, during the life of the latter Queen.

The preamble of the Riot Act states that "many rebellious riots and tumults had "been in divers parts of the kingdom, to the disturbance of the public peace, and the "endangering of His Majesty's person and Government, and that the punishments "provided by the laws then in being were not adequate to such heinous offences." It then enacts, "for the preventing and suppressing such riots and tumults, and for "the more speedy and effectual punishing the offenders, that if any persons, to the "number of *twelve* or more, being unlawfully, riotously, and tumultuously assem-"bled together, to the disturbance of the public peace, and being required or com-"manded to disperse themselves, by proclamation, to be made in a given form, and "by certain specified magistrates or officers, should, to the number of twelve or "more (notwithstanding such proclamation made), unlawfully, riotously, and tu-"multuously remain or continue together by the space of one hour after such "request or command made by proclamation, that then such continuing together "to the number of twelve or more" should be adjudged a capital felony. The fifth section provides that "if any person or persons should, with force and arms, wil-

* Hawkins's P. C. book i. ch. 65, s. 10.

† Rex *v.* the Bishop of Bangor, Russell on Crimes, p. 363, *note*.

" fully and knowingly oppose, obstruct, or in any manner wilfully and knowingly " let, hinder, or hurt any person or persons that should begin to proclaim, or go to " proclaim, according to the proclamation directed by the Act to be made, whereby " such proclamation should not be made," such opposition or hindrance should also be a capital felony. The statute further enacts that " all persons so riotously as- " sembled, to whom proclamation should have been made if it had not been so hin- " dered, and continuing together, to the number of twelve or more, for the space of " one hour after such hindrance made," should also be guilty of a capital felony.

The capital punishment was removed from the several offences defined in the above clauses by the statute " for abolishing the punishment of death in certain cases," which was passed in the first year of Your Majesty's reign, and the punishment now annexed by the law to them is transportation for life, or not less than fifteen years, or imprisonment for any term not exceeding three years.

The offences defined in the above clauses of the Riot Act are in truth nothing more than aggravated riots. The first aggravation consists in the larger number of persons collected, the presence of three persons being sufficient to constitute a riot at common law, whereas twelve at the least must be assembled in order to constitute a felonious riot under the statute. As the danger to the public peace is obviously increased in proportion to the number of persons assembled, it appears to us that this circumstance may be properly treated as an aggravation of the crime. The next and most important aggravation is the continuance of the assembly after a formal and authoritative notice to disperse. In this respect we think the provisions of the Riot Act are founded upon just principles. It is in general necessary, both in civil and criminal jurisprudence, to rely upon the presumption that all men know the law, though it is probable that wrong may occasionally result from a too rigid application of this rule. But all pretence of injustice is taken away, if the law before it strikes, gives the offender in each particular case express and timely notice of his peril, and offers him the opportunity of escape. On the other hand, no greater aggravation of a crime, and no more complete justification of severe punishment, can well be conceived, than exists in the case of a resolute determination to persevere in the commission of an offence in defiance of express notice of the law.

It would no doubt increase the effectiveness of penal laws in preventing crimes, if direct notice of the laws and the consequences of transgression could be given to every individual who is subject to them. To do this, generally, however, is for obvious reasons impracticable; but the great importance of preventing the mischief resulting from tumultuous assemblies, as well as the peculiar nature of the offence, seem to render an abundance of caution in this case desirable; and the numerous instances in which dangerous disturbances have been suppressed or checked by the application of the proceedings directed by the Riot Act, seem to prove its practical efficiency as a preventive law.

For these reasons, we propose to retain the provisions of the Riot Act, so far as they relate to the prevention and suppression of tumultuous assemblies, especially as the offences created by it are no longer subject to capital punishment.

In observing upon the enactments of the Riot Act, it is proper to notice the offence of riotously demolishing houses or other buildings, which was originally created by that statute, and has been continued by the statute 7 and 8 of King George IV., c. 30, s. 8. This offence is still capital, not having been included among the crimes with respect to which the punishment of death was abolished by the statute passed in the first year of Your Majesty's reign. So far as relates to the demolition of *dwelling-houses* by a riotous assembly, the application of the punishment of death to such an offence is justifiable upon the principle to which we have more than once had occasion to advert,* namely, the probable danger to human life. It can hardly be conceived that a riotous assembly should begin to demolish a building used for the habitation of man, without the occurrence of danger (more or less imminent, according to circumstances) to the lives of the inhabitants or neighbours; and therefore, upon the principle above noticed, this offence may with propriety be subject to capital punishment. But by the law, as it is now contained in the statute 7th and 8th of King George IV., c. 30, s. 8, the pulling down, or beginning to pull down, a stable, coach-house, or out-house, and also several other kinds of buildings, wholly unconnected with the habitation of man, are likewise

* See Second Report of the Criminal Law Commissioners, and also the Correspondence between the Secretary of State for the Home Department and the Commissioners.

made capital crimes. As, in these cases, capital punishment is used to protect property, and not human life, it is manifestly not justified by the principle above adverted to; and if that principle be correct, and if there is no apparent necessity for a departure from it in this particular instance, it seems to be desirable that the punishment of death should be restricted to the offence of riotously demolishing buildings by which human life is, or may probably be, endangered. This consideration, however, does not immediately affect the definition of the crime, though it must necessarily be considered in the arrangement of the scales of punishment. For the present, therefore, we have merely inserted the provision in the Digest in the terms in which it is expressed in the statute 7th and 8th of King George IV. c. 30.

OFFENCES AGAINST THE PUBLIC PEACE.

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Art. 1.

Riot.

If three or more persons shall assemble, or being together shall continue together for the common purpose of executing some unlawful and violent act, or of executing any act whatsoever, in such manner and under such circumstances of violence, threats, tumult, numbers, display of arms or otherwise, as are calculated to create terror and alarm amongst the Queen's subjects, and shall in either case, wholly or in part, execute such purpose, every such person shall be deemed to be guilty of a riot (*a*), and shall incur the penalties of the class (*b*)

(*a*) See the definitions of this offence in 1 Hawkins's Pleas of the Crown, c. 65, s. 1; 3 Inst. 176; 4 Black. Com. 146. In the Queen *v.* Soley and others, 11 Mod. 116, Lord Holt, after noticing the obscurity of the authorities on the subject of riot, is reported to have expressed an opinion that, "*though no act is done*, if a number of men assemble with arms *in terrorem populi*, it is a riot." The case of the Queen *v.* Soley is, however, liable to much animadversion, and all the recent cases tend to show that, in order to constitute a riot, the act intended must be actually proceeded upon, and executed, at least in part, by the unlawful assembly. In the case of Redford *v.* Birley and others, 3 Starkie's Nisi Prius Reports, p. 102, Mr. Justice Holroyd says, "persons may be riotously assembling together, yet, unless they do some act of violence, it would not go so far as to constitute actually a riot."

We have defined riots in the above article in conformity with the suggestions which we have made in the Prefatory Remarks to this class of offences. As the law now stands, it is necessary, in order to constitute a riot, that the common design entertained and acted upon by the assembly should be of a private nature; that is, it must relate to interests or disputes affecting particular persons, and in no way concerning the public. The reason given for this distinction is, that the proceedings of a riotous assembly to redress public grievances, would amount to a constructive levying of war against the King. See 1 Hawkins's P. C. c. 65, s. 6. In that part of the Digest which relates to high treason, we shall have to submit some remarks upon the inexpedience of considering these tumultuous assemblies as overt acts of treason, and to suggest some modifications of the present law.

(*b*) The punishment of the offence of riot by the common law was discretionary fine and imprisonment, to which, in cases of great enormity, the pillory was sometimes added. By the Stat. 3 Geo. IV. c. 114, hard labour might be imposed either in addition to, or instead of, other punishment.

Art. 2.

Assembly to assert a right.

It is not a riot where three or more persons assemble to assert a claim of right, and afterwards act in pursuance of such claim, provided the number of persons assembled and the force used be not greater than are probably necessary for the purpose, and provided that no threatening language or gestures be employed.(*c*)

(*c*) Thus, where a man having erected a wear across a public navigable river, several persons assembled with spades, crows, and other proper instruments to remove it, and dug a trench in the land of the man that made the wear, in order effectually to remove the obstruction by turning the water, and thus abated the nuisance, this was holden to be no riot. But if, in removing such a nuisance, threatening words were used, or any other behaviour in apparent disturbance of the peace, it would be a riot. Dalton's Justice, c. 137.

Art. 3.

The rule contained in the last preceding Article applies whether the claim intended to be asserted be lawful or unlawful, and whether the act done in pursuance of such claim be justifiable or wrongful. (*d*)

(*d*) "An assembly to do a wrong," says Lambard (Eirenarcha, c. 5. p. 178), "may be so handled, that it shall prove neither a riot, nor a rout, nor an unlawful assembly; as if I gather meet company together to carry away a piece of timber, which will not be moved without a good many, whereto I pretend right, though in law it is another man's. And so also to do an unlawful thing, as if many do

play at bowls, tables, or cards, and do use no misbehaviour against the peace, they are not punishable in this degree. And yet if he that carrieth the piece of timber away, will use dreadful words, as to say, that 'he will carry it in spite of him that hath it,' or, that 'he will have it, though he die for it,' or such like, his doing it may then become a riot."

ART. 4.

In order to constitute a riot, there must be actual force and violence, or a manifest tendency thereto, as by carrying arms, or making use of menacing and turbulent language or gestures; but it is not necessary that any violence to persons or property should have been actually committed in the execution or part execution of the common purpose. (*e*)

(*e*) See the language of Sir J. Mansfield, C. J., in Clifford *v.* Brandon, 2 Camp. 369.

ART. 5.

It is not a riot where three or more persons being assembled together, for any lawful purpose, happen on a sudden quarrel to commit a breach of the peace, however violent. (*f*)

(*f*) "Thus," says Lambard (Eirenarcha, p. 179), "if many be at an alehouse, a Christmas dinner, or churchale, and they suddenly fall together by the ears, and make it *Lapitharum convivium*, yet this is no riot, because they had no such intention. And if twelve jurors, being committed to their keeper, do fall out and fight, six against six, this maketh no riot, because they were lawfully assembled, and were compelled to be in company together." The reason of this rule is the accidental nature of the disturbance, and the absence of all preconcerted design to do any particular act. See 1 Hawkins's P. C. c. 65. s. 3. The offence in this case is an affray.

ART. 6.

Rout.

If three or more persons shall assemble, or being together shall continue together for such common purpose as is essential to constitute a riot, and shall use any endeavour to execute such purpose, every such person shall be deemed to be guilty of a rout, although such purpose be not executed either wholly or in part (*g*), and shall incur the penalties of the class.

(*g*) Some of the more ancient authorities limit a rout to such assemblies only as are formed with a view to execute a design common to all the company, as the inclosure of land, in which all of them claim rights of common, &c. But by all modern text-writers it is described to be a disturbance of the peace by persons assembling together with an intention to do a thing, which, if it be executed, will make them rioters, and actually making a motion towards the execution of their purpose. Mr. Serjeant Hawkins says, "It generally agrees with a riot as to all the rest of the particulars requisite to constitute a riot, except only in this, that it may be a complete offence without the execution of the intended enterprise." Hawkins's P. C. c. 65, s. 8. Mr. Justice Holroyd, in the case of Redford *v.* Birley, above cited, says, "a rout or routous assembly is where persons come for some unlawful purpose, intending to do something in violence, but do not go to the full extent, or take any actual step for accomplishing their purpose." The punishment of a rout by the common law is discretionary fine and imprisonment, to which the pillory might formerly have been added.

ART. 7.

Unlawful assembly.

If three or more persons shall assemble, or, being together shall continue together for any unlawful purpose, or shall assemble or, being together, shall continue together for any purpose whatsoever, in such manner and under such such circumstances of violence, threats, tumult, numbers, display of arms or otherwise, as are calculated to create terror and alarm amongst the Queen's subjects, every such person shall be deemed to be guilty of an unlawful assembly, and shall incur the penalties of the class. (*h*)

(*h*) This definition appears properly to describe the offence of an unlawful assembly at common law. A less comprehensive definition is given by ancient authorities (see Brooke's Abr. tit. Riots, 3 Inst. 176; Lambard's Eirenarcha, p. 175; Dalton's Justice, chap. 136), which Mr. Serjeant Hawkins censures as being "much too narrow;" and he goes on to say that "any meeting whatsoever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace and raise fears and jealousies among the King's subjects, seems properly to be called an unlawful assembly; as where great numbers, complaining of a common grievance, meet together armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests; for no one can foresee what may be the event of such an assembly." 1 Hawkins's, P. C. c. 65, s. 9.

The language of Mr. Justice Bayley, in the King *v.* Hunt, which is cited with approbation in Redford *v.* Birley, would appear at first to carry the law much further. He says, "all persons assembled to sow sedition, and bringing into contempt the constitution, are in an unlawful assembly; all persons assembled in furtherance of this object are unlawfully assembled too." It is clear, however, that the learned judge is here alluding to *seditious meetings*, which have usually been considered as distinct from unlawful assemblies.

ART. 8.

Assembly in defence of dwelling-house.

It shall not be deemed to constitute either a riot, rout, or unlawful assembly if three or more persons assemble for the common purpose of assisting in the defence of the possession of the dwelling-house of any of them, or in the defence of the person of any of them, against such as threaten to enter his dwelling-house, in order to beat him, although they execute or endeavour to execute such purpose, or otherwise conduct themselves violently and tumultuously, or in such a manner, and under such circumstances as are calculated to create terror and alarm amongst the Queen's subjects. (*i*)

(*i*) This exception to the general rule is founded upon the ancient maxim, that "a man's house is looked upon as his hold and castle." 1 Hawkins's P. C. c. 65, s. 10; Lambard's Eirenarcha, p. 179. It does not therefore extend to the case of a number of persons assembled to defend the possession of a close, or even to assist another to defend his person against an expected assault elsewhere than in his own house. In these cases it is said that a man must appeal to the law by calling for sureties, and not make use of modes of redress and protection which endanger the public peace. See Hawkins's P. C. *ubi supra*, and Regina *v.* Soley, 11 Mod. 110. The utility of such a distinction may reasonably be doubted. See the Prefatory Remarks, p. 93.

ART. 9.

In defence of any other private right.

But if three or more persons shall assemble for the common purpose of asserting or defending any other private right, or repelling any other private injury, besides those mentioned in the last preceding Article, and shall execute such purpose wholly or in part, or use any endeavour to execute such purpose, or shall otherwise conduct themselves violently and tumultuously, or in such a manner, and under such circumstances as are calculated to create terror and alarm amongst the Queen's subjects, every such person shall be deemed to be guilty of a riot, rout, or unlawful assembly, as the case may be, according to the rules hereinbefore stated.

ART. 10.

The rule contained in the last preceding Article applies, although the right intended to be asserted or defended is lawful, (*k*) and although the injury intended to be repelled is unlawful.

(*k*) See 1 Hawkins's P. C. c. 65, s. 7, where the doctrine stated in this article is contained, and the reason given is, that "the law will not suffer persons to seek redress of their grievances by such dangerous disturbances of the public peace." It is also held by the court in an Anonymous Case in 12 Mod. 648, that "if one goes to assert his right with force and violence, he may be guilty of a riot." In Lambard's Eirenarcha, c. 5. p. 177, it is said, that "the lawfulness or unlawfulness of the thing itself that is done, or intended, doth not always excuse or accuse the parties to a riot, rout, or unlawful assembly, but so that the manner and circumstance of the doing must also be brought into judgment with it." In the case of the Queen *v.* Soley, reported in 11 Mod. 115, and 2 Salkeld, 594, the Court of King's Bench held in effect that there can be no riot unless the design of the assembly is unlawful, because they determined in that case on a prosecution of an assembly for a riot, in opposing with violence and tumult the election of bailiffs by the corporation of Bewdley, and forcibly breaking open the door of the Guildhall, it was necessary to show that the corporation had a right to elect; otherwise the court said, the conduct of the mob would not be unlawful. There are ancient dicta in support of this opinion (See Dalton's Justice, c. 136); but it appears to us to be founded upon a mistaken view of the point of the offence of riot, which, according to the obvious policy of the law, both in ancient and modern times, and also according to the best authorities, consists in doing acts by numbers of persons with violence and tumult. The lawfulness of the design, or of the particular acts done in pursuance of it, independently of the circumstances of numbers and tumult, may therefore be wholly immaterial to the substance of the crime, though they may be important considerations in apportioning the punishment.

ART. 11.

Sudden quarrel.

Where three or more persons lawfully assembled, suddenly quarrel, and then form themselves into parties (each consisting of three or more persons) against each other, or suddenly agree to go together to execute any common purpose, and afterwards wholly or in part execute such purpose, or use any endeavour to execute such purpose, and in so doing conduct themselves violently and tumultuously, or in such a manner, and under such circumstances as are calculated to create terror and alarm amongst the Queen's subjects, every such person shall be deemed to be guilty of a riot, rout, or unlawful assembly, as the case may be, according to the rules hereinbefore stated.

(*l*) The principle of this rule is, that though the original assembly was lawful, the new agreement and the subsequent violent execution of it, constitute a riot, and cannot be extenuated by the circumstance, that the parties met at first for another purpose.

ART. 12.

Encouraging rioters, &c.

Whosoever seeing other persons actually engaged in a riot, rout, or unlawful assembly shall join himself unto such persons, and assist them therein, or shall by words, signs, or gestures, or by wearing any badge or ensign, encourage or take part in such riot, rout, or unlawful assembly, shall be deemed to be guilty of a

riot, rout, or unlawful assembly, as the case may be, according to the rules hereinbefore stated. (*m*)

(*m*) As to this rule, see the language of Sir James Mansfield, C. J., in Clifford *v.* Brandon, 2 Camp. 370; Rex *v.* Boyce, 4 Burr. 3073; and 2nd and 3rd Resolutions in the Sissinghurst House Case, 1 Hale, P. C. 463. The reason given by Hawkins and by several late writers for this rule, namely, "that it would be endless as well as superfluous to examine whether every particular person engaged in a riot had any previous knowledge of the design," seems to be unsatisfactory, as it would apply to almost every case of a compound offence committed by numbers. If the previous knowledge of the joint design is an essential part of the *corpus delicti*, it cannot be superfluous to inquire into the fact, and the difficulty of proof is not a valid reason for omitting it altogether. Perhaps a better reason for the rule may be found in the presumption that a man who assists or encourages rioters must either be previously aware of their design, or that it was imparted to him upon his joining them; or in the maxim of law that one who aids those acting illegally without inquiry, does so at his peril. (See Digest of Homicide, Fourth Report of the Criminal Law Commissioners, p. 37.)

Art. 13.

Riotously pulling down buildings, &c.

If any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy any church or chapel used for religious worship, or any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture or in any branch thereof, or any steam-engine or other engine, for sinking, draining, or working any mine, or any staith, or any bridge, waggon-way, or trunk for conveying minerals from any mine, every such offender shall suffer death. (*n*)

(*n*) 7 and 8 Geo. IV. c. 30, s. 8. The statute 7 and 8 Geo. IV. c. 27, repeals the several statutes of the 9 Geo. III. c. 29; 52 Geo. III. c. 130; 56 Geo. III. c. 125; and so much of 1 Geo. I. s. 2, c. 5 (Riot Act), as relates to any rioters demolishing or pulling down, or beginning to demolish or pull down any of the buildings therein mentioned; and the statute 7 and 8 Geo. IV. c. 30, s. 8, consolidates and re-enacts their several provisions with some important verbal improvements. The several offences enumerated in the above clause, the substance of which we have retained in this article, still continue to be capital, not being included in the "Act for abolishing the punishment of death in certain cases," 1 Vict. c. 91. See the reasons for the abolition of capital punishment in respect of this class of offences suggested in the Prefatory Remarks, p. 94.

Art. 14.

Riots by keelsmen.

If any seamen, keelsmen, casters, ship carpenters, or any other persons riotously assembled together to the number of three or more, shall, unlawfully and with force, prevent, hinder, or obstruct the loading or unloading, or the sailing or navigating of any ship, keel, or other vessel, or shall unlawfully and with force board any ship, keel, or other vessel, with intent to prevent, hinder, or obstruct the loading or unloading, or the sailing or navigating of such ship, keel, or other vessel, every such offender shall incur the penalties of the class. (*o*)

(*o*) Stat. 33 Geo. III. c. 67, s. 1. This statute, which assigns a punishment of imprisonment and hard labour, for not more than 12 months and not less than 6 months, to the offences it describes, was probably passed in order to repress acts of violence and riot committed by seamen and others connected with the Newcastle coal trade in consequence of some temporary discontents. It is one of the numerous statutes which have been directed to the removal of accidental and particular evils of a local nature, and which have been framed without much consideration whether the common law was not already strong enough to repress them, and without much care in the arrangement of their details. The several acts of violence described by the statute would constitute a riot at common law, with the single exception that the statutable offence is in terms complete, though the turbulent acts are not done *in terrorem populi*. But it seems improbable that such acts as the statute defines should not be accompanied with threats or violent language or gestures, so as to amount to a common law riot. For this reason, and as no punishment is authorized by the statute which might not be inflicted by the common law, there appears to us to be no sufficient ground for the continuance of this particular provision; and we should, therefore, recommend that it be wholly repealed.

Art. 15.

Unlawful assemblies continuing together after proclamation to disperse.

If any persons, to the number of 12 or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, and being required or commanded by the sheriff or his under-sheriff, or any justice of the peace of the county, or by the mayor, bailiff, or other head officer for the time being, or any justice of the peace of any city or town corporate where such assembly shall be, by proclamation to be made in the form hereinafter directed, to disperse themselves, and peaceably to depart to their habitations or to their lawful business, shall, to the number of 12 or more (notwithstanding such proclamation made), unlawfully, riotously, and tumultuously remain or continue together by the space of one hour after such proclamation shall have been made, every such offender shall incur the penalties of the class. (*p*)

(*p*) 1 Geo. I. st. 2, c. 5, s. 1.

ART. 16.

Order and form of proclamation.

The order and form of such proclamation as is mentioned in the last preceding Article shall be as follows (that is to say), the person authorized by that Article to make such proclamation shall, among the said rioters, or as near to them as he can safely come, with a loud voice command, or cause to be commanded, silence while proclamation is making; and immediately after that, shall openly and with a loud voice, make or cause to be made proclamation in the words following, or to the like effect:—Our Sovereign Lady the Queen charges and commands all persons being here assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, or they will incur the penalties of the laws against riotous assemblies. God save the Queen. (*q*)

(*q*) It might perhaps be doubted whether it would be desirable to retain the specific form of proclamation. The substance of the offence is the continuance of the unlawful assembly for the space of an hour after proclamation for its dispersion has been formally and publicly made by the authorities designated for that purpose. The mere form of the proclamation, therefore, might seem to be immaterial. In consequence of the precise directions given in the Riot Act as to the form and manner of making the proclamation, it has been considered that the offence of remaining together for an hour after it had been made, could not be completed unless these directions had been literally pursued. This has been occasionally productive of inconvenience; for instance, upon the trials by the special commission for Hampshire in 1830, a charge of this kind is reported to have failed, because the magistrate who read the proclamation from the Riot Act had omitted the words "God save the King." On other occasions, very slight variations from the words of the proclamation have been held to be fatal objections to prosecutions for this offence. It must be admitted that this extreme nicety does not depend upon any reason or principle; and it is perhaps worthy of remark, that in the ancient Riot Acts, 3 and 4 Edward VI. c. 5, and 1 Mary, c. 12, from which the words of the statute 1 Geo. I. are evidently taken, no form of prolamation is given. Nevertheless, considering the peculiar nature of the offence constituted by Article 15, we think it would be prudent to retain the form of the proclamation. From a practice of more than a century, the ceremony of "reading the Riot Act," as it is popularly termed, is well known among the people; and if a less formal proceeding were to be adopted, we apprehend that, in excited assemblies, it might frequently happen that the proclamation might be so imperfectly and indistinctly made as to occasion fatal misapprehensions.

ART. 17.

Obstructing persons making proclamation.

Whosoever shall forcibly oppose or hurt, or in any manner hinder or obstruct any person lawfully making or endeavouring to make such proclamation as in the last two preceding Articles is mentioned, whereby such proclamation shall not be made, shall incur the penalties of the class. (*r*)

(*r*) 1 Geo. I. st. 2, c. 5, s. 5.

ART. 18.

Not dispersing after proclamation hindered.

If any persons, to the number of 12 or more, being unlawfully, riotously, and tumultuously assembled together, to whom proclamation should or ought to have been made, if the same had not been obstructed and hindered as in the last preceding Article is mentioned, shall continue together and not disperse themselves within one hour after such obstruction and hindrance made, every such offender shall incur the penalties of the class. (*s*)

(*s*) 1 Geo. I. st. 2, c. 5, s. 5. The provisions contained in Articles 15, 16, 17, and 18, are in substance the same with those of the Riot Act, the alterations made being merely verbal. By the Riot Act these offences were capital; but by the recent Act for abolishing the punishment of death in certain cases, 1 Vict. c. 91, the capital punishment is removed, and offenders of this kind are now liable to be transported for life or 15 years, or to be imprisoned for three years.

The statutes relating to unlawful societies for political purposes, as the 39th Geo. III. c. 79 (the Corresponding Society Act), and of confederacies bound by unlawful oaths, &c., will be more properly digested under the head of Conspiracy, as a permanent association whose meetings are not characterized by any display of force, or a tendency to immediate disturbance of the public peace, does not come within the notion of an unlawful assembly. The statute 13 Car. II. st. 1, ch. 5, respecting tumultuous petitioning, will likewise be more appropriately considered in the Digest of Offences against the King and the Houses of Parliament.

ART. 19.

Drilling.

Whosoever shall be present at or attend any meeting or assembly of persons for the purpose of training or drilling themselves, or of being trained or drilled to the use of arms, or for the purpose of practising military exercise, movements, or evolutions, without any lawful authority from Her Majesty, or the lieutenant or two justices of the peace of any County or Riding by commission or otherwise for so doing, for the purpose of training and drilling any other person or persons to the use of arms, or the practice of military exercise, movements, or evolutions; or shall train or drill any other person or persons to the use of arms, or the practice of military exercise, movements, or evolutions, or shall aid or assist therein, shall incur the penalties of the class. (*t*)

(*t* By the statute 60 Geo. III. and 1 Geo. IV. c. 1, s. 1, from which we have taken this and the

next following Article, these offences are punishable with transportation for seven years, or imprisonment for two years.

ART. 20.

Whosoever shall be present at any such meeting as in the last preceding Article is mentioned, for the purpose of being, or who shall at any such meeting or assembly be, trained or drilled to the use of arms or the practice of military exercise, movements, or evolutions, shall incur the penalties of the class. (*u*)

(*u*) This offence is punishable by the statute 60 Geo. III. and 1 Geo. IV. c. 1, with fine and imprisonment not exceeding two years.

ART. 21.

Not aiding, when warned, to resist Riots, Routs, and unlawful Assemblies.

Whosoever, being sufficient to travel in the county where routs, assemblies, or riots against the law be, shall not be assistant to the justices, commissioners, sheriff or under-sheriff of the same county, when he shall be reasonably warned to ride with the said justices, commissioners, and sheriff or under-sheriff, in aid to resist such riots, routs, and assemblies, shall incur the penalties of the class. (*v*).

(*v*) 2 Hen. V. stat. 1, c. 8. This Article, and also Article 25, are in effect contained in some of the general provisions of the Digest of Offences against the Executive Power. As they are still part of the statute law, we have thought it right to include them; but they are practically obsolete, and might, we think, be properly repealed.

ART. 22.

Forcible Entry.

Whosoever shall make entry into any lands and tenements, except in case where entry is given by the law, shall incur the penalties of the class. (*w*)

(*w*) 5 Rich. II. stat. 1, c. 8. This provision can scarcely be considered at the present day as an indictable offence, but must be regarded as a mere trespass remediable by action.

ART. 23.

Whosoever, in case where entry is given by the law, shall enter into any lands and tenements with a strong hand or with multitude of people, and not in peaceable and easy manner, shall incur the penalties of the class. (*x*)

(*x*) This Article is taken from the words of an ancient but unrepealed statute, the 5 Rich. II. stat. 1, c. 8. At common law it appears from Bracton that a person who had been disseised of lands might expel the disseisor by force if the disseisin was recent. "Disseisitus, per se si possit, *vel sumptis viribus vel resumptis*, dum tamen sine ullo intervallo, flagrante disseisinâ et maleficio, rejiciat spoliantem." Bracton, lib. iii. cap. 5. The above statute was passed to obviate the constant breaches of the public peace which arose from these forcible vindications of the right of property without legal process, and to prevent the injustice and oppression occasioned by giving to powerful men the opportunity, under feigned titles, of forcibly ejecting their weaker neighbours, and also of forcibly retaining their wrongful possessions. Hawkins's P. C., book i. c. 64.

ART. 24.

Whosoever shall, forcibly and violently, or in such a manner and with such circumstances as are calculated to create terror and alarm amongst the Queen's subjects, make entry into or detain possession of any dwelling-house, land, or tenement, shall incur the penalties of the class. (*y*)

(*y*) It is quite clear, from a variety of authorities, that a forcible entry or detainer is an offence at common law (see Rex *v.* Bathurst, Sayer, 225; Rex *v.* Storr, 3 Burr. 1698; and Rex *v.* Wilson and others, 8 Term Rep. 357), and in modern times this has been found the most efficacious mode of prosecuting the offence, unless where the prosecutor is seeking for restitution under the stat. 15 Rich. II. c. 2. A general provision of the above kind seems all that is necessary to secure the objects of the Criminal Law; and if so, the statute of 5 Rich. II., upon which the two immediately preceding Articles are founded, might be, without inconvenience, repealed. To constitute this offence, Mr. Serjeant Hawkins says, "there ought to be some circumstances of actual violence or terror;" and as illustration of the kind of conduct in the offender which is essential, he mentions the carrying such an unusual number of servants, or arming himself in such a manner as plainly intimates a design to back his pretensions by force, or actually threatening to kill, maim, or beat those who may oppose him. Hawkins's P. C., book i., cap. 64.

ART. 25.

Not assisting in the arrest of Persons holding Lands forcibly after forcible Entry.

Whosoever shall not be attendant upon the justices of the peace, to go and assist the same justices to arrest any that hold any lands or tenements, or other possessions whatsoever, forcibly, after forcible entry made, shall incur the penalties of the class. (*z*)

(*z*) 15 Rich. II. c. 2.

ART. 26.

Affray.

If two or more persons shall fight together in a public place in such a manner, or with such circumstances as are calculated to create terror and alarm amongst

the Queen's subjects, every such person shall be deemed to be guilty of an affray, and shall incur the penalties of the class. (*a*)

(*a*) The point of the offence called an affray (which indeed appears from its etymology, being derived from "*effrayer*," to terrify) is the alarm occasioned by a violent breach of the peace, "which the law," says Lambard (Eirenarcha, p. 125), "understandeth to be a common wrong." It is in this point that it is distinguished from an assault, which, if it happens in a private place, out of the hearing and seeing of any, except the parties concerned, could not excite terror or alarm. The one, therefore, is properly to be considered as an offence against the public peace, and the other an offence against the person of an individual.

ART. 27.

No quarrelsome or threatening words, however violent, will amount to an affray. (*b*)

(*b*) 1 Hawkins's, P. C., c. 63, s. 4.

ART. 28.

If two or more persons shall openly carry dangerous and unusual weapons in any public place in such a manner and with such circumstances as are calculated to create terror and alarm amongst the Queen's subjects, every such person shall be deemed to be guilty of an affray and shall incur the penalties of the class. (*c*)

(*c*) The law contained in this Article was probably founded upon the statute 2 Edw. III. c. 3, which formed part of the capitularies of laws called the Statutes of Northampton. It enacts "that no man, of what condition soever, except the king's servants in his presence and his ministers in executing their office, and such as be in their company assisting them, and also upon a cry made for arms to keep the peace, shall come before the king's justices, or other of the king's ministers doing their office with force and arms, nor bring any force in *affray of the peace:* nor go nor ride armed, by night or day, in fairs or markets, or in the presence of the king's justices or other ministers, or elsewhere; upon pain to forfeit their armour to the king, and their bodies to prison at the king's pleasure". This statute is further enforced by 7 Rich. II. c. 13, and by the 20 Rich. II. c. 1, which latter statute adds the further punishment of a fine. These specific laws were framed with a view to the manners and habits of the country in an imperfect state of civilization; and their provisions being, for the most part, inapplicable at the present day, it appears to us that they might be advantageously repealed.

ART. 29.

Challenging to fight.

Whosoever shall challenge any person to fight, or shall in any manner or by any means whatsoever incite or provoke any person to fight, either with himself or with any other person, or to challenge any other person to fight, shall incur the penalties of the class. (*d*)

(*d*) 1 Hawk. P. C. c. 63, s. 3; Rex *v.* Rice, 3 East P. C. 581.

We humbly submit this the Fifth Report of the Commissioners to Your Majesty's Royal consideration.

THOMAS STARKIE (L.S.)
H. BELLENDEN KER (L.S.)
WILLIAM WIGHTMAN (L.S.)
D. JARDINE (L.S.)

Received 22nd day of April, 1840,

COTTENHAM, C.

APPENDIX.

Extracts from the Revised Statutes of the State of New York.

ARTICLE SECOND.

OF BURGLARY.

[Sec. 10. Burglary in the first degree, declared.
11, 12, 13, 14, and 15. Burglary in second degree, declared.
16. What buildings to be deemed dwelling-houses.
17 and 18. Burglary in third degree, declared.
19. When breaking out to be deemed burglary.
20. Breaking an inner door, when burglary.
21. Punishment for different degrees of burglary.]

10. Every person who shall be convicted of breaking into and entering, in the night-time, the dwelling-house of another, in which there shall be at the time some human being, with intent to commit some crime therein, either, Burglary in first degree.

(1.) By forcibly bursting or breaking the wall, or an outer door, window, or shutter of a window of such house, or the lock or bolt of such door, or the fastening of such window or shutter: or,

(2.) Breaking in any other manner, being armed with some dangerous weapon; or with the assistance and aid of one or more confederates, then actually present, aiding and assisting: or,

(3.) By unlocking an outer door by means of false keys, or by picking the lock thereof, shall be deemed guilty of burglary in the first degree.

11. Every person who shall be convicted of breaking into any dwelling-house in the day-time, under such circumstances as would have constituted the crime of burglary in the first degree, if committed in the night-time; shall be deemed guilty of burglary in the second degree. Burglary in second degree.

12. Every person who shall be convicted of breaking into any dwelling-house in the night-time, with intent to commit a crime, but under such circumstances as shall not constitute the offence of burglary in the first degree; shall be deemed guilty of burglary in the second degree. Ibid.

13. Every person who shall enter into the dwelling-house of another by day or by night, in such manner as not to constitute any burglary hereinbefore specified, with an intent to commit a crime; or being in the dwelling-house of another, shall commit a crime; and shall in the night-time break any outer door, window, or shutter of a window, or any other part of such house, to get out of the same, shall be adjudged guilty of burglary in the second degree. Ibid.

14. Every person who having entered the dwelling-house of another in the night-time, through an open outer door or window, or other aperture not made by such person, shall break any inner door of the same house, with the intent of committing any crime, shall be adjudged guilty of burglary in the second degree. Ibid.

15. Every person who being admitted into any dwelling-house, with the consent of the occupant thereof, or who being lawfully in such house, shall in the night-time, break any inner door of the same house with the intent of committing any crime, shall be adjudged guilty of burglary in the second degree. Ibid.

16. No building shall be deemed a dwelling-house, or any part of a dwelling-house, within the meaning of the foregoing provisions, unless the same be joined to, immediately connected with, and part of, a dwelling-house. What to be deemed dwelling-houses.

17. Every person who shall be convicted of breaking and entering, in the day or in the night time,— Burglary in third degree.

(1.) Any building within the curtilage of a dwelling-house, but not forming a part thereof; or,

(2.) Any shop, store, booth, tent, warehouse, or other building, in which any goods, merchandize, or valuable thing shall be kept for use, sale, or deposit, with intent to steal therein, or to commit any felony, shall, upon conviction, be adjudged guilty of burglary in the third degree.

Burglary in third degree.

18. Every person who shall be convicted of breaking and entering into the dwelling of another, in the day time, under such circumstances as would have constituted the offence of burglary in the second degree, if committed in the night time; shall be deemed guilty of burglary in the third degree.

Breaking out of house.

19. The breaking out of any dwelling-house, by any person being therein, shall not be deemed such a breaking of a dwelling-house, as to constitute burglary in any case, other than such as are herein particularly specified.

Breaking an inner door.

20. The breaking of the inner door of any house, by any person being therein, shall not be deemed such a breaking of a dwelling-house, as to constitute burglary in any case, other than such as are herein particularly specified.

Punishment.

21. Burglary in the first degree shall be punished by imprisonment in a state prison, for a term not less than 10 years; burglary in the second degree, shall be punished by imprisonment in a state prison for a term not more than 10 years, nor less than five years; and burglary in the third degree, shall be punished by like imprisonment for a term not exceeding five years.

ARTICLE THIRD.

OF FORGERY.

[Sec. 22 and 23. Cases enumerated to constitute forgery in the first degree.
24. Forging certain seals, forgery in second degree.
25. Altering, &c. records, &c., forgery in second degree.
26. Falsely making, &c. entries in records, forgery in the second degree.
27. Officers making false certificates of proof of deeds, &c.
28. Counterfeiting gold and silver coins.
29. Forging, &c. foreign coins to export, forgery in the third degree.
30. Engraving, &c. plates in similitude of bank bills, &c., forgery in the second degree.
31. When plates to be deemed in similitude of genuine bills.
32. Selling, receiving, &c. counterfeit notes, forgery in second degree.
33. Forging, &c. certain public and private instruments, forgery in third degree.
34. False entries, &c. in certain public books of accounts.
35. And in books of monied corporations.
36. Having in possession counterfeit bills, &c. with intent to pass.
37. Having in possession other counterfeit instruments.
38. Possessing counterfeit coins.
39. Uttering counterfeit instrument or coin.
40. When such uttering may be found forgery in fourth degree.
41. Making false instrument in one's own name.
42. Punishment for different degrees of forgery.
43. Total erasure, &c., when to be deemed forgery.
44. Putting together parts of several genuine instruments.
45. What to be deemed writings, &c.
46. Intent to defraud, when sufficient.
47. Affixing pretended signatures to notes, &c. of corporations.]

Forgery in first degree.

22. Every person who shall be convicted of having forged, counterfeited, or falsely altered,

(1.) Any will of real or personal property, or any deed or other instrument being or purporting to be the act of another, by which any right or interest in real property shall be or purport to be transferred, conveyed, or in any way charged or affected.

(2.) Any certificate or endorsement of the acknowledgment by any person of any deed or other instrument which by law may be recorded, made, or purporting to have been made by any officer duly authorized to make such certificate or endorsement; or,

(3.) Any certificate of the proof of any deed, will, or other instrument, which by law may be recorded, made, or purporting to have been made, by any court or officer duly authorized to make such certificate:

With intent to defraud, shall be adjudged guilty of forgery in the first degree.

23. Every person who shall be convicted of having forged, counterfeited, or falsely altered,

(1.) Any certificate or other public security, issued, or purporting to have been

issued, under the authority of this state, by virtue of any law thereof; or any bill of credit heretofore issued by or under the authority of the legislature of this state, or purporting to have been so issued; by which certificate, bill, or other public security, the payment of any money absolutely, or upon any contingency, shall be promised, or the receipt of any money, goods, or valuable thing, shall be acknowledged; or,

(2.) Any certificate of any share, right, or interest in any public stock, created by virtue of any law of this state, issued, or purporting to have been issued, by any public officer; or any other evidence of any debt or liability of the people of this state, either absolute or contingent, issued, or purporting to have been issued by any public officer; or,

(3.) Any endorsement or other instrument, transferring, or purporting to transfer the right or interest of any holder of any such certificate, public security, bill of credit, certificate of stock, evidence of debt, or liability, or of any person entitled to such right or interest:

With the intent to defraud the people of this state, or any public officer thereof, or any other person, shall be adjudged guilty of forgery in the first degree.

Forging seals.

24. Every person who shall forge or counterfeit the great or privy seal of this state; the seal of any public office authorized by law; the seal of any court of record, including surrogate's seals; or the seal of any body corporate, duly incorporated by or under the laws of this state; or who shall falsely make, or forge, or counterfeit, any impression purporting to be the impression of any such seal; with intent to defraud, shall, upon conviction, be adjudged guilty of forgery in the second degree.

Altering, &c., records, &c.

25. Every person who, with intend to defraud, shall falsely alter, destroy, corrupt, or falsify,

(1.) Any record of any will, conveyance, or other instrument, the record of which shall by law be evidence; or,

(2.) Any record of any judgment in a court of record, or any enrolment of any decree of a court of equity; or,

(3.) The return of any officer, court, or tribunal, to any process of any court; shall, upon conviction, be adjudged guilty of forgery in the second degree.

False entries, &c., in records, &c.

26. Every person who shall falsely make, forge, or alter, any entry in any book of records; or any instrument purporting to be any record or return, specified in the last section; with intent to defraud, shall, upon conviction, be adjudged guilty of forgery in the second degree.

False certificates.

27. If any officer authorized to take the proof or acknowledgment of any conveyance of real estate, or of any other instrument which by law may be recorded, shall wilfully and falsely certify that any such conveyance or instrument was acknowledged by any party thereto, when in truth no such acknowledgment was made; or that any such conveyance or instrument was proved, when in truth no such proof was made; he shall, upon conviction, be adjudged guilty of forgery in the second degree.

Counterfeiting coin.

28. Every person who shall be convicted of having counterfeited any of the gold or silver coins, which shall be at the time current by custom or usage within this state, shall be adjudged guilty of forgery in the second degree.

Counterfeiting foreign coin.

29. Every person who shall be convicted of having counterfeited any gold or silver coin of any foreign government or country, with the intent of exporting the same, to injure or defraud any foreign government or the subjects thereof, shall be deemed guilty of forgery in the third degree.

30. Every person who shall be convicted of,

Plates similar to bank-bills, &c.

(1.) Having made or engraved, or having caused or procured to be made or engraved, any plate in the form or similitude of any promissory note, bill of exchange, draft, check, certificate of deposit, or other evidence of debt issued by any incorporated bank in this state, or by any bank incorporated under the laws of the United States, or of any state or territory thereof, or under the laws of any foreign country or government, without the authority of such bank; or,

(2.) Having or keeping in his custody or possession, any such plate, without the authority of such bank, with the intent of using, or having the same used, for the purpose of taking therefrom any impression to be passed, sold, or uttered; or

(3.) Having or keeping in his custody or possession, without the authority of such bank, any impression taken from any such plate, with intent to have the same filled up and completed for the purpose of being passed, sold or uttered; or,

(4.) Having made or caused to be made, or having in his custody or possession,

any plate upon which shall be engraved any figures or words, which may be used for the purpose of falsely altering any evidence of debt issued by any such incorporated bank, with the intent of having the same used for such purpose:

Shall be adjudged guilty of forgery in the second degree.

Similitude defined.

31. Every plate specified in the last section shall be deemed to be in the form and similitude of the genuine instrument imitated, in either of the following cases:

(1.) When the engraving on such plate resembles and conforms to such parts of the genuine instrument as are engraved: or,

(2.) When such plate shall be partly finished, and the part so finished resembles and conforms to similar parts of the genuine instrument.

Selling, &c., counterfeit notes.

32. Every person who shall be convicted,

(1.) Of having sold, exchanged, or delivered, for any consideration, any forged or counterfeited promissory note, check, bill, draft, or other evidence of debt or engagement for the payment of money absolutely, or upon any contingency, knowing the same to be forged or counterfeited, with intention to have the same uttered or passed: or,

(2.) Of having offered any such note or other instrument for sale, exchange, or delivery for any consideration, with the like knowledge and with the like intention: or,

(3.) Of having received any such note or other instrument upon a sale, exchange, or delivery, for any consideration, with the like knowledge and with the like intention:

Shall be adjudged guilty of forgery in the second degree.

Forging certain instruments.

33. Every person who, with intent to injure or defraud, shall falsely make, alter, forge, or counterfeit,

(1.) Any instrument or writing, being or purporting to be, any process issued by any competent court, magistrate, or officer; or being or purporting to be, any pleading or proceeding filed or entered in any court of law or equity: or being or purporting to be, any certificate, order, or allowance by any competent court or officer, or being or purporting to be, any licence or authority authorized by any statute:

(2.) Any instrument or writing, being or purporting to be, the act of another, by which any pecuniary demand or obligation shall be or shall purport to be, created, increased, discharged, or diminished, or by which any rights or property whatever shall be or purport to be, transferred, conveyed, discharged, diminished, or in any manner affected, the punishment of which is not herein before prescribed:

By which false making, forging, altering or counterfeiting, any person may be affected, bound, or in any way injured in his person or property, upon conviction thereof shall be adjudged guilty of forgery in the third degree.

Forging public accounts, &c.

34. Every person who, with intent to defraud, shall make any false entry, or shall falsely alter any entry made in any book of accounts, kept in the office of the comptroller of this state, or in the office of the treasurer, or of the surveyor-general, or of any county treasurer, by which any demand or obligation, claim, right, or interest, either against or in favour of the people of this state, or any county or town, or any individual, shall be or shall purport to be discharged, diminished, increased, created, or in any manner affected, shall, upon conviction, be adjudged guilty of forgery in the third degree.

Books of monied corporations.

35. Every person who, with intent to defraud, shall make any false entry, or shall falsely alter any entry made in any book of accounts kept by any monied corporation within this state, or in any book of accounts kept by any such corporation or its officers, and delivered or intended to be delivered, to any person dealing with such corporation, by which any pecuniary obligation, claim, or credit, shall be or shall purport to be, discharged, diminished, increased, created, or in any manner affected, shall, upon conviction, be adjudged guilty of forgery in the third degree.

Having counterfeit notes in possession, &c.

36. Every person who shall have in his possession any forged, altered, or counterfeit negotiable note, bill, draft, or other evidence of debt, issued or purporting to have been issued, by any corporation or company duly authorized for that purpose by the laws of the United States or of this state, or of any other state, government or country, the forgery of which is herein before declared to be punishable, knowing the same to be forged, altered, or counterfeited; with intention to utter the same as true or as false, or to cause the same to be so uttered with intent to injure or defraud, shall upon conviction, be subject to the punishment herein prescribed for forgery in the second degree.

Possessing other counterfeit instruments.

37. Every person who shall have in his possession any forged or counterfeited

instrument, the forgery of which is herein before declared to be punishable (except such as are enumerated in the last section), knowing the same to be forged, counterfeited or falsely altered, with intention to injure or defraud, by uttering the same as true or as false, or by causing the same to be so uttered, shall be subject to the punishment herein provided for forgery in the fourth degree.

Possessing counterfeit coins.

38. Every person who shall have in his possession any counterfeit of any gold or silver coin, which shall be at the time current in this state, knowing the same to be counterfeited, with intention to defraud or injure, by uttering the same as true or as false, or by causing the same to be so uttered, shall, upon conviction, be adjudged guilty of forgery in the fourth degree.

Uttering counterfeits.

39. Every person who shall be convicted of having uttered and published as true, and with intent to defraud, any forged, altered or counterfeited instruments, or any counterfeit gold or silver coin, the forging, altering or counterfeiting of which is herein before declared to be an offence, knowing such instrument or coin to be forged, altered or counterfeited, shall suffer the same punishment herein assigned for the forging, altering or counterfeiting the instrument or coin so uttered, except as in the next section specified.

Ibid. when to be forgery in fourth degree.

40. But if it appear on the trial of the indictment that the accused received such forged or counterfeited instrument or coin of another, in good faith and for a good or valuable consideration, without any circumstances to justify a suspicion of its being forged or counterfeited, the jnry may find the defendant guilty of forgery in the fourth degree.

False instrument in one's own name.

41. If any one shall, with intent to injure or defraud, make any instrument in his own name, intended to create, increase, discharge, defeat or diminish any pecuniary obligation, right or interest, or to transfer or affect any property whatever, and shall utter or pass it, under the pretence that it is the act of another who bears the same name, he shall, upon conviction, be adjudged guilty of forgery in the same degree as if he had forged the instrument of a person bearing a different name from his own.

Punishment for forgery.

42. Persons convicted of the different degrees of forgery herein specified shall be punished as follows:

(1.) Those convicted of forgery in the first degree, by imprisonment in a state prison for a term not less than ten years.

(2.) Those in the second degree, by the like imprisonment, not more than ten and not less than five years.

(3.) Those in the third degree, by the like imprisonment, not exceeding five years.

(4.) Those in the fourth degree, by the like imprisonment, not exceeding two years, or by imprisonment in a county gaol not exceeding one year.

Total erasure, &c., of instruments.

43. The total erasure or obliteration of any instrument or writing, with inteut to defraud, by which any pecuniary obligation, or any right, interest or claim to property shall be, or shall be intended to be created, increased, discharged, diminished, or in any manner affected, shall be deemed forgery in the same manner and in the same degree as the false alteration of any part of such instruments or writing.

Joining parts of instruments.

44. Where different parts of several genuine instruments shall be so placed or connected together as to produce one instrument, with intent to defraud, the same shall be deemed forgery in the same manner, and in the same degree, as if the parts so put together were falsely made or forged.

What to be writings.

45. Every instrument partly printed and partly written, or wholly printed, with a written signature thereto; and every signature of an individual, firm, or corporate body, or of any officer of such body, and every writing purporting to be such signature, shall be deemed a writing and a written instrument within the meaning of the provisions of this chapter.

Intent to defraud.

46. Wherever, by any of the foregoing provisions, an intent to defraud is required to constitute forgery, it shall be sufficient if such intent appear to defraud the United States, any state or territory, any body corporate, any county, city, town or village, or any public officer in his official capacity, any co-partnership, or any one of such partners, or any real person whatever.

Pretended signatures to corporate acts.

47. The false making, forging or counterfeiting of any evidence of debt, issued or purporting to have been issued, by any corporation having authority for that purpose, to which shall be affixed the pretended signature of any person as an agent or officer of such corporation, shall be deemed forgery in the same degree, and in the same manner, as if such person was at the time an officer or agent of such corpora-

tion; notwithstanding such person may never have been an officer or agent of such corporation, or notwithstabding there never was any such person in existence.

Extract from the Penal Code prepared by the Indian Law Commissioners.

"The giving of false evidence must always be a grave offence. But few points "in penal legislation seem to us clearer than that the law ought to make a distinc- "tion between that kind of false evidence which produces great evils, and that kind "of false evidence which produces comparatively slight evils.

"As the ordinary punishment of false evidence, we propose imprisonment for a "term of not more than seven years, nor less than one year. If the false evidence "is given or fabricated with intent to cause a person to be convicted of a grave "offence not capital, we propose that the person who gives or fabricates such evi- "dence may be punished with the punishment of the offence which he has attempted "to fix on another. If the false evidence be given or fabricated with the intention "of causing death, we propose to punish it in the same manner in which we pro- "pose to punish the worst attempts to murder. If such false evidence actually "causes death, the person who has given or fabricated it falls under the definition "of murder, and is liable to capital punishment. In this last point, the law, as we "have framed it, agrees with the old law of England, which, though in our opinion "just and reasonable, has become obsolete."

Extract from the Introductory Report to the Code of Crimes and Punishments prepared for the State of Louisiana by Mr. Livingstone.

"Perjury is one of the offences which not only affects the administration of jus- "tice, but all the other operations of government in its various departments. By "the English law this crime could only be committed by false swearing in some "judicial proceeding. Our statute of 1805 wisely extends it to all cases in which "depositions or affidavits are taken pursuant to the laws of the territory. Doubts "might arise, under this statute, whether affidavits or depositions, taken under laws "made subsequent to that statute, were included in it; and also, whether the affi- "davits and depositions intended were not exclusively such as were taken as evi- "dence in a judicial proceeding. The code, by covering a broader ground, puts an "end to those doubts. It defines the crime to be 'a falsehood asserted verbally or "'in writing, deliberately and wilfully, relating to something present or past, under "'the sanction of an oath, or such other affirmation as is or may be by law made "'equivalent to an oath, legally administered under circumstances in which an oath "'or affirmation is required by law, or is necessary for the prosecution or defence "'of private right, or for the ends of public justice.' This definition includes all "testimony and judicial oaths whatsoever, whether oral or written; and it further "extends the provisions of our statute so as clearly to embrace all other oaths which "are required by law to attest the truth of any fact, such as declarations under the "quarantine laws and the like; in all of which cases the moral evil and the injury "to the community may be as great as if the perjury were committed in a court of "justice. Yet a deliberate falsehood, asserted under oath, according to our present "laws would not be punishable at all, except it were connected with a judicial pro- "ceeding, unless special provision to that effect should be made in the law requiring "the oath, which is frequently neglected where it is necessary, and for want of a "general provision, such as the code contains, unnecessarily increases the length of "our laws where it is not neglected. The definition excludes the breach of promis- "sory oaths, such as oaths of office, from the guilt of perjury, because there the "offence is not one that exists in taking the oath, which may be done with the sin- "cerest intentions of keeping it, but in some act done subsequently, which may be "inconsistent with it. If that act be sufficiently injurious to call for the animad- "version of the law, it will be found to have been provided against, under its proper "head; if it be not, it is contrary to the principle of this code to punish it, however "unconscientious it may be: for we cannot too often repeat, that the endeavour has "been to place no acts in the ranks of offences but such as were injurious, and were "done either with a design to injure, or with an inattention to the rights of others, "that is nearly as reprehensible.

"This chapter punishes, under the appellation of false swearing, all deliberate

" falsehoods, asserted in voluntary affidavits, not taken in the course of judicial pro-
" ceedings, nor required by law, but yet made the engines of detraction and other
" mischiefs, for which it is deplored by writers on English law, that it affords no
" remedy. The punishment of this last offence is, of course, lighter than the former ;
" but the prevalence of the evil seemed to require that it should be repressed by a
" penalty ; and the nature of the crime suggested the further provision, that a con-
" viction for this offence might be given in evidence against the credit of the party
" in any case in which he might be sworn as a witness.

" On this head of perjury, too close an adherence to the English law led me to
" insert an article, which further reflection has induced me to wish may be erased.
" It is the second of the chapter, which provides for a case that will probably never
" happen, and can cause no injury if it should,—the case of a witness swearing to a
" fact that is true, although at the time he believes it to be false.

" The suborner to perjury is made liable to the same punishment with the
" principal offender. In this the code agrees with the present law ; and it adopts
" the same measure with respect to false swearing. It also adds a lighter penalty
" on him who makes an ineffectual attempt to procure the commission of either of
" these offences."

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SIXTH REPORT

OF

HER MAJESTY'S COMMISSIONERS

ON

CRIMINAL LAW.

DATED THE THIRD DAY OF MAY, 1841.

Presented to both Houses of Parliament by Command of Her Majesty.

LONDON:
PRINTED BY W. CLOWES AND SONS, STAMFORD STREET,
FOR HER MAJESTY'S STATIONERY OFFICE.

1841.

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COMMISSION.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To Our trusty and well-beloved Thomas Starkie, Henry Bellenden Ker, William Wightman, Andrew Amos, and David Jardine, Esquires, greeting: Whereas his late Majesty King William the Fourth did, by his Letters Patent, bearing date the Twenty-first day of October, in the Seventh Year of His Reign, appoint you, the said Thomas Starkie, Henry Bellenden Ker, William Wightman, Andrew Amos, and David Jardine, to be His Commissioners for the purpose of digesting the several Statutes relating to the Criminal and other Law. Now know ye, that We have revoked and determined, and by these presents do revoke and determine, the said recited Letters Patent, and every Clause, Article, and Thing therein contained. And further know ye, that We, reposing great trust and confidence in your zeal and ability, and being graciously pleased to renew the said Commission, and to continue you in such employment, have authorized and appointed, and do by these presents authorize and appoint, you, the said Thomas Starkie, Henry Bellenden Ker, William Wightman, Andrew Amos, and David Jardine, or any three or more of you, to be Our Commissioners, for the purpose of digesting into one Statute all the Statutes and Enactments touching Crimes, and the Trial and Punishment thereof, and also for digesting into one other Statute all the Provisions of the Common or Unwritten Law touching the same; and for inquiring and reporting how far it might be expedient to combine both those Statutes into one body of the Criminal Law, repealing all other Statutory Provisions, or how far it may be expedient to pass into a Law the first-mentioned only of the said Statutes, and generally for inquiring and reporting how far it might be expedient to consolidate the other branches of the existing Statute Law, or any of them. And for the better effecting the purposes of this Our Commission, We do by these presents give and grant to you, or any three or more of you, full power and authority to call before you, or any three or more of you, such Persons as you shall judge necessary, by whom you may be the better informed on the subject of this Our Commission, and every matter connected therewith; and also to call for, have access to, and examine all such Official Books, Documents, Papers, and Records, as may afford the fullest information on the subject; and to inquire of and concerning the premises, by all other lawful ways and means whatsoever. And We do hereby give and grant to you, or any three or more of you, full Power and Authority, when the same shall appear to be requisite, to administer an Oath or Oaths to any Person or Persons whatsoever to be examined before you, or any three or more of you, touching or concerning the Premises. And Our further Will and Pleasure is, that you, or any three or more of you, do and shall, within the space of One Year after the date of this Our Commission, or sooner if the same can reasonably be, certify to Us in Our Court of Chancery, on parchment, under your hands and seals respectively, your several proceedings in this matter, as the same shall be respectively completed and perfected. And We will and command, and by these presents ordain, that this Our Commission shall continue in full force and virtue; and that you Our said

Commissioners, or any three or more of you, may, from time to time, proceed in the execution thereof, and of every matter and thing therein contained, although the same be not continued from time to time by adjournment. And we hereby command all and singular Our Justices of the Peace, Sheriffs, Mayors, Bailiffs, Constables, Officers, Ministers, and all other Our loving subjects whatsoever, as well within liberties as without, that they be assistant to you and each of you in the execution of these presents. And for your assistance in the due execution of this Our Commission, We have made choice of Our trusty and well-beloved James John Lonsdale, Esquire, Barrister at Law, to be Secretary to this our Commission, and to attend you, whose service and assistance We require you to use from time to time, as occasion may require. In witness whereof We have caused these Our Letters to be made Patent.

Witness Ourself, at Westminster, the Twenty-sixth Day of October,
in the First Year of Our Reign.

By Writ of Privy Seal,

EDMUNDS.

SIXTH REPORT.

TO THE QUEEN'S MOST EXCELLENT MAJESTY, IN HER HIGH COURT OF CHANCERY.

We, Your Majesty's Commissioners, appointed by Your Majesty's Commission, bearing date the 26th day of October, in the first year of Your Majesty's reign, whose hands are hereunto set, do humbly submit to Your Majesty, in our present Report, the Consolidation of the Law of England respecting the following Offences:—

I. Treason and other Offences against the State;

II. Offences against the Protestant Establishment declared to be Treasons and Misprisions of Treason;

III. Libel;

IV. Offences against Religion;

V. Offences relating to the Coin;

VI. Offences relating to the Public Revenue;

And, according to the method which we have adopted on previous occasions, we have prefixed to the several parts of the Digest now submitted to Your Majesty such prefatory remarks as have appeared to us to be necessary for the purpose of explaining the principles upon which the law is founded, and also the reasons for the course which we have adopted in its consolidation.

TREASON, AND OTHER OFFENCES AGAINST THE STATE.

Prefatory Remarks.

Principles of the law of treason.

LAWS for the protection of the state against destruction or harm depend on principles common to every political constitution, and are so connected by unity of object as to render it desirable that they should be considered as a distinct and general class.

As regards the law of England, it is the more expedient to consider offences thus distinguished as a general class, inasmuch as some of them of an inferior degree, and having but a remote tendency to produce danger or detriment to the state, have been mixed up with offences based on very different principles.

Provisions for the preservation of the political constitution involve the necessity of prohibiting by the severest penalties such offences as tend to dissolve the bonds of civil society. But although severe laws are absolutely necessary for the prevention of offences which threaten to destroy the fabric of political society, the rules applicable to the definition and proof of such offences must for the most part be those which are recognized and used in respect of other crimes. At the same time, however, that the heinousness of the offence, and the severity with which it is necessary to punish it, can suggest the introduction of no new principle of legislation, such considerations supply the most urgent reason for plain and distinct definitions of the different branches of the crime, and consequently for the exclusion of forced constructions; and at the same time suggest the propriety of giving ample opportunity for the means of defence, of imposing some conditions on the prosecutor in respect of his evidence, and of requiring some larger measure of evidence than is necessary in ordinary cases. The reasons for any such distinction in favour of a party charged with treason are so fully displayed in the history of the country as to render further notice in this place unnecessary.

We deem it superfluous to dwell upon the illustration of the obvious principles which govern this most important branch of the Criminal Law; and therefore proceed at once to make some observations on the law of England as to this offence, particularly as regards those provisions which are founded on considerations peculiar to this branch of the Criminal Law.

History of Law of Treason.

The principal statute in operation against the crime of treason is that of the 25th of King Edward III., St. 5. c. 2, commonly called the Statute of Treasons. This statute appears to have been occasioned by the anxiety of the Commons to ascertain the limits of forfeitures for that crime by means of a parliamentary definition. It appears from a petition on the rolls of Parliament of the 21st year of that reign, "that "certain justices had then lately given judgment in their courts for treason, and "accroachment of royal power, and they pray that it may be declared in Parliament "to what cases of accroachment the royal power extended, whereby lords lost their "profit of the forfeitures of their tenants, and the accused their benefit of clergy." And in consequence of this and another later petition to the like effect, the statute was made for the purpose of declaring the law of treason.

This statute, besides declaring offences directed immediately against the person of the sovereign and certain members of his family, or committed by levying of war, or slaying the chancellor, or one of the king's justices, and counterfeiting the great seal,* which continue to be treasons at the present day, included also treasons in counterfeiting the king's money, and bringing counterfeited money into the kingdom. These latter offences, by virtue of recent statutes, are no longer punishable as treasons. The statute also included another class of treasons, which in later times have been

* This offence is still high treason, but is no longer punishable capitally.

distinguished as petit treason, (but which at the present day are felonies only,) as in the case of a servant killing his master, a wife her husband, or a secular, or man of religion, his prelate, to whom he owed faith and obedience. Such crimes involving a breach of the fidelity due to a superior were, from analogy to the case of treason against the king, by a breach of allegiance on the part of the subject, declared to be traitorous. This, however, was a species of treason which did not create a forfeiture to the Crown or deprive the lord of his escheat.

The statute of treasons, although mainly attributable to a desire to regulate feudal rights, constituted an essential improvement of the law by furnishing for the first time a distinct and intelligible definition of the crime of treason. Its excellence in this respect will be apparent from considering the loose and unsettled state of the law regarding treason previously to that statute. A multitude of acts were, before that statute, held to amount to high treason, as tending to diminish the dignity of the Crown. Not only killing the king's father or brother, but even his messenger; producing the pope's bull of excommunication and pleading it in disability; refusing to answer a man in the king's courts and summoning him to appear and defend himself before a foreign prince, were deemed to be acts of treason.* Indeed immediately before the passing of the statute, viz., in the 21st year of the reign of King Edward III., a knight of Hertfordshire was found guilty of treason because he had forcibly detained a man till he paid him £90,—such an act being considered as *accroaching* or attempting to exercise royal power.† Although many encroachments were afterwards made upon the principle of this law, as well by judicial decisions as by numerous subsequent statutes, yet all these were repudiated and abrogated by the stat. 1 of Queen Mary, sess. 1, c. 1,‡ which, after reciting in very forcible terms, the opinion of the Legislature on the impolicy of extremely severe laws, and stating the fact that many honourable persons, as well as persons of good reputation, had then of late, for words only, suffered shameful death, enacts that no act shall be adjudged to be high treason save such as is expressed in the Statute of Treasons, 25 of King Edw. III. Numerous statutes subsequent to that of Queen Mary have been enacted. Of those now in force, two of the reign of Queen Elizabeth were enacted against the maintaining the authority of the Pope or other foreign prince or person within the realm—one of the reign of King James I. against the withdrawing the subjects of this realm from their natural obedience to his Majesty, or endeavouring to reconcile them to the See of Rome, or to promise obedience to the See of Rome, or to any other prince, state, or potentate—two of the reign of Queen Anne, against hindering the due succession to the Crown, or asserting any title to the Crown otherwise than according to the statutes 1 King Will. and Queen Mary, sess. 2, c. 2, and 12 King Will. III., c. 2, and the Acts for the union of England and Scotland, or asserting that the kings or queens of the realm, with the authority of Parliament, are not able to make laws and statutes of sufficient force to limit the Crown and the descent thereof—a statute of the 36th year of the reign of King George III., which, embodying some of the more important constructions upon the Statute of Treasons raised in the course of several centuries, makes it treason to compass the levying of war against the sovereign, in order to compel him to change his measures, or to put any force or constraint upon, or to intimidate or overawe either House of Parliament, or to move or stir any foreigner or stranger with force to invade the realm—and, lastly, an Act of the 3d and 4th years of

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* 3 Inst. 7; Hawk. P. C. b. 1, c. 2, s. 1; Hale's P. C. 76.

† Reeves's History of the English Law, vol. 1, p. 451.

‡ In the preamble of the 1 Mary, sess. 1, c. 1, it is recited, "that the state of every king consists "more assuredly in the love of the subjects towards their prince than in the dread of laws made by "rigorous pain, and that laws made for the preservation of the commonwealth, without great pains, "are more often obeyed and kept than laws made with extreme punishments. And, in special, such "laws so made whereby not the ignorant but also the learned, minding honesty, are often trapped; "yea, many times for words only, without other fact or deed done or perpetrated; and thereupon the "queen calls to remembrance that many, as well honourable persons as others of good reputation, had "then of late, for words only, without other opinion, fact, or deed, suffered shameful death, and "expresses her pleasure that the severity of such like extreme, dangerous, and painful laws shall be "abolished." And then follows the enacting clause, "That from thenceforth none act or offence, "being by Act of Parliament or statute made treason, petit treason, or misprision of treason, by words, "writing, ciphering, deeds, or otherwise whatsoever, shall be taken, had, deemed, or adjudged to be "high treason, petit treason, or misprision of treason, but only such as be declared and expressed to "be treason, petit treason, or misprision of treason by 25 Edw. III.; nor that any pains of death, "penalty, or forfeiture, in any ways ensue to any offender for the doing any treason, &c., other than "such as by the said statute of the 25 Edw. III. be ordained, any statute since the said 25th year of "Edw. III. or other declaration to the contrary in anywise notwithstanding."

Your Majesty's reign, whereby it was made treason to be married to, or to be concerned in procuring or bringing about the marriage of the king or queen, for whom a regent is by that Act appointed, being under the age of 18 years, without the consent in writing of the regent, and the assent of both Houses of Parliament previously obtained.

Present State of the Law. Overt Act.

We now proceed to notice some peculiarities of the law of treason, with a view to the suggestions which we shall afterwards make; and first, as regards overt acts of treason. Treason, in imagining or compassing the death of the king or queen, consists in the wicked intention to accomplish that purpose; but still it is an intention which is to be proved through the medium of some overt act; or perhaps, more properly speaking, it is essential to the proof of such treason to show that some act has been done towards the accomplishment of the traitorous intention. This is a rule which, in its application, has always been peculiar to the crime of treason. Formerly, indeed, it was a general rule, applicable to all felonies, that "*voluntas reputabitur pro facto;*" but still, although upon this principle the accomplishment of the meditated crime was not essential to the conviction of the offender, he was not to be found guilty on mere proof of intention. It was necessary to show some actual and immediate endeavour to perpetrate the crime, as by lying in wait in order to assassinate another. Many new offences, long after the time when the application of the above rule had fallen into disuse, have been founded by the statute law on a kindred principle of punishing a guilty but unsuccessful endeavour to commit a crime; but in no case has the mere naked intention to commit the crime been constituted a substantive offence: on the contrary, some act, in its own nature indicative of the guilty intention, has always been included in the definition of the crime as an essential circumstance. There seems, therefore, to be no crime except the particular branch of treason which consists in compassing the king's death, in which the mere secret intention, independently of any act, constitutes the *corpus delicti;* and in the case of treason, in compassing the king's death, an overt act, though not essential to the abstract crime, is still essential to the offender's conviction, as he must, in the language of the Statute of Treasons, "be thereof proveably attainted of *open deed.*" The statute has thus wisely provided that in this particular kind of treason which manifestly tends to the most extensive public evil, the intention shall constitute the crime, but has at the same time with equal wisdom, and with a proper care for the safety of the accused, provided that the intention shall be manifested by some act tending towards the accomplishment of the criminal object.

An eminent modern writer has noticed what he considers to be an imperfection in the Statute of Treasons, connected with this subject. "In this famous statute," says Mr. Hallam,* "we find it only declared treasonable to compass or imagine the "king's death; while no project of rebellion appears to fall within the letter of its "enactments unless it ripen into a substantive act of levying war." To this omission in the Statute of Treasons may possibly be attributed many of those artificial constructions of its words which have gradually arisen. As those who administered the law could find no express provision in the statute making it treason to conspire to levy war or to depose the king, they resorted to artificial means of bringing such offences within the reach of punishment, and determined it to be an invariable presumption of law that these acts contemplated the physical destruction of the king; and, consequently, that they were overt acts of treason in the article of compassing his death. These, and other constructions of a similar kind, we shall have occasion to discuss more fully hereafter; we merely notice them here as connected with the legal doctrine respecting the manifestation of intention by means of overt acts.

An overt act sufficient to support a charge of treason, is of a description distinguishable as well from such acts as were formerly necessary to warrant the application of the ancient principle, "*voluntas reputabitur pro facto,*" as from such as are usually made essential to the statutable offences just adverted to. As regards the former class, the principle was applicable only in the case of an actual and immediate attempt to perpetrate the crime; and the acts which, coupled with a criminal intention, constitute statutable offences, are such as of themselves afford evidence of a malicious intent, as in the instances of attempting to murder by cutting, wounding, or discharging fire-arms. It is clear, however, that an act may constitute an overt act of treason, although it be not done either in immediate execution of the treasonable intention, or be not in its own nature indi-

* Constitutional History, vol. iii. p. 206.

cative of such intention. An act in itself the most innocent may undoubtedly constitute an overt act of treason, if it be done towards or in the course of executing a preconcerted treasonable scheme: thus, in Lord Preston's case,* it was held that the embarking on board a vessel in London, for the purpose of prosecuting a treasonable project abroad, was a sufficient overt act of treason.

It seems also to be clear, though doubts formerly existed upon the subject, that an offence within one branch of the statute may constitute an overt act of a different species of treason. Lord Coke seems to have been of a different opinion; and Mr. Just. Foster† intimates that Lord Hale once concurred with Lord Coke in this respect, because in his Summary, speaking of conspiracy to levy war, he says it is no overt act of compassing the King's death, *because it relateth to a distinct treason.* "But (adds Sir M. Foster) Hale altered his opinion; "and it is every day's "experience, that many offences, falling directly and by name under other branches "of the statute, may be brought within this of compassing the King's death. Levy-"ing war is an overt act of compassing; and under certain limitations, *conspiring* to "levy war likewise is an overt act of compassing, within this branch; and so is a "treasonable correspondence with the enemy, though it falleth more naturally "within the clause of *adhering to the King's enemies.*"

Treasonable words and writings.

How far words or writings of a seditious nature may be regarded as overt acts of compassing the king's death, under the Statute of Treasons, was formerly the subject of much debate; but, as the rule on this subject seems to have been settled, we think that the law, on matters of such high importance, ought to be sanctioned by the Legislature, and not be allowed to rest on the mere authority of text writers or conflicting decisions. The rule as to words, and the sound reasons on which that rule rests, are clearly laid down and expounded by Sir M. Foster, in his Discourse on the Law of High Treason. He observes:‡—

"As to mere words supposed to be treasonable, they differ widely from writings "in point of real malignity and proper evidence. They are often the effect of mere "heat of blood, which, in some natures otherwise well disposed, carrieth the man "beyond the bounds of decency or prudence. They are always liable to great mis-"construction from the ignorance or inattention of the hearers, and too often from a "motive truly criminal. And therefore I choose to adhere to the rule which "hath been laid down on more occasions than one since the revolution, that loose "words, *not relative to any act or design*, are not overt acts of treason; but words "of advice or persuasion, and all consultations for the traitorous purposes treated "of in this chapter, are certainly so: they are uttered in contemplation of some "traitorous purpose actually on foot or intended, and *in prosecution* of it.

"Lord Chief Justice Hale was of opinion that bare words are not an overt act "of treason; Coke was of the same opinion. Hale hath treated the subject pretty "much at large, and I shall not repeat his argument; but I must say, that I think "his reasons, founded on temporary acts, or acts since repealed, which make speak-"ing the words therein set forth *felony or misdemeanor*, are unanswerable; for if "those words, seditious to the last degree, had been deemed overt acts within the "Statute of Treasons, the Legislature could not, with any sort of consistency, have "treated them as felony or misdemeanor." §

But, although bare words, merely spoken, cannot, however dangerous and wicked in their tendency, be treated as overt acts of treason, it is equally clear, according to the highest authorities, that if conspirators meet and consult how to kill the king, although they do not then fall on any scheme for the purpose, it is an overt act of compassing his death; and that words of advice, persuasion, or command, to incite others to commit the fact or join in the attempt, are also to be so considered; and that even one who assents to any overtures for that purpose is involved in the same guilt. ‖

Seditious writings differ widely from mere words spoken; they are (to continue the language of Sir M. Foster) "permanent things, and, if published, they scatter "the poison far and wide; they are acts of deliberation, capable of satisfactory "proof, and not ordinarily liable to misconstruction; at least, they are submitted to

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* Howell's State Trials, vol. xii. p. 727.

† Discourse I. of High Treason, c. 1, s. 5, p. 197.

‡ Discourse I., cap. 1, s. 7, p. 200.

§ "The like use hath been made of temporary statutes, which make words in certain cases treason; "but I do not build upon them: I rely on those which make words *felony* or *misdemeanor*."

‖ Foster's Disc. on High Treason, c. 1, s. 2.

" the judgment of the court naked and undisguised, as they came out of the author's " hands. Words are transient and fleeting as the wind; the poison they scatter " is at the worst confined to the narrow circle of a few hearers: they are " frequently the effect of a sudden transport, easily misunderstood and often " misreported." *

But although, for the weighty reasons thus stated by Sir M. Foster, great distinction is to be made between mere words and writings, and, although there is no doubt authority to the contrary, the preponderance of authority is in favour of the rule, that writings not published cannot constitute an overt act of treason. Lord Hale † mentions two circumstances, as concurring to make words reduced into writing overt acts of compassing the king's death, viz., that they be published, and that they import such compassing. Mr. Just. Foster ‡ was of the same opinion. That learned judge observes:—" True it is that in Peacham's case a MS. sermon, in " which were some treasonable passages, found in his study, never for aught appear- " ing preached or published, or intended to be so, was thought to bring him within " this branch of the statute, and accordingly he was found guilty *but not executed;* " for, whatever rule the Court of King's Bench, where he was tried, might lay down, " 'many of the judges,' saith Croke, 'were of opinion that it was not treason.' This " case, therefore, weigheth very little, and no great regard hath been paid to it ever since." And Mr. Just. Foster proceeds to state circumstances connected with that case, which well warrant his concluding reflection, that the method pursued doth no honour to the memory of the persons concerned in a transaction so insidious and unconstitutional, and at the same time greatly weakeneth the authority of the judgment.

Mr. Just. Foster, in concluding the first chapter of his Discourse on High Treason observes:—" I have considered the question touching words and writings supposed " to be treasonable, the more largely, not only because of the diversity of opinions " upon it, but likewise for the great importance of the point, and the extreme danger " of multiplying treasons upon slight occasions."

In addition to this weight of authority, some force must be attributed to the terms of the statute, " and thereof be attainted, on due proof of open deed;" and, however limited that construction may be, the terms cannot, it should seem, without violence, be applied to a mere secret unpublished writing. §

Levying war.

We cannot but think it expedient that these limitations of the law of high treason, should be sanctioned by the Legislature.

One very important branch of the crime of treason, as declared by the statute 25 of King Edw. III., calls upon this occasion for some remarks on account of the doubts which have occurred upon the interpretation of the statute, and the great obscurity which still attaches to the construction which has been given to it, as well by judicial authority, as by eminent text writers on Criminal Law. We allude to the branch of treason which consists in the levying of war against the king, to which much latitude has been given by constructive interpretations.

We proceed to cite the terms of the statute, to advert to the difficulties which have arisen as to the branch of it which concerns the levying of war, and propose then to notice some of the judicial decisions and text authorities in point, and of the latter in particular the rules deduced by Mr. Just. Foster, in his able Discourse of Treason, and to subjoin the result of our own considerations on the expediency and means of rendering the law upon the subject more certain and definite than it at present seems to be in respect of the distinction between such insurrections, risings, or unlawful meetings as do, and such as do not, constitute a levying of war against the Statute of Treasons.

The Statute of Treasons declares that it shall amount to high treason " if a " man do levy war against our lord the king in his realm, or be adherent to the " king's enemies in his realm, giving them aid and comfort in the realm or elsewhere, " and thereof be provably attainted of open deed by the people of their condition." Looking to the terms of the statute and the context of the words concerning the levying of war, with those which follow as to adhering to the king's enemies, the former seem naturally to import a levying of war by one who, throwing off

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* Foster's Disc. on High Treason, c. 1, s. 8, p. 204.
† 1 Hale's P. C. 118.
‡ Disc. on High Treason, c. 1, s. 6, p. 198.
§ See Hawk. P.C., b. i. ch. 17, s. 32.

the duty of allegiance, arrays himself in open defiance of his sovereign, in like manner and by the like means as a foreign enemy would do, having gained footing within the realm.* The previous provisions of the statute include all cases of treason which consist in the intention to occasion any personal injury to the sovereign; and in this respect a levying of war in the ordinary sense of the words may and would in many instances constitute an overt act of treason within a previous branch of the statute. Upon this ground it has been argued that the terms "levying war" were not to be understood in their natural sense, in which they would reach such treasons only as were already provided against, but must have a wider effect given by construction. It is, however, probable that the framers of the statute, after having provided against all treasons consisting in *evil intention* against the person of the sovereign, contemplated the offences of levying war and of adhering to the king's enemies as *acts in themselves*, constituting substantive treasons without any regard to the particular motive or object of the offenders. The essence of the first would be the criminal intent against the royal person; in the second, it would consist in the mere act of levying war;—a fact which, if made out, would leave no necessity for further inquiry as to intention, the *quo animo* being altogether immaterial except as incidental to the inquiry, whether war had in fact been levied or not.

Constructive levying of war.

We now proceed to notice some of the decisions connected with this branch of treason; not for the purpose of controverting them, but to show the principles upon which they were founded, and upon which constructive extensions of the clause against levying of war must rest at the present day.

In the case of Bradshaw and Burton, which occurred in 1597,† it appeared that those persons with others had agreed to arm themselves and to go from one gentleman's house to another, to pull down inclosures generally; and a majority of the judges agreed that this was high treason against the statute 13 of Queen Eliz. c. 1, the words of which are, that if any intend to levy war against the queen, &c., this shall be high treason; for they all agreed that rebellion of subjects against the queen had always been high treason at common law. For the statute 25 of King Edw. III. c. 1, is, that levying of war within the realm against the king is treason and rebellion, as all the war which a subject can make against the king. But the minority of the judges thought that, as the statute 1 of Queen Mary, Sess. 2, c. 12, declared it to be a *felony* if any persons to the number of twelve or more assembled themselves to the intent to pull down inclosures, pales, and the like, with force, and continued together, after proclamation according to the statute to go away, by the space of an hour, these actions could not have been then considered *treason* at common law, else it had been to no purpose to make it felony. And it seemed to them that the resistance ought to be with *force* to the Queen before that such acts shall be said to be treason. But the majority of the judges agreed that if any assemble themselves with force to alter the laws, or set a price upon victuals, or to lay violent hands upon *the magistrate*, or upon the mayor of London, and the like, and with force attempt to put it in action, that this is rebellion and treason *at common law*. And they drew a distinction between the cases of pulling down inclosures, pales, &c., comprised in the statute 1 of Queen Mary; for those are to be understood where persons, to the number of twelve or more, pretending any or all of them, *to be injured in particular*, as by reason of their common or other interest in the land inclosed, and the like, and assembling to pull the particular inclosure down forcibly, and not to the cases where they have a general dislike to all manner of inclosures; and therefore the assembling in a forcible manner, and with arms to pull them down when they have any interest whereby they were in any particular to be annoyed or grieved, is not treason. But in the case of Bradshaw and Burton they thought that the intention clearly *tending to a generality* made the act, if it had been executed, to be high treason by the course of the common law.

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* Mr. Luders, (Considerations on the Law of High Treason, p. 13) observes, "It is reasonable to "infer that the war forbidden to be levied within the realm was the same kind of war as might have "been levied without the realm; and that the enemies not to be adhered to were such enemies as "were capable of levying such war, and of being assisted out of the realm as well as in it. Public "rebellion and hostile invasion seem to have been the evils which the statute had chiefly in view in this "clause. The Legislature is careful to distinguish its objects, and particularly guards against a mis-"taken construction by describing more circumstantially than is expected of general ordinances, an "example which shall be deemed an exception to the rule."

† Popham, 122; 2 And. 66; 3 Co. Inst. 10.

In Benstead's case,* (1640,) it was resolved that going to Lambeth House in a warlike manner, to surprise the archbishop, who was a privy councillor, it being with drums and a multitude (as the indictment was to the number of three hundred persons), was treason.

In the case of Messenger† (1668), it was held that a tumultuous rising of four hundred or five hundred persons, some of whom had clubs and swords, with a green apron borne on a pole for an ensign, led by one with a drawn sword, who cried "Down with the bawdy-houses," and proceeded to pull them down tumultuously, and beat a constable who opposed them, was levying war against the king, and high treason within the Statute of Treasons. Eleven judges, upon full consideration of a special verdict, were of this opinion, contrary to that of Lord Hale, then Chief Baron, who was the only dissentient. Chief Justice Kelyng states their resolution as follows: "This rising with intent to pull down bawdy-houses *in general*, or to "break open prisons *in general* and let out prisoners, and putting their intention "in execution by force, in any of these instances, is a levying war against the "king, and high treason at common law within the declaration of the statute 25 "Edw. III."

Lord Hale gave the following reasons for his dissent from this resolution. 1st. Because it seemed but an unruly company of apprentices; 2ndly. Because the finding "to pull down bawdy-houses" might reasonably be intended of two or three particular bawdy-houses, and the indefinite expression should not, *in materia odiosa*, be construed either universally or generally; 3rdly. Because the statute 1 Mar. c. 12, though now discontinued, makes assemblies of above twelve persons and of as high a nature only felony, and that not without a continuance together one hour after proclamation made.

The case of Damaree‡ (1709) has been considered the leading one on this subject. It is entitled to much greater weight than those which preceded it, as it is not subject to the charges of hasty and unfair dealing, from which some of those which occurred before the Revolution are not exempt. This was, however, a case in which the decisions already alluded to had great influence, having been ruled (according to Mr. Just. Foster) "on consideration of former precedents." The prisoner was the leader of a mob, which, during the trial of Dr. Sacheverell, became very riotous in support of his cause and party. They had attended the doctor from Westminster to the Temple, and continued together for some time in King's Bench Walk, crying, among other cries of the day, "Down with the Presbyterians." At length it was proposed, to pull down the meeting-houses, and thereupon the cry became general, "Down with the meeting-houses;" and some thousands immediately moved towards a meeting-house in Lincoln's-inn-fields, which they soon demolished, and burnt the pews, pulpit, and other materials. After they had finished at that place, they agreed to proceed to the rest of the meeting-houses; and hearing that the guards were coming to disperse them, they agreed, for the greater dispatch, to divide into several bodies, and to attack different houses at the same time, and many were that night in part demolished and the materials burnt. The prisoner Damaree put himself at the head of a party, which drew off from Lincoln's-inn-fields and demolished a meeting-house in Drury-lane, and burnt the materials in the street: the mob continually crying they would pull them all down that night.

Upon the trial all the judges present were of opinion that the prisoner was guilty of high treason in levying war against the Queen; "for here was a rising "with an avowed intention to demolish *all* meeting-houses in general, and this the "rioters carried into execution as far as they were able. If the meeting-houses of "Protestant dissenters had been erected and supported in defiance of all law, a "rising in order to destroy such houses *in general* would have fallen under the "rule laid down in Kelyng with respect to demolishing *all* bawdy-houses. But "since the meeting-houses of Protestant dissenters are, by the Toleration Act, "taken under the protection of the law, the insurrection in the present case was to "be considered as a public declaration by the rabble against that Act, and an "attempt to render it ineffectual by numbers and open force."§

Having now adverted to the principal precedents upon which the doctrine of a constructive levying of war is founded, we proceed to state the general rules

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* Cro. Car. 583. † Kel. 71, 72.
‡ Fost. Disc. on H. Treason, c. 2, s. 7. p. 213.
§ Foster's Crown Law, p. 213.

which have been deduced from them. These have been, after much consideration, extracted and stated by Mr. Just. Foster, in his Discourse of High Treason, Mr. Just. Foster, after adverting to the difference taken by Lord Hale between those insurrections which have carried the appearance of an army formed under leaders, and provided with military weapons and with drums, colours, &c., and those other disorderly tumultuous assemblies which have been drawn together and conducted to purposes manifestly unlawful, but without any of the show and apparatus of war, intimates that little stress is to be laid on this distinction. He observes that "in "the cases of Damaree and Purchase, there was nothing given in evidence of the "usual pageantry of war, and yet the want of these circumstances weighed *nothing* "with the Court, although the prisoner's counsel insisted much on that matter;— "that the number of insurgents supplied the want of military weapons, and that "they were provided with axes, crows, and other tools of the like nature, proper "for the mischief they intended to effect; that the true criterion in all these cases "is *quo animo* did the parties assemble? For if the assembling be on account "of some private quarrel, or to take revenge on particular persons, the Statute of "Treasons had already determined that point in favour of the subject."* In the 2d sec. of the same chapter he states some classes of cases to which the same principle extends, and which are therefore not to be received as amounting to a levying of war. He says, "Upon the same principle and within the reason and equity of "the statute, risings to maintain a *private* claim of right, or to destroy *particular* "inclosures, or to remove nuisances which affected or were thought to affect *in* "*point of interest the parties assembled for these purposes*, or to break prisons "in order to release *particular* persons without any other circumstance of aggrava- "tion, have not been holden to amount to levying war within the statute.

"And upon the same principle and within the same equity of the statute, I think "it was very rightly holden by five of the judges, that a rising of the weavers in "and about London to destroy all engine-looms, machines which enabled those of "the trade who make use of them to undersell those who had them not, did not "amount to levying war within the statute; though great outrages were committed "on that occasion, not only in London but in the adjacent counties, and the magi- "strates and peace-officers were resisted and affronted. For those judges consi- "dered the whole affair merely as a private quarrel between men of the same trade "about the use of a particular engine, which those concerned in the rising thought "detrimental to them."

In the 4th section Mr. Just. Foster thus states his conclusions upon the question, what does constitute a constructive levying of war;—"Insurrections in order to throw "down *all* inclosures, to alter the established law or change religion, to inhance the "price of *all* labour, or to open *all* prisons,—all risings in order to effect these in- "novations of a public and general concern by an armed force are, in construction "of law, high treason, within the clause of levying war; for though they are not "levelled at the person of the king, they are against his royal majesty; and besides, "they have a direct tendency to dissolve all the bonds of society, and to destroy all "property and all government too, by numbers and an armed force. Insurrections "likewise for redressing national grievances, or for the expulsion of foreigners in "general, or indeed of any single nation living here under the protection of the "king, or for the reformation of real or imaginary evils *of a public nature, and in* "*which the insurgents have no special interest*,†—risings to effect these ends by "force and numbers are, by construction of law, within the clause of levying war: "for they are levelled at the king's crown and royal dignity."

Without intending at present to impugn the decisions which have been referred to, or the policy of extending, by definite enactments, this branch of the law of

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* See Post, p. 9. n.

† In his charge, on Watson's trial, Lord Ellenborough considers the necessity of the absence of what Foster calls a "special interest," in order to constitute treason, as a doctrine derived from the express words of the proviso in the statute of treasons, respecting acts resulting from and relating to private quarrels. "This provision," says Lord Ellenborough, "applies to the case of persons engaged "in a sort of predatory warfare between neighbouring chieftains, and which was very common in "early periods of our history. That is not a levying war *against our Lord the King*, in his realm. "The words of the statute are these:—'And if percase any man of this realm ride, armed covertly or "'secretly with men-of-arms, *against any other*,' (not *against the King*, but in the course of such "hostility between neighbouring chieftains, as I have mentioned,) 'to slay him, or rob him, or to take "'and detain him till he hath made fine or ransom for to have his deliverance, it is not the mind of "'the King nor his council that in such case it shall be judged treason.' Tumults, therefore, the "object of which is the peculiar, private, and individual interest of the parties engaged in them, are "distinguished by the statute of treasons itself from attacks upon the regal authority of the realm."

treason, we think it proper to express our opinion that a law corresponding and co-extensive with the doctrines here expounded would be uncertain and indefinite, and consequently ill adapted to answer the great end proposed in framing the Statute of Treasons, the *declaring* of the law.

According to this construction, the offence of treason would be completed by any tumultuous rising or assembly for the purpose of pulling down inclosures, and of course for perpetrating any other such outrages. The plain objection to this is the one which was urged by four of the judges in the case of Bradshaw and Burton, and by Sir M. Hale, in Messenger's case, viz., that this would extend the crime of high treason to offences recognised and punishable by the law as offences of inferior quality and denomination. It would, in truth, be to throw down the barriers between treason and mere riotous assemblies, or other offences committed with force and by numbers. To obviate this difficulty, two limitations are proposed to be applied. The first of these consists in the distinction alluded to by Mr. Justice Foster in the passage last cited, and taken by the majority of the judges in Bradshaw and Burton's case, namely, the presence or absence of *a special interest* on the part of those who are parties to tumults of this kind. In the case of Bradshaw and Burton the objection that the offence charged was made a *felony* by the statute 1 of Queen Mary, and consequently could not have been then considered as treason, was met by the observation, that the statute must be understood of persons "pretending any or all of them to be "*injured* in particular, as by reason of their common or other interest in the land "enclosed and the like, and assembling to pull it down forcibly, and not to the case "where they have dislike to *all* manner of inclosures; and therefore the assembling "in a forcible manner, with arms, to pull them down, where they have any interest "whereby they were in any particular to be annoyed or grieved, is not treason." It must be evident, however, that this is no answer where the statute constituting the lower offence applies to strangers who, without any particular interest, join in unlawfully doing the prohibited act. Independently of this, it cannot, we think, be reasonably contended that any private interest can make that outrage to be no treason which would otherwise amount to treason; least of all, as it seems to us, can such a doctrine be interposed to prevent that which, in the abstract, would be an overt act of levying war from being so considered. If a number of persons, throwing off their allegiance, were to set the sovereign at defiance and commit an unambiguous act of levying war, it is perfectly clear that no motive of private interest would be available to them in defence; it is therefore difficult to understand how the law can be different as applicable to any overt act of the like treason. If, however, the limitation were to be carried to the extent proposed, that is to every case where the inclosure or nuisance which affected, or was thought to affect, in point of interest the parties assembled for these purposes, it would usually exclude a conviction; for it rarely, if ever, happens that parties engage in such unlawful and dangerous enterprises, as the pulling down inclosures or removing nuisances, unless they are either in fact particularly affected by them or think that they are so. And on this ground, and to remove this difficulty, as it seems, the majority of the judges distinguished the conduct of the rioters in Bradshaw and Burton's case from that of persons asserting a particular right or interest by saying that their acts "*tending* "*to a generality*," would have been high treason, if executed. Again it is to be remarked, that this limitation or exception by reason of interest, would be applicable but to a few of the cases which would be brought by construction within this branch of treason. There can be no colour on the score of interest for breaking prison in order to obtain the release of particular persons, and many others might if necessary be cited, in respect of which no pretence of interest could be relied on for the purpose of extricating particular felonies and misdemeanors perpetrated or attempted to be perpetrated by numbers from the wide doctrine of constructive treason.

Generality of intention.

That limitation, however, of constructive treason, on which the greatest stress is laid, consists in the *universality* or *generality* of the intention which is made essential to such treason. According to the doctrine laid down by the judges in the cases cited, the insurrection, to be constructively treasonable, must extend to the throwing down *all* inclosures, or the enhancing the price of *all* labour, or to open *all* prisons. This must either mean that the intention shall be absolutely *universal*, or that it shall be *general* in respect of number or place, or that an intention *indefinite* in point of extent shall be deemed to be sufficient. It will, we believe, be found upon inquiry that no one of these predicaments can consistently be established as an adequate measure and test to be applied to the crime of treason. If proof

were required to be given of such an universal intention to effect the mischief, it would rarely, if ever, happen that *offenders* could justly be convicted of having formed so extensive a project, such offences being usually committed without premeditation, upon some sudden excitement,—and were it otherwise, the bringing the offence within the scope of the law on the principle of universality, to the exclusion of all cases where the intention, though not confined to particulars, was yet not universal, would be quite inconsistent with the real nature of the offence supposed to be constituted, viz., a levying of war against the king's crown and royal dignity; for if the rising to throw down all inclosures throughout the realm was a levying of war, so also must a rising for the purpose of doing the like in a particular portion of the realm, *e. g.*, in that part of England which lies north of Trent,—it is no more possible, in any legal view of the case, to consider the larger attempt to be treason, and the more limited one a misdemeanor, than it would be to regard an actual levying of war in the one case to be treason, and in the latter to be an offence of lower quality. Whatever may be the danger or injury to the crown or royal dignity which constitutes treason in the one case, must also constitute an offence of the like nature in the other; for the crime of treason in levying war must depend, as the act of levying war itself must, not on the scale of preparation made, or force used, or extent of territory seized or laid under contribution, but on the nature and quality of the act done: the occupation of a single acre of ground, or single castle or fort, may be as unequivocal an act of levying war as if a whole county had been occupied. Mr. Just. Foster says, this holding a castle or fort against the king or his forces, if actual force be used to keep possession, is levying war. If, then, the rising of numbers with intent forcibly to throw down inclosures be a proceeding which is, by the aid of analogy, to be deemed a levying of war within the Statute of Treasons, it seems to be impossible, consistently with that analogy, to say that such a rising does not amount to a levying of war, because the intention is not universal, but extends only to a single province or county. It is, we think, dangerous to found a constructive treason on a mere analogy of so weak a nature that it is necessary to reject its most obvious and natural consequences; and it seems to us, that the making universality of intention to constitute the essence of the offence, is not warranted by any just or recognized legal principle; that it is in effect not only to constitute an artificial limit to the extent of an offence, but to make an artificial condition essential to the crime. It is, moreover, one which could rarely, if ever, be proved without a strained presumption in point of fact,—*i. e.*, by inferring, from particular acts, coupled with loose expressions, such as are likely to be uttered by a mob on any sudden excitement and outbreak, a generality of intention sufficient for the purpose.

If, on the other hand, a rising to throw down inclosures (or the like) by numbers and with force, may constitute a levying of war, although the intention be not universal, we are unable to discover by what rule or test it is to be determined what specific intention shall be sufficiently general to constitute a test of treason, as contradistinguished from the intention to destroy particular inclosures. If a rising to destroy all inclosures within a county may be treasonable as regards generality of intention, it should seem that the like project, though limited to a parish or township, would be an offence of the same quality, for it is in respect of quantity only, not quality, that the cases differ. And if this be so, there can be no distinction in reason or principle between the intent to destroy particular inclosures, and the intent to destroy those within a particular district; for it may frequently happen that particular inclosures extend over a large local district, so that the execution of a general intention as regarded the district, would be less mischievous and less criminal than the executing the intention as regarded particular inclosures.

Indefinite intention.

A similar objection would operate to the making the existence of a mere *indefinite* attempt the test of constructive treason. An indefinite intention on the part of those engaged in a work of demolition of such a nature cannot reasonably be presumed, for the sake of involving the parties in the guilt of treason, to extend beyond their efforts and exertions, on the particular occasion, and must be considered as confined therefore to the immediate neighbourhood. And upon this point the Weavers' case may be referred to, in which it was holden by five of the judges that a rising of the weavers *in and about London* to destroy *all* engine looms did not amount to a levying of war within the statute, though great outrages were committed on that occasion, not only in London, but in the adjacent counties, and the magis-

trates and peace-officers were resisted and affronted. Mr. Just. Foster concurs in this opinion of the five judges; five other judges were, however, of a different opinion, but the Attorney-General proceeded against them as for a riot only.

It is to be observed that the judges who held that this case was not treason, seem to have relied on the consideration that the affair was merely a private quarrel between men of the same trade about the use of a particular engine, which those concerned in the rising thought detrimental to them. With deference, however, to such authority, we cannot but think it exceedingly questionable whether a sense of private detriment can properly be available as any colour or excuse for an outrage of such a nature. Since the Weavers' case, the destruction of machinery has in some instances been made capital, numerous prosecutions for such offences have of late years taken place, but it has never been urged, that we are aware of, even in mitigation of punishment, that the offenders were actuated by motives of self-interest.

Besides the instances above adverted to, in respect of which the proposed line of distinction between treason and other offences appears to us to be insufficient, many other anomalies would result from such a principle of limitation. We refer to one in particular. In Bradshaw and Burton's case it was said by all the judges but three that if any assemble themselves to lay violent hands upon the magistrate, as upon the mayor of London and the like, and with force attempt to put it into action, that this is rebellion and treason at common law. So that whilst by the express provision of the Statute of Treason the killing of the Lord Chancellor or one of the judges is not treason, unless he be sitting in judgment, the laying violent hands upon an ordinary magistrate might, it seems, by construction, be deemed treason.

We have thus considered the extent to which the authorities would tend to carry the doctrine of constructive treason, in the article of Levying War against the King. We have done this in order to show that the doctrine is not objectionable merely as an indirect mode of legislation, but that the principles of such extension are in themselves defective, and incapable of supporting any certain and definite enactments. We have already had occasion to make some general remarks on the subject of constructive extensions of the penal laws, and of the evil consequences resulting from a practice which, as far as we have proceeded, we have endeavoured to obviate by the substitution of direct provisions. In no other instance, however, is such a practice so dangerous in its consequences, and so liable to abuse as in the case of treason; in no other have the decisions of the Courts been so frequently impugned, and so strenuously resisted. And it is to be observed that, although since the Revolution the doctrine has been pressed, and convictions have been founded upon it, there does not appear to have been a single instance in which the convicted parties have suffered. In the very case of Damaree, the first of this kind which occurred after the Revolution, although the judges appear to have been unanimous as to the propriety of the conviction, the prisoner, who had sentence of death, soon afterwards received a free pardon.

We proceed to make a few observations in support as well of the above recommendation, that the doctrine of constructive treason should no longer be admitted, as of the general policy of discountenancing constructive extensions of the penal law.

To constitute a constructive offence, the words of the original offence are made to signify that which in their natural and ordinary sense they do not signify. And this is done by reason of the similarity or identity of acts as regards merely their consequences. And thus acts wholly dissimilar from each other are by reason of similarity of tendency made to constitute the same offence. From so doing this inconvenience results, that it is impossible to foresee to what extent the principle may be carried, its plain tendency being to extend a crime, however defined and limited in respect of the particular acts made essential to it, to all others which can be identified with them in respect of consequences.

The practice is much to be deprecated, on account of the laxity and uncertainty which it necessarily introduces, and the obvious result to which it tends, of throwing down the barriers by which existing classes of crimes are distinguishable from each other, and also from civil injuries, remediable merely in damages; and thus making the *tendency* not the nature of particular acts to constitute at once criminal as well as civil liability. Were such a method of arrangement convenient or practicable, the work of penal legislation would be comparatively easy. For example, the laboured distinctions between theft, embezzlement, or obtaining property by false pretences, and the mere dishonest conversion of moveable property, which is not

a crime, but remediable only by action, would become unnecessary, for all have one common end and object, viz., the spoliation of property; and all consist either in a wrongful appropriation of another's property, or in acts tending to that result; and therefore if without regarding the *means* of offence, *a common tendency* to produce similar evil were sufficient, it would be desirable at once to make all fraudulent appropriations, or fraudulent endeavours to appropriate another man's goods, penal, without regard to the means used. All such distinctions as are unnecessary are worse than useless—they are positive impediments to the course of justice.

Nothing, however, can be more certain than the necessity for distinguishing crimes from each other, and from mere civil injuries, by careful definition of the means or acts by which the injury is effected or endeavoured to be effected, and that criminal liability cannot be made commensurate with the injurious or criminal tendency of acts done or means used. It is frequently by means of these only, that civil and criminal liability are distinguishable, and that the different gradations of crime are preserved; to disregard such limits would be to confound criminal and civil liability to the excessive and vexatious multiplication of penal prosecutions, and to destroy those distinctions as to criminal liability, which are at once essential to the efficacy of the penal law and the security of the subject from unjust and oppressive charges.

The crime is in plain and unambiguous terms declared by the statute to consist in a levying of war. There is nothing to indicate that these terms were intended to be used otherwise than according to their literal sense; and, indeed, the context, as well as the history of the times antecedent to this declaratory Act, confirm the position that they were meant to be used in that sense. The statute is wholly silent as to the intention or motive of the offender; and, therefore, the intention or motive can be material only to show that the intention was to levy war, where that purpose was not sufficiently manifested by the acts themselves. The question whether war has or has not been levied, is a question of fact rather than of law, and seems to be no more a question of law than any other compound fact or matter of inference from circumstances, the ascertainment of which is essential to any judicial proceeding, and in this, as in all other cases, where a compound fact depends on a variety of circumstances, the question of law must depend on the question of fact, as an inference made from all the acts done and the intention of the actors. Such being the case, it seems to be extraordinary that by any artificial rules of law or process of reasoning, parties can be deemed to have been guilty of treason, in respect of acts which would not be regarded as a levying of war within the plain meaning of the words, but only by a circuitous process of artificial induction, which, to many eminent lawyers, amongst whom is Lord Hale, has appeared to be unsatisfactory. That process was as follows:—It was argued that the offence of levying war may either be aimed against the person of the king, or against his crown and royal dignity; but that as a levying of war against his person would also be an overt act of a different species of treason, it was therefore to be presumed that the object of the clause was the protection of the king's crown and dignity. And lastly, that as offences committed by numbers and with force were against his royal majesty, and were levelled against his crown and dignity, it was to be held that in construction of law they came within the clause of levying war. Consistently with this view, Mr. Justice Foster expresses an opinion, that little stress ought to be laid on the absence of the external characteristics mentioned by Lord Hale, who takes a distinction between those insurrections which have carried the appearance of an army, formed under leaders, and provided with military weapons, and with drums, colours, &c., and those other disorderly tumultuous assemblies, which have been drawn together and conducted to purposes manifestly unlawful, but without any of the ordinary show and apparatus of war. This distinction, in a great measure, involved the whole question; Lord Hale deemed an actual levying of war to be essential as contradistinguished from a disorderly and tumultuous assembly, however unlawful; and therefore laid stress on circumstances which usually evidence an intention to levy war, whilst Mr. Justice Foster, making the criminality of the act to depend not so much on the nature of the act itself as on its consequences, disregarded those circumstances. The effect of this doctrine has been to bring within the scope of this branch of the law of treason many classes of offences; and thus a great multitude of acts, which no man of plain reason and understanding, whose mind had not been sharpened to some considerable degree of artificial and technical subtlety,

would regard as a levying of war against the crown, and which are even expressly recognised by the law as offences of a known and inferior degree, are construed to be Treasons. It could not, however, escape the attention of those who sanctioned this constructive doctrine, that without some restraint it would include all offences to be effected by force and numbers, which could be regarded, in the technical language of an indictment, to be against the king's crown and dignity. And it therefore became necessary to prescribe limitations for confining and narrowing the extent of the doctrine. We have endeavoured to show that such limitations would be ineffectual as practical limits to this branch of the law, the operation of which would be left vague and uncertain. We may further observe that these limitations are merely arbitrary, and, so far from being referable to any just principle, that they are inconsistent even with the very principle on which the constructive doctrine is founded. If the throwing down of inclosures by numbers and with force can be deemed to be treasonable, because indirectly it is an offence against the crown and royal dignity, so must every single act of destruction be which is effected by the same persons, the same tools, and with equal force. All such limitations are, in truth, arbitrary and artificial limitations of an artificial crime, created by the strained construction of a statute framed for the express purpose of making the law of treason plain and definite. We may further observe, that the distinction thus made between a general and particular, *e. g.*, between an intention to throw down particular inclosures, and the intention to throw down *all* inclosures, was one entirely novel and which yet remains without sanction from legal analogy. The law recognises no such principle as generality in the constitution of other crimes; civil trespasses are not on this ground convertible into misdemeanors, nor misdemeanors into felonies, nor even felonies into treasons; whilst in this instance a general intention to commit misdemeanors of a particular class is made, *per saltum*, to constitute treason. Such a latitude of construction affords a striking contrast with the close and strict adherence to the words of the statute, which has in other cases been deemed to be necessary.* We conclude these observations on the doctrine of a constructive levying of war by again referring to the just and emphatic observations of Sir M. Hale upon the subject. After a review of the statute, that learned judge concludes by observing,† "1. How necessary it was that there should be some fixed and "settled boundary for this great crime of treason, and of what great importance "the statute of 25 Edw. III. was in order to that end; 2. How dangerous it is to "depart from the letter of that statute, and to multiply and enhance crimes into "treason by ambiguous and general words, *as accroaching of royal power, sub-*"*verting of fundamental laws*, and the like; and, 3. How dangerous it is by "construction and analogy to make treasons where the letter of the law has not "done it; for such a method admits of no limits or bounds, but runs as far as "the wit and invention of accusers, and the odiousness and detestation of persons "accused will carry men."

It will be seen that the purposes enumerated by Sir M. Foster, insurrections for the effecting of which are stated to constitute high treason within the clause against levying of war, are of two widely different descriptions. Risings, or riotous or unlawful assemblies for some of the purposes there mentioned, viz., to alter the established law, or change religion, are wholly distinct in their nature and consequences from such as are usually the result of mere temporary excitement, as in other instances mentioned of throwing down inclosures, raising wages, releasing prisoners, breaking looms, or the like. It cannot be doubted that the former are of a far more dangerous quality and tendency than the latter. They are in their own nature general; they produce, by combinations of force and numbers, alterations in the political constitution of the country, which ought, by virtue of that constitution, to result only from free will, exercised in a constitutional manner.

The modern statute 36 of King Geo. III., c. 7, has made provision against treason of this description. It is remarkable, however, that whilst the latter statute has made the compassing and imagining to levy war with any of the several intents specified, viz., by force or constraint to compel the sovereign to change his measures or counsels, or to put any force or constraint upon or to intimidate or overawe both

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* So strictly has the statute of treasons in other cases been construed, that where the king has been actually murdered, the compassing and imagining his death have been charged in the indictment as the treason, and the killing merely as an overt act. Kel. 8; 1 Hale's P. C. 107, 119; Fost. C. L.; 59, 185.

† 1 Hale's P. C., vol. i., p. 86.

Houses or either House of Parliament, to constitute treason, the crime of levying war generally, as expressed in the Statute of Treasons, is left just as it was before, so that, whilst the one statute makes any levying of war against the king treason, the other, in effect, makes a levying of war to be treason, provided the war be levied with one of the intents specified. The former provision, in fact, includes the latter. As the treason in levying war under the statute of 25 King Edward III., stat. 5, c. 2, is not repealed, it of course remains in force, subject to the constructions which it has frequently received. The Legislature, however, in repeating the enactment against this species of treason, but confining its operation as regards the objects of such treason, may perhaps be considered as having deemed it to be unnecessary that this species of treason should be extended, by any constructive process, beyond the limits prescribed by the latter statute.

Constructive compassing of the king's death.

Upon the subject of constructive treasons, it appears necessary briefly to allude to artificial interpretations of another clause in the statute of King Edward III., which were formerly of great practical importance; and which, notwithstanding that the statute 36th of King George III. has directly constituted those acts and circumstances to be treason which were previously only so by the constructions to which we allude, have been still repeated and enforced on most of the modern trials for this offence. The first of these constructions is the doctrine that conspiring to effect the deposition or imprisonment of the king is an overt act of compassing his death. The statute of treasons made no provision for this offence; and the defect was usually supplied by express clauses in the various statutes which enacted new and strange treasons in the unsettled reigns which succeeded that of King Edward III.* But these statutes, being either of temporary duration, or being from time to time superseded by new enactments, which restored the law to the popular standard of the statute of treasons, recourse was had to constructive interpretations of the latter statute; and about the middle of the reign of Queen Elizabeth, the doctrine first began to appear that an intention or conspiracy to depose the queen was an overt act of compassing her death under the Statute of Treasons. The queen's counsel, on the trial of the Duke of Norfolk,† declared that the maintenance of the title of the Queen of Scots, by force against Queen Elizabeth, was an evident purpose to depose and deprive the latter queen. "And how could that "have been done," they ask, "without compassing her highness's death and destruc-"tion? for the jealousy of an usurper cannot suffer the just prince to live." From this time the doctrine has prevailed in our courts as an unquestionable principle, and is usually justified by the supposed necessary presumption that something worse than deprivation must be intended by such as have so far thrown off their bounden duty to their sovereign as to use force against him; while a practical reflection of Machiavel, that "there is generally but a short interval between the "prisons and the graves of princes," is cited in support of the presumption.‡ Mr. Hallam justly observes§ that "it seems not very reasonable to found a capital "conviction on this sententious remark; and that it is not by any means true that "a design against a king's life is necessarily to be inferred from the attempt to get "possession of his person." In truth, the object was directly contrary to this presumption in many rebellions which have actually taken place, and would be so in many others which may be supposed, where purposes of the rebels would be defeated by the death of the sovereign whose name they intended to employ. It is remarkable that Chief Justice Brooke, who compiled his abridgment of the law during the reigns of King Henry VIII., King Edward VI., and Queen Mary, expresses a doubt whether a design to deprive the king of his crown be within the Statute of Treasons;‖ "because," he says, very sensibly, "one may deprive the king of his "crown, without designing his death." And he corroborates his opinion by referring to the several statutes which had been passed to meet this particular case.

Another still more remarkable enlargement of this clause of the Statute of Treasons is the construction that insurrections of a domestic nature, or hostile conspiracies with foreign powers, where, though the alteration of the constitution and government may be intended, an attack upon the person of the sovereign is not in any degree or manner contemplated by the insurgents, constitute overt acts of

* See stat. 21 Rich. II., c. 3; 26 Hen. VIII., c. 13; 1 Edw. VI., c. 12; and 13 Eliz. c. 1.
† Howell's State Trials, vol. i. p. 1001.
‡ Blackstone's Commentaries, vol. iv., p. 79.
§ Constitutonal History, vol. iii., p. 208.
‖ Brooke's Abridgement, Tit. Treason, pl. 24.

compassing the king's death. Thus, in 1663, a consultation at Farley-wood, in Yorkshire, to effect a rising against the government, was held to be an overt act of compassing the king's death;* and in Queen Elizabeth's time, Doctor Stone, who had conspired abroad with a foreign prince to invade this realm, was held to be guilty of high treason in the article of compassing the queen's death.†

These ample extensions of the literal meaning of the provision of the Statute of Treasons against compassing the king's death are unquestioned law at the present day, being not only established by the ancient precedents above referred to, but confirmed by the authority of Mr. Justice Foster and the best modern text writers, and approved by judicial decisions and declarations in recent times. On the trial of Hardy, in 1794,‡ Chief Justice Eyre says, "the conspiracy to depose the king "is evidence of compassing and imagining the death of the king, conclusive in its "nature; so conclusive, that it is become a presumption of law; which is, in truth, "nothing more than a necessary and violent presumption of fact, admitting of no "contradiction." And the learned judge then goes on to say that "it was impos- "sible for the counsel for the prisoner to maintain that an honest man could fairly "doubt whether he who conspires to depose the king has compassed or imagined "his death." The same learned judge repeats this proposition on the subsequent trial of Horne Tooke, in terms equally decided and emphatic.§ A comparison of this positive judicial opinion with the doubt expressed by Chief Justice Brooke, 150 years before, and in times of high prerogative doctrines, exhibits in a striking point of view the advance of artificial reasoning upon the terms of the statute, notwithstanding the general improvement of our criminal law, which had taken place in the course of that period. The second constructive interpretation to which we have above alluded, is likewise distinctly adopted by Chief Justice Eyre, in his charge to the grand jury, previously to Hardy's trial; on which occasion he says that, "in a design to subvert the constitution, the compassing and imagining the "death of the king is involved, and is in truth of its very essence.‖

Long after these constructions of the Statute of Treasons had been firmly established, in the criminal law, the statute of the 36th of King George III., c. 7, was passed, which superseded the necessity of resorting to them by making direct provisions respecting the several points of which they are composed. By that statute, which, though originally in force for the life of King George III. only, was made perpetual by the statute 57th King George III., c. 6, it is enacted that "if "any person shall, within the realm or without, compass, imagine, invent, devise, "or intend death or destruction, or any bodily harm tending to death or destruction, "maim or wounding, imprisonment or restraint, of the person of the king, or to "deprive or depose him from the style, honour, or kingly name of the imperial "crown of this realm, or of any other of his majesty's dominions or countries, or to "levy war against his majesty within this realm, in order by force or constraint to "compel him to change his measures or counsels, or in order to put any force or "constraint upon, or to intimidate or overawe, both Houses or either House of "Parliament, or to move or stir any foreigner or stranger with force to invade this "realm or any other his majesty's dominions or countries under the obeisance of his "majesty; and such compassings, imaginations, inventions, devices, and intentions, "or any of them shall express, utter, or declare, by publishing any printing or "writing, or by any overt act or deed; every such offender being legally con- "victed upon the oath of two lawful and credible witnesses, shall be adjudged a "traitor, and suffer as in cases of high treason."

It will be seen that this statute (as Lord Ellenborough observed on Watson's trial in 1817 ¶) "did not so much introduce any new treasons, as declare to be "substantive treasons those acts which had been, by successive constructions of the "Statute of Treasons, determined to be the strongest and most pregnant overt acts "of the several treasons specified in that statute." It might have been supposed that this explicit declaration of the law would have put an end to the practice of resorting to those artificial constructions of the statute of King Edward III., which could only be justified or excused, as extensions of a penal law, by the omission of the ancient statute to provide for such cases. For some reason, however, which we do not comprehend, it has been the practice, ever since the passing of the statute

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* 1 Hale's P.C. 121. † Ibid. 122. ‡ Howell's State Trials, vol. xxiv., p. 1361.
§ Howell's State Trials, vol. xxv., p. 725. ‖ Ibid., vol. xxv., p. 203-4.
¶ Ibid., vol. xxxii., p. 579.

of the 36th of King George III., in all prosecutions for high treason where the facts seemed to admit of it, to insert counts upon the statute of treasons in the indictments founded entirely upon these forced interpretations of that law. This practice was adopted on the trial of Watson for high treason in 1817, and the insertion of counts in the indictment to meet these constructive charges was expressly approved by Lord Ellenborough, by whom the doctrine itself was explained and enforced in summing up the evidence in that case to the jury.* It was also adopted in the case of Thistlewood and others, who were tried and executed for high treason in 1820; and on that occasion likewise Lord Tenterden (then Lord Chief Justice Abbott) explained and justified the doctrine of constructive compassing the king's death, though he directed the attention of the jury more particularly to that part of the charge which was founded upon the direct enactments of the modern statute.†

With the utmost respect for the opinions of the learned judges whom we have just mentioned, we are unable to understand how it could be necessary or expedient to found a charge upon indefinite and artificial constructions of an ancient law, when the subject of the accusation fell distinctly within the direct and positive terms of a modern statute. We cannot perceive that such a mode of proceeding affords any just facilities for procuring the conviction of a traitor; and, on the other hand, we think that mischief, and possibly a failure of justice may arise from combining charges founded upon totally different principles, and thereby embarrassing the accused in his defence, or affording grounds of doubt and perplexity to the jury. Under these impressions, we are inclined to recommend that the use of all constructive interpretations of the Statute of Treasons, both in the article of levying war and of compassing the king's death, should be abolished by the express interference of the Legislature; and we have accordingly inserted in the Digest provisions which will have the effect of excluding them.

Before we quit this subject, we think it proper to advert to another incident peculiar to the law of high treason, viz. its rejection of the distinction at present observable in the case of other felonies between principals and accessories before the fact. This distinction is an exception peculiar to *mere* felonies, not being recognised in respect of such felonies as amount to treason, or in the case of any mere misdemeanor. We notice it in this place for the purpose of observing that we have not been able to discover that the absence of this distinction, as regards accessories before the fact, in the case of treason, has been attended with either hardship or inconvenience in practice. This we think affords a fair inference that it is altogether useless and unnecessary. To this subject, as connected with the crime of felony, we shall afterwards have occasion to recur when we consider the subject of accessories generally.

We now proceed to the consideration of a large class of offences which, although inferior in degree to the crime of treason, are regarded as penal by reason of their tendency to occasion some political hurt or detriment of a lower degree. The principles upon which the latter stand are similar to those which support the laws against treason. It is necessary not only to restrain by severe penalties direct attempts to destroy the body politic, but also such practices as tend to endanger the safety of the State, or impair or injure the vigorous working of the system. Such offences, founded as they all are upon the same plain and self-evident characteristic principle, vary much in respect not only of the means used for their accomplishment, but also in respect of the degree of mischief or danger likely to result from them. They consist either, first, of specific acts inconsistent with the safety of the State, such as the seducing or endeavouring to seduce the subjects of the realm from their duty of allegiance, or raising bodies of armed troops without lawful authority. Some of these have been termed by the law of England misprisions of treason. Within this class must be contained all endeavours or attempts to perpetrate treason, which do not actually amount to the very crime itself. Secondly, they may consist in general endeavours to promote public disorder or disturbances of the political system, as by seditious meetings, libels, or conspiracies, for the purpose of creating or inflaming discontents, or exciting men to resort to violent and unconstitutional means for the redress of supposed grievances.

Offences against the State inferior to Treason.

Although there is no offence or class of offences recognized by the law of England under the title of sedition, there are several which are punishable by reason of their seditious tendency, viz., seditious assemblies, seditious libels, and seditious conspiracies. Such offences, though inferior to that of treason, are so far similar that

Offences exciting to Sedition.

* Howell's State Trials, vol. xxxii., p. 579. † Ibid., vol. xxxiii., p. 919.

they tend to injure and endanger the political constitution, by engendering public dissensions, tumults, and conflicts, by exciting discontent in men's minds against the constitution and laws, or the manner of their administration, or by exposing the Sovereign or public functionaries to hatred and contempt, and thus exciting them to effect sudden political changes by unlawful means. Such offences therefore may be regarded in the light of assaults on the constitution, which, although they do not aim at its destruction, ought for the sake of its safety and security to be prohibited under proportionate penalties.

Misprisions.

A third and numerous class includes all cases which tend more remotely and indirectly to impair the administration of the political system, particularly by any contumelious expressions derogatory of the dignity of the Sovereign, by calumniating either the constitution itself, or the manner in which public authority is administered, or by exposing either to hatred or ridicule, or by personal attacks on those entrusted with the administration of justice, or any other branch of the executive power. Such practices, although they do not amount to direct attempts to injure or impair the constitution, or to endanger its safety, tend indirectly to effect these mischiefs. Neither the system itself, nor the manner in which its affairs are administered, can be rendered odious or contemptible, without producing a sense of grievance and injury, and exciting and encouraging an improvident desire for sudden and violent change. The law of England comprehends many of the offences which we have lately described under the denomination of misprisions. This is a term which though frequently used, especially by the earlier writers on the criminal law, is not one of any definite sense or meaning. It is stated by Mr. Serjeant Hawkins to be applicable generally to all such high offences as are under the degree of capital; and these are said to be twofold, 1. Negative misprisions, which consist in the omission of something which ought to be done. 2. Positive misprisions, which consist in some *misdemeanor* actually committed. The term in its original sense signifying a contempt, has been applied to include a concealment of some projected or perpetrated crime, which was deemed to involve a contempt of authority and breach of fidelity, in not discovering the fact, especially in a case of treason; and for a similar reason was used also as descriptive of some positive offences which included the notion of a special contempt of authority, as in the case of all offences against the King's person, government, or title, which are also commonly described as *contempts*.*

Misprision of Treason.

At common law any delay in discovering high treason was deemed to be an assent to it, and business the most urgent constituted no excuse; according to Bracton, it was scarcely permitted to the party even to look behind him on his way to make the discovery to the proper authority.† But by the statute 1 and 2 of Queen Mary, c. 10, the bare knowledge and concealment of treason constitutes a misprision only.‡ And at the present day, although such mere knowledge and concealment be punishable only as a misprision, under the statute of Queen Mary, yet undoubtedly such knowledge and concealment, coupled with circumstances which showed assent and approbation, would amount to treason; as in the case put by Hawkins, if one having notice beforehand that persons designed to meet in order to conspire against the government, went into their company and heard their consultation and concealed it, the facts would afford strong evidence to show a participation in the crime.

Many of the other offences which are properly included within the general description of offences against the constitution, as consisting either in tumultuous or disorderly meetings for political purposes, or in excitements to discontent and sedition, are recognised and punishable by the law of England under the denomination of unlawful assemblies, conspiracies, or libels. These titles which are referable to the particular means of offending, by no means peculiar to the class of crimes now under consideration, include of course many others, the objects of which are widely different from the present. What, therefore, is peculiar to offences comprehended under those titles, as regards the particular acts or means essential to the offence, is a matter for distinct consideration. It is important with a view to the class of cases now under consideration to notice such only as falling within some general

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* See Hawkins's P. C. book i. c. 5 and 6.

† *Nec debet ad aliqua negotia quamvis urgentissima se convertere quia vix permittitur ei quod retro aspiciat.—Bract. lib.* 3. *De Corona.*

‡ This offence has been classed as one against the executive. See Fifth Report of the Criminal Law Commissioners.

definition as to the means used, such as libel, are in truth offences against the state.

A large class of offences recognised by the law of England, many of which are referable to the present head, consists of positive misprisions or contempts against the king, his government, courts, or prerogative.

Contempts against the King's Courts.

Under the description of contempts against the king's courts, the law includes not only such as consist in some contumely or insult offered to a court of justice or to a judge engaged in the execution of his office, or such as tend to render the administration of justice odious or contemptible; but also striking, and other violence committed or attempted in the presence of the court, and also the rescuing offenders from any of such courts, although no blow be struck. These latter offences, aggravated no doubt as they are in reference to the occasion of committing the offence, may be more properly and conveniently classed as offences amounting to actual obstructions of the executive power.

We propose, therefore, to include within the class of offences now under consideration such only of those which fall within the above common law notion of contempts, as constitute acts of contumely or insult committed against a court of justice, or judge acting in the execution of his office or such as tend to bring the administration of justice into hatred or contempt, and which are therefore injurious and hurtful, as amounting in truth to a contempt of the government itself; no acts can more strongly and directly tend to engender discontent and disobedience to the law than such as diminish men's respect for the administration of justice. Offences which, independently of any deliberate insult to the executive authority, are criminal, as actual obstructions, are punishable *per se*, on general and obvious principles to which we have already adverted.

It is also laid down as a rule within the general and extensive notion of the common law doctrine, that a contempt of a statute is indictable if no other punishment be provided.* This also is a rule for the support of which it is not necessary to refer to the doctrine of contempt, and treat the offence as a kind of insult to authority, the rule stands on the plain and obvious principle, that a power to compel obedience is essential to the existence of a law, and that where the law concerns the public, the proper and ordinary mode of compelling obedience, is by entailing punishment as a consequence to disobedience. Upon these grounds we have already classed offences of this nature with other offences against the administration of the executive power.†

Contempts against the Royal Prerogative.

Another class of offences recognized by the law of England as contempts against the royal authority, are such as regard the prerogative, and these have been stated to be so various in their nature that it is impossible even to reduce them to any certain heads.‡ Some of those indeed which are particularized seem to be of a very loose and uncertain description. Mr. Serjeant Hawkins states that the principal of them seem to come under the following particulars. 1st. Refusing to assist the king for the good of the public. 2dly. Preferring the interests of a foreign prince to that of our own. 3dly. Disobeying the king's lawful commands or prohibitions. Such refusals as are criminal within the first of these particulars must, it is conceived, be understood as refusals in breach of the law by the refusal or omission to render some legal duty, and indeed the rule is afterwards so limited by the examples given of the application of the rule, as well as by the exposition given in the same book:—"First, therefore, it is a high offence for any "subject to deny the king that assistance for the good of the public, either in his "councils or wars, *which by the law he is bound to give him;* as for a peer not to "come to the parliament at the day of the summons, &c." The offences, therefore, comprised within this predicament need no support from the doctrine of constructive contempt, as they are omissions directly obstructing the exercise of the executive or legislative functions. The definition of such duties does not fall within the scope of the Criminal Law. The omission to render any public service the burthen of which is by the constitution thrown on particular persons, and from which omission detriment is likely to result to the interests of the public, is criminal upon principles which we have already stated.§ All such breaches of duty are of a criminal nature, and in prohibiting them no other specification can usually be necessary than such as may be required for the purpose of a due apportionment of punishment.

In commenting on the second of the above particulars, it is stated to be so high

* Hawk. book i. c. 6, s. 5. Cro. Eliz. 655.
† See Fifth Report of the Criminal Law Commissioners.
‡ Hawk. P. C. book i. c. 22. Tit. "Contempts against the king's prerogative."
§ See Fifth Report of the Criminal Law Commissioners.

an offence to prefer the interest of a foreign prince to that of our own, that it is criminal to do anything which may but incline a man so to do; as to receive a pension from a foreign prince, without the leave of the king. This appears to be a very strong extension of the doctrine of contempts of the prerogative. Mr. Serjeant Hawkins says, "it is so high an offence to prefer the interest of a foreign prince "to that of our own, that it is criminal to do anything which may but incline a man "so to do,—as to receive a pension from a foreign prince without the leave of our "king."* This learned writer gives, indeed, no authority for such a proposition, but his reference to a former chapter, in which the statutes against foreign enlistment and acting under foreign military commissions are discussed, seems to show that, in his opinion, it is only by analogy to those laws, that such an act would be criminal. At all events, we are not aware that this rule, as laid down by Mr. Serjeant Hawkins, has received any judicial sanction. As those services to foreign powers which tend to compromise or prejudice the safety of the crown or the interests of the public, are now provided against by special enactments, we do not conceive that any inconvenience can result from the omission in the Digest of any provision under this head.

The third general particular of offences punishable as contempts against the prerogative, viz., the disobeying the king's lawful commands or prohibitions, falls also within a distinct principle, which supports them independently of any consideration of their constituting contempts of authority. The disobedience either of the king's lawful commands or of such as are lawfully made by any officer of the crown or other person entrusted by law with authority to make any order in a public capacity, is properly punishable as an offence against the due administration of the executive authority,† whilst such disobedience can only constructively and by implication be regarded as an offence against the royal prerogative, as, indeed, every ordinary offence is described to be in the formal words of the indictment, against the king's crown and dignity. Amongst contempts against the king's person or government, some by a very forced construction have been held to be criminal. For the purpose of illustration we refer to the following instances. Such contempt‡ may consist in "The doing an act which impliedly encourages rebellion; as by "absolving persons at the gallows, who being condemned for high treason show "no signs of repentance, but persist in justifying the fact, or by drinking to the "pious memory of a person executed for high treason."

"Also *it is said* to be an offence (*i. e.* a contempt of the King's person or "Government) for which a man may be indicted, to refuse in a foreign port to pay "the usual customs, because it may cause a breach between our King and the "King of the country."§

Libels against Foreign Princes or Potentates.

The passage to which we have just adverted suggests a class of offences which falls within the general principle of safety to the State, and which has in several instances been deemed to be criminal. We allude to publications which tend to defame, scandalize, and vilify foreign princes or potentates. If such libels were to be permitted the almost necessary consequence would be, the exclusion, probably the general exclusion, from foreign countries of the literary productions of this country. Such a consequence would be in itself an evil, but the mischief would not rest here, it would be difficult effectually to exclude such articles; and, were that possible, the practice of publishing such calumnies in this country would be injurious, as tending to create false and mischievous prejudices against foreign powers, to produce irritation on their part, and remonstrances with the Government, necessarily ineffectual unless the offence were prohibited by law. The tendency therefore of such practices must be to interrupt the friendly understanding existing between this country and foreign powers; and although the Government of this country had no power to repress such slanders, yet from no other source could redress for that which might justly be regarded as a grievance be sought or expected.

It will be seen that the law of England has, under the general denomination of contempts, included a very wide circle of offences, which, in truth, are so considered on several distinct and peculiar grounds, and which can be regarded as contempts in no other than a constructive sense, or in so wide and comprehensive a meaning of the term as would render it insignificant. The objection to this is not merely nominal; the nature and extent of an offence cannot be properly estimated, unless it be referred to its true principles; where it is made to depend on an artificial foundation, subject to constructive enlargement, its limits are necessarily indefinite.

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* 1 Hawkins, P. C., c. 22, s. 3.

† See the Fifth Report of the Criminal Law Commissioners.

‡ Hawk. P. C. book i. c. 23. s. 2. § Hawk. P. C. book i. c. 23. s. 7.

TREASON AND OTHER OFFENCES AGAINST THE STATE.

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TREASON.

Art. 1.

Whereas by a statute made in the 25th year of the reign of King Edward the Third, (commonly called the Statute of Treasons,) it was (amongst other things) enacted, to the effect following, that is to say, "Whereas divers opinions have "been before this time in what case treason shall be said, and in what not; the "King, at the request of the Lords and Commons, hath made a declaration in the "manner as hereafter followeth, that is to say, when a man doth compass or "imagine the death of our lord the king, or of our lady his companion, or of their "eldest son and heir; 25 Edw. 3, st. 5, c. 2.

"Or if a man do violate the king's companion, or the king's eldest daughter "unmarried, or the companion of the king's eldest son and heir;

"Or if a man do levy war against our lord the king in his realm;

"Or be adherent to the king's enemies in his realm, giving to them aid and "comfort in the realm or elsewhere;

"And thereof be probably attainted of open deed by the people of their con-"dition;

"And if a man slay the chancellor, (*a*) treasurer, or the king's justices of the "one bench or the other, justices in eyre or justices of assize, and all other justices "assigned to hear and determine, being in their places doing their offices;

"And it is to be understood that in the cases above rehearsed that ought to be "adjudged treason which extends to our lord the king and his royal majesty; (*b*) and "of such treason the forfeiture of the escheats pertaineth to our sovereign lord, as "well of the lands and tenements holden of other as of himself;

"And because many other like cases of treason may happen in time to come which "a man cannot think nor declare at this present time, it is accorded that if any other "case supposed treason which is not above specified doth happen before any justices, "the justices shall tarry without any going to judgment of the treason till the cause "be showed and declared before the king and his parliament whether it ought to "be adjudged treason or other felony. And if per case any man of this realm ride "armed covertly or secretly with men of arms against any other, to slay him or "rob him, or take him or retain him till he hath made fine or ransom for to have "his deliverance, it is not the mind of the king nor his council, that in such case "it shall be judged treason, but shall be judged felony or trespass, according to the "laws of the land of old time used, and according as the case requireth."

["Pur ceo qe diverses opinions ount este einz ces heures qen cas quant il avient doit estre "dit treson et en quel cas noun, le Roi a la requeste des Seignurs et de la Communalte ad fait

" declarissement qe ensuit, cest assavoir: en cas quant homme fait compasser ou imaginer la mort nostre " Seignur le Roi, Madame sa compaigne, ou de lour fitz primer et heir; ou si homme violast la com- " paigne le Roi, ou la eisne fille le Roi nient marie ou la compaigne leisne fitz et heir du Roi; et si " homme leve de guerre contre nostre dit Seignur le Roi en son roialme; ou soit adherdant as enemys " nostre Seignur le Roi en le roialme, donant a eux eid ou confort en son roialme ou par aillours; et " de ceo provablement soit atteint de overt faite par gentz de lour condition. Et si homme tuast " chanceller, tresorer, ou justice nostre Seignur le Roi del un baunk ou del autre, justice en eir et des " assises et toutes autres justices assignez a oier et terminer, esteantz en lours places en fesantz lours " offices. Et fait a entendre qen les cases suisnomez doit estre ajuggee treson qe ce estent a nostre " Seignur le Roi, et a sa roial majeste: et de tieles maneres de treson la forfaiture des eschetes appartient " a nostre Seignur le Roi sibien des terres et tenemenz tenus des autres come de lui mesmes. Et pur " ceo qe plusurs autres cases de semblable treson purront escheer en temps a venir queux homme ne " purra penser ne declarer en present assentu est qe si autre cas supposee treson qe nest especifie " paramount aviegne de novel devant ascunes justices demoerge la justice saunz aler au juggement de " treson tanqe par devant nostre Seignur le Roi en son Parlement soit le cas monstree et declare le " quel ceo doit estre ajugge treson ou autre felonie. Et si par cas ascun homme de cest roialme " chivache arme descovert ou secretement od gentz armees contre ascun autre pur lui tuer ou derober " ou pur lui prendre et retenir tanqil face fyn ou raunceon pur sa deliverance avoir nest pas lentent " du Roi et de son conseil qe en tiel cas soit ajugge treson einz soit ajugge felonie ou trespas solonc " la lei de la terre auncienement usee et solonc ceo qe le cas demand."]

36 Geo. III. c. 7.

And whereas, by a statute made in the 36th year of the reign of King George the Third, intituled "An Act for the safety and preservation of his Majesty's person and government against treasonable and seditious practices and attempts," it was (amongst other things) enacted to the effect following: that is to say, " If any " person or persons, during the natural life of our Sovereign Lord the King, and " until the end of the next Session of Parliament after a demise of the Crown, " shall, within the realm or without, compass, imagine, invent, devise, or intend " death or destruction, maim or wounding, imprisonment or restraint of the person " of the same our Sovereign Lord the King, his heirs and successors;

" Or to deprive or depose him or them from the style, honour, or kingly name " of the imperial crown of this realm, or of any other of the King's dominions or " countries;

" Or to levy war against the King, his heirs and successors, in order, by force or " constraint, to compel him or them to change his or their measures or counsels, or " in order to put any force or constraint upon, or to intimidate or overawe, both " Houses or either House of Parliament;

" Or to move or stir any foreigner or stranger with force to invade this realm, " or any other the King's dominions or countries under the obeisance of the King, " his heirs and successors;

" And such compassings, imaginations, inventions, devices, or intentions, or any " of them, shall express, utter, or declare by publishing any printing or writing, or " by any overt act or deed, shall, being legally convicted thereof upon the oaths of " two lawful and credible witnesses upon trial, or otherwise convicted or attainted " by due course of law, then every such person or persons so as aforesaid offending " shall be deemed, declared, and adjudged to be a traitor and traitors, and shall " suffer pains of death, and also lose and forfeit as in cases of high treason."

57 Geo. III. c. 6.

And whereas, by another statute made in the 57th year of the reign of King George the Third, intituled " An Act to make perpetual certain parts of an Act of the 36th year of His present Majesty for the safety and preservation of His Majesty's person and government against treasonable and seditious practices and attempts, and for the safety and preservation of the person of his Royal Highness the Prince Regent against treasonable practices and attempts," it was (amongst other things) enacted to the effect following: that is to say, " That all and every " the hereinbefore recited provisions of the said last-mentioned statute of the " 36th year of the reign of King George the Third, which relate to the heirs and " successors of His said Majesty the Sovereign of these realms, shall be, and the " same are hereby, made perpetual."

Now, therefore, whosoever shall commit any of the treasons hereinbefore mentioned, and which are contained in the said first two recited statutes, and shall thereof be attainted or convicted by due course of law, shall incur the penalties of the class.

(*a*) Sir Edward Coke says (3 Inst. 18) that " this Act extends only to the persons here particularly " named, and to no other; and, therefore, extendeth not to the Court of the Lord Steward, or of the " Constable and Marshal, nor to the Court of Admiralty, or any other, nor to any Ecclesiastical Court. " Nay, it extends not to the High Court of Parliament, if any member of the Lords' House or House " of Commons be slaine in his place, and doing his office, because it is *casus omissus*, and not men- " tioned in this Act." The stat. 5 Eliz. c. 18, and the stat. 1 Will. and Mary, c. 21, place the lord keeper and lords commissioners of the great seal upon the same footing as the lord chancellor as to " place, authority, jurisdiction, execution of laws, and all other customs, commodities, and advantages;"

but doubts have arisen whether these enactments have the effect of extending the provisions of the Statute of Treasons, so as to make the slaying of the lord keeper or lords commissioners high treason.—See Hawkins's P. C., book i. c. 17, s. 47; and Blackstone, vol. iv. p. 84. If the present law be retained, this doubt should of course be removed by the use of explicit words, either including or excluding these high officers. It is obvious, however, that this clause in the statute of Treasons relates to a state of things very different from the present. It may well be doubted whether the murder of judicial officers should now be considered as Treason. At the same time, these functionaries perform their duties at the present day by virtue of a direct delegation of royal authority, and in theory represent the crown in the administration of justice. The offence of slaying them while "in their places doing their offices," is therefore a crime of the most aggravated character, though we doubt whether it is proper to consider it as a treason. If it should be determined to retain such offences in the class of treason, the words of the ancient statute should be amended in particular by leaving out the justices in eyre, who no longer exist as officers; and the barons of the exchequer should be placed in the same predicament as the other judges of the superior courts.

(*b*) There is a difference in the translations of this clause of the statute, which may, in some measure, affect the interpretation of it. The words in the original are, "Et fait a entendre qe en les cas "susnomees doit etre ajuggee treison qe ce estent a nostre seignur le roi, et a sa roiale mageste." Sir Edward Coke translates these words as we have given them in the text (3 Inst. 2); but Mr. Luders translates them thus,—"And be it known that in the cases above named there ought to be "judgement of treason, *for that it extendeth* unto our lord the king and his royal majesty." It appears to us that the latter translation is strictly correct, and makes better sense of the statute than the former version.

Art. 2.

Protection for those who aid the King *de facto*.

Provided that no person who shall attend upon the King and sovereign lord of this land for the time being, in his person, and shall do him true and faithful service of allegiance in the same, or shall be in other places by his commandment, in his wars, within this land or without, shall for the said deed and true duty of allegiance be in anywise convicted or attainted of treason. (*c*)

(*c*) 11 Hen. VII. c. 1. The object of this law was to protect those who aided a king *de facto* from prosecution for treason in case of the eventual success of the party opposing such king. The statute was passed after the expedition of Perkin Warbeck, when the adherents of Henry VII., conceiving that other attacks might be made on his title, which might possibly succeed, prevailed upon the king to consent to a law for their security.—Reeves's History of the English Law, vol. iv. p. 132. Lord Bacon characterises this law as "rather just than legal, and more magnanimous than provi-"dent." From several passages in Lord Hale's Pleas of the Crown, it appears that he thought that persons assisting an usurper, though in the actual possession of the crown, might be punished as traitors on the regress of the crown to the right heir. 1 Hale's P. C. 60, 61, 101 to 105. Mr. Serjeant Hawkins deduces from this statute the doctrine that "a king out of possession is so far from "having any right to our allegiance by virtue of any other title which he may set up against the "king in being, that we are bound by the duty of our allegiance to resist him."—Hawkins's P. C., book i. c. 17, s. 16. This doctrine is opposed by Sir William Blackstone, who says that the true distinction introduced by the statute is, that "it does not command any opposition to a king *de* "*jure*, but excuses the obedience paid to a king *de facto*."—Commentaries, vol. iv. p. 77. Sir M. Foster, however, strongly supports Hawkins's position, and refers to the preamble of the statute of Henry VII., as "a parliamentary declaration that by the ancient law and constitution of England, "founded on principles of reason, equity, and good conscience, the allegiance of the subject is due to "the king for the time being, and to him alone." "This," he goes on to say, "putteth the duty of "a subject upon a rational and safe bottom." Foster's Fourth Discourse, p. 399. The preamble to the statute recites, "That the subjects of England are bound by the duty of their allegiance to serve "their prince and sovereign lord *for the time being* in his wars, for the defence of him and his realm "against every rebellion, power and might raised against him, and with him to enter and abide in "service in battle, if case so require; and that whatsoever may happen in the fortune of war against "the mind and will of the prince, as in this land some time past it hath been seen, it is not reasonable, "but against all laws, reason, and good conscience, that such subjects attending upon such service "should suffer for doing their true duty and service of allegiance." In consequence of the difference of opinion expressed by learned writers as to the proper interpretation of this ancient statute, we have thought it better merely to give the words of the enactment in our Digest, and to submit the ultimate disposal of the question to the legislature. If it be determined that *bonâ fide* service rendered to a king *de facto*, should, under no circumstances, expose a party to the penalties of treason upon the eventual success of the king *de jure*, it will be easy to alter the expression of the law so as to effect the purpose without ambiguity.

Art. 3.

Definition of "King."

The term "King" in the two preceding Articles, and in all other Articles relating to treason, shall be deemed to signify the person invested with the office and dignity of the King or Queen (*d*) of the United Kingdom of Great Britain and Ireland, and being in actual possession of the crown. (*e*)

(*d*) The stat. 1 Mary, c. 1, sess. 3, after reciting "that the most ancient statutes of this realm, "being made by Kings then reigning, do attribute and refer all prerogative, preheminence, power, "and jurisdiction royal unto the name of King," declares that "the law of this realm is, and ever hath "been, and ought to be understood, that the kingly or regal office of this realm, and all dignities, "prerogative royal, power, preheminences, privileges, authorities, and jurisdictions thereunto annexed, "united, or belonging, being invested either in male or female, are and be, and ought to be, as fully, "wholly, absolutely, and entirely deemed, judged, accepted, invested, and taken in the one as in the "other; so that what or whensoever statute or law doth limit and appoint that the King of this realm "may and shall have, execute, and do anything as King, or doth give any profit or commodity to the

" King, or doth limit or appoint any pains or punishment for the correction of offenders or trans-
" gressors against the regality and dignity of the King or of the Crown, the same the Queen may by
" the same authority and power likewise have, exercise, execute, punish, correct, and do, to all intents,
" constructions, and purposes, without doubt, ambiguity, scruple, or question."

(*e*) See note to Article 2; and 3 Inst. 7; 1 Hawkins, P. C. c. 17, s. 20. Sir M. Foster says, " Protection and allegiance are reciprocal obligations; and consequently the allegiance due to the " Crown must be paid to him, who is in the full and actual exercise of the regal power, and to none " other. The warmest advocates for the distinction between Kings *de facto* and Kings *de jure*, and " for the principles upon which it hath been founded, admit that even a King *de facto*, in the full and " sole possession of the Crown, is a King within the statute of treasons. It is admitted, too, that the " throne being full, any other person out of possession, but claiming title, is no King within the Act, " be his pretensions what they may. These principles, I think, no lawyer hath ever yet denied. They " are founded in reason, equity, and good policy."—Foster's Discourse on High Treason, I. s. 8.

ART. 4.

"King's Companion."

The terms "King's Companion," contained in Article 1, shall be deemed to signify the Queen Consort of the reigning King during the coverture. (*f*)

(*f*) Sir Edward Coke says, that "the word 'compaigne' (which is all one with consort or wife) " was used that compassing, &c., must be during the marriage with the King; for after the King's " death she is not 'sa compaigne,' and, therefore, it extendeth not to a Queen Dowager."—3 Inst. 8. The Queen Consort, however, after a divorce *a vinculo matrimonii*, would clearly not be within the statute; though Lord Hale hesitates to extend the exclusion to a divorce *a mensâ et thoro*.—1 Hale's P. C. 124; 1 East's P. C. 64.

ART. 5.

Definition of "eldest son and heir."

The terms "eldest son and heir," contained in Article 1, shall be deemed to signify the eldest son of the reigning King, and heir apparent to the crown for the time being. (*f*)

(*f*) Sir Edward Coke says, "that before the statute of treasons it was held to be treason to com- " pass the death of any of the King's children; but that by the statute it is restrained to the Prince, " the King's son, being heir apparent to the Crown for the time being."—3 Inst 8. It is clear also that the statute extends to the second born son of the King, after the death of the elder, and the like of the rest; but not to a collateral heir, though declared by Act of Parliament to be heir apparent. —1 East's P. C. 64; 1 Hale's P. C. 125.

ART. 6.

"King's eldest daughter unmarried."

The terms, "the King's eldest daughter unmarried," contained in Article 1, shall be deemed to signify the eldest or only daughter for the time being of the King who shall not have been married. (*g*)

(*g*) The authorities distinctly state that by the words "*nient marry*," in the statute of treasons, is meant *before marriage*, and therefore they do not apply to the eldest daughter afterwards, though a widow.—1 East's P. C., 65. And yet, as the reason of the law was to guard the succession of the Crown from any suspicion of bastardy, the statute ought at least to have included the eldest daughter under coverture, whose issue might by law lay claim to the crown.

ART. 7.

"Companion of the King's eldest son and heir."

The terms, "the companion of the King's eldest son and heir," contained in Article 1, shall be deemed to signify the princess consort of the King's eldest son and heir during the coverture. (*h*)

(*h*) 1 Hale's P. C., 128. See also the note to Article 4.

ART. 8.

"Violate."

The term "violate," contained in Article 1, shall be deemed to signify having carnal knowledge of the person, with or without force. (*j*)

(*j*) 1 Hale's P. C. 128; 3 Inst. 9; 1 East's P. C. 65.

ART. 9.

Consent to violation by King's companion or companion of King's eldest son.

If the King's companion, or the companion of the King's eldest son, shall consent or willingly submit to such violation as is mentioned in Article 1, she shall be guilty of high treason, and being thereof attainted or convicted by due course of law, shall incur the penalties of the class. (*i*)

(*i*) The text writers distinctly lay down the law as it is stated in this Article. See 3 Inst. 9; 1 Hale's P. C., 128; 1 East's P. C., 65. At the same time, we think it proper to observe that the only authorities given for the proposition are the proceedings relating to Queen Anne and Queen Catharine Howard, in the reign of Henry VIII., which must always be considered as suspicious precedents. Mr. Hallam has truly observed that "it is an unfortunate circumstance, that precedents " which, from the character of the times when they occurred, would lose at present all respect, having " been transfused into text-books, and formed perhaps the sole basis of subsequent decisions, are still, " in not a few points, the invisible foundation of our law."—Constitutional History, vol. iii., p. 214.

ART. 10.

Definition of "compass or imagine the death."

The terms, "compass or imagine the death," contained in Article 1, shall be deemed to signify an actual intention to kill. (*k*)

(*k*) Mr. Luders, in his "Considerations on the Law of High Treason in the Article of Levying War," p. 137, has collected much information upon the meaning of these words in the statute of treasons from writings contemporaneous with the statute. He contends that the words "compasser ou imaginer" mean nothing more than "attempt or contrive," and that nothing beyond this signification could have been intended by the law-makers of that day. However this may be, the statute of the 36 Geo. III. c. 7, by providing for the case of a consultation to injure, imprison, or depose the King, has rendered it wholly unnecessary to resort to artificial or constructive interpretations of these words of the statute of treasons. See the Prefatory Remarks, p. 16.

ART. 11.

"Levying war." The terms, "levying war," contained in Article 1, as regards the manner of it, may consist not only in the assembling of men armed and arrayed in a warlike manner, the enlisting, drilling or marching of men, the using drums, colours, or any other of the ordinary pageantry, ensigns, or outward circumstances indicative of war, but also in any rising or assembling of people whether armed and arrayed in a warlike manner or not, in order, by dint of numbers or superior force, to execute such treasonable purpose as is hereinafter specified.

ART. 12.

A levying of war shall be deemed to be a levying of war against the King where it is levied against the person of the King, or against any army or force appointed by him, in opposition to his authority, (*l*) or with intent to do him any bodily harm, or impose any restraint upon his person, or to depose him, or to dispossess or deprive him of any portion of his dominions or regal authority, or with intent by force or constraint to compel him to change his measures or counsels, or to put any force or constraint upon, or to intimidate or overawe both Houses or either House of Parliament. (*m*)

(*l*) Fost. 219.

(*m*) See the Prefatory Remarks, p. 17. The statute of the 36 Geo. III. c. 7, which may be considered to a certain extent as a legislative exposition of the statute of treasons, defines the particular objects or designs, which will constitute a compassing to levy war, treason. It appears to us that a levying of war ought not to amount to treason under the statute of Edw. III., unless where the objects contemplated by the rising are those enumerated by Lord Hale as constituting express and direct treason as contradistinguished from mere constructive treason, and those specified in the statute of Geo. III. We can conceive no other objects which can come within the words "levy war against the King," without applying to the terms a technical and figurative signification, and thus constituting what is called constructive or interpretative treason. If there should be any other general or public objects which may by possibility form the motives for levying war against the King, and which the Legislature may think ought to give such levying of war the character of treason, the terms of the above definition may be readily enlarged so as to comprehend them. But in that case we think it cannot be desirable that the rule should comprehend such designs as pulling down enclosures, meeting-houses, &c., however general the object of the offenders may be; but that it should be limited to insurrections which are directly intended to resist or coerce the political government by numbers and force.

ART. 13.

Provided that no assembling or rising of people shall, by reason of any illegality or generality of purpose, be deemed to amount to a levying of war against the King unless such assembling or rising be with one or other of the several intentions specified in the last preceding Article.

ART. 14.

Definition of "King's enemies." The terms, "King's enemies," contained in Article 1, shall be deemed to signify any foreign powers or states owing no allegiance to and in actual hostility with the King, although no war shall have been solemnly declared. (*n*)

(*n*) 1 Hale's P. C. 162; Foster, "Discourse on High Treason," I. s. 12; 1 East's P. C. 77. Sir Edward Coke says, "The subjects of the King, though they be in open war or rebellion against the "King, yet are they not the King's enemies, but traitors; for enemies be those that be ut of the "allegiance of the King."—3 Inst. 11. See also Blackstone's Comm., vol. iv., p. 83.

ART. 15.

"Adhering to the King's enemies." Any assistance furnished to the King's enemies, to aid them in their operations against the King, or in defence of themselves, shall be deemed to be "adhering to the King's enemies," within the meaning of Article 1.

ART. 16.

Force and fear of present death excuses from treason, in levying war and adhering to King's enemies. Provided that no person shall be deemed to be guilty of treason in "levying war against the King," or "adhering to the King's enemies," within the meaning of Article 1, by reason of any acts done by such person while he is under actual force, and a reasonable fear of present death, as the immediate consequence of his refusal to do such acts. (*o*)

(*o*) Foster's Crown Law, Disc. on High Treason, c. 2, s. 8. Lord Chief Justice Lee in M'Growther's case (Foster, p. 14), says, "The only fear that doth excuse is a force upon the person, "and present fear of death; and the force and fear must continue all the time the party remains with "the rebels. It is incumbent on every man, who makes force his defence, to show an actual force, "and that he quitted the service as soon as he could; agreeably to the rule laid down in Oldcastle's "Case (1 Hale, 50) that they joined *pro timore mortis, et recesserunt quam cito potuerunt.*" This rule appears to depend upon a principle which is applicable to most crimes; and it may hereafter be desirable to supersede this particular provision by a more general enactment.

ART. 17.

Definition of "Overt act."

The terms "open deed," and "overt act or deed," as used in Article 1, and elsewhere under this head, shall be deemed to include any act of conspiring, or conferring or consulting with, or advising, persuading, counselling, commanding, or inciting any person, or any other act, measures or means whatsoever, done, taken, used, or assented to, towards and for the purpose of effecting the traitorous intentionor act charged.

ART. 18.

An act laid to be an overt act done for the effecting any alleged treason shall not be deemed to be insufficient to support the charge, by reason that such act either constitutes or may properly be alleged to be an overt act of any other kind or branch of treason; provided it be in its nature and circumstances a sufficient overt act to support the charge of treason so alleged. (*p*)

(*p*) See the Prefatory Remarks, p. 5.

ART. 19.

Mere words not an overt act of treason.

Words spoken shall not be deemed to constitute an overt act of any treason, unless they be words of advice, direction, or persuasion tending to effectuate some traitorous act or design; provided that nothing in this Article contained shall be deemed applicable to any consultation for any traitorous purpose. (*q*)

(*q*) See the Prefatory Remarks, p. 5.

ART. 20.

Unpublished writing not an overt act of treason.

No writing which shall not have been published in contemplation or prosecution of some traitorous act or design shall be deemed to be an overt act of treason. (*r*)

(*r*) See 1 Hale, 118; Sir M. Foster's Discourse of High Treason, ch. i. s. 6; and the Prefatory Remarks to this branch of the Digest, *supra*, p. 5.

ART. 21.

Where overt act is the assassination, &c. of the King, the trial and evidence shall be the same as in cases of murder.

Provided that where the overt act or overt acts of compassing or imagining the death of the King shall be the assassination or killing of the King, or any direct attempt against his life, or against his person, whereby his life may be endangered, or his person may suffer bodily harm, the person or persons charged with such offence shall be indicted, arraigned, tried, and attainted, in the same manner, and according to the same course and order of trial in every respect, and upon the like evidence, as if such person or persons stood charged with murder, but upon conviction shall incur the penalties of the class. (*s*)

(*s*) 39 and 40 Geo. III. c. 93. The above Article belongs properly to the head of procedure.

ART. 22.

Interfering with the succession to the Crown.

Whosoever shall endeavour to deprive or hinder any person who shall be next in succession to the crown for the time being, according to the limitations of an Act intituled "An Act declaring the Rights and Liberties of the Subject, and settling the Succession of the Crown," and according to one other Act, intituled "An Act for the further Limitation of the Crown and better securing the Rights and Liberties of the Subject," from succeeding after the decease of Her Majesty to the imperial crown of this realm, and the dominions and territories thereunto belonging, according to the limitations in the before-mentioned Acts, and the same maliciously, advisedly, and directly, shall attempt by any overt act or deed, or, knowing the said offence to be done, shall aid, procure, or comfort the offender or offenders therein, shall be deemed to be guilty of treason, and incur the penalties of the class. (*t*)

(*t*) 1 Ann, stat. 2, c. 17, s. 3. This is one of the statutes passed for securing the Protestant succession soon after the revolution, when the strength and number of the parties in England who favoured the cause of the Pretender, rendered such an enactment necessary.

ART. 23.

Whosoever shall maliciously, advisedly, and directly, by writing or printing, maintain and affirm that any other person or persons hath or have any right or

title to the Crown of these realms, otherwise than according to the two Acts of Parliament mentioned in the last preceding Article, and the Acts made in England and Scotland mutually for the union of the two kingdoms, or that the Kings or Queens of this realm, with and by the authority of Parliament, are not able to make laws and statutes of sufficient force and validity to limit and bind the Crown, and the descent, limitation, inheritance, and government thereof, shall be deemed to be guilty of treason and incur the penalties of the class. (*u*)

(*u*) 6 Ann, c. 7, s. 1. This was also an Act passed for securing the Protestant succession against the intrigues of the Jacobites. There is only one instance upon record of a prosecution under this statute, which was in the case of one Matthews, who was tried in 1719, and executed.—See Howell's State Trials, vol. xv. p. 1323.

ART. 24.

Procuring the marriage of the issue of Her present Majesty whilst under eighteen, without the assent of Parliament, &c.

Whosoever shall be acting, aiding, abetting, or concerned in obtaining, procuring, or bringing about the marriage of the King or Queen of this realm for whom a regent is appointed, by an Act passed in the 3rd and 4th years of Her present Majesty's reign, intituled "An Act to provide for the administration of the Government in case the Crown should descend to any issue of Her Majesty whilst such issue shall be under the age of eighteen years, and for the care and guardianship of such issue," before his or her age of eighteen years, with any person whomsoever, without the consent in writing of the Regent, and the assent of both Houses of Parliament previously obtained; and whosoever shall be so married to such King or Queen under the age of eighteen years shall be deemed to be guilty of treason, and incur the penalties of the class. (*v*)

(*v*) 3 and 4 Vic. c. 52, s. 4.

ART. 25.

Forging of the Great and other Royal Seals.

Whosoever shall forge, or counterfeit, or utter, knowing the same to be forged or counterfeited, the great seal of the United Kingdom, Her Majesty's privy seal, any privy signet of Her Majesty, Her Majesty's royal sign manual, any of Her Majesty's seals appointed by the 24th Article of the Union to be kept, used, and continued in Scotland, the great seal of Ireland, or the privy seal of Ireland, shall be deemed to be guilty of treason, and incur the penalties of the class. (*w*)

(*w*) 11 Geo. IV. and 1 Will. IV. c. 66, s. 2; 2 and 3 Will. IV. c. 123; 3 and 4 Will. IV. c. 44, s. 3; 7 Will. IV. and 1 Vic. c. 84, ss. 2 and 3. The punishment for the above treason is transportation for life, or for any term not less than seven years, or imprisonment for any term not exceeding four nor less than two years. The 11 Geo. IV., and 1 Will. IV. c. 66, (the Forgery Consolidation Act,) continued the offence described in the above Article as a capital treason. The 2 and 3 Will. IV. c. 123, however, subsequently repealed the punishment of death for forgery in all but the two cases of wills and powers of attorney; but as it left the *quality* of the offence enumerated in the 11 Geo. IV., and 1 Will. IV. c. 66, without alteration, to forge the royal seals and sign manual, although it has ceased to be a capital offence, is still treason. It deserves consideration whether it would not be more appositely placed as a felony under the head of Forgery.

OFFENCES AGAINST THE STATE INFERIOR TO TREASON.

ART. 26.

Entering into the service of Foreign Powers.

Whosoever, being a natural born subject of Her Majesty, her heirs, or successors, without the leave or licence of Her Majesty, her heirs or successors for that purpose first had and obtained under the sign-manual of Her Majesty, her heirs or successors, or signified by Order in Council, or by proclamation of Her Majesty, her heirs or successors, shall take or accept, or shall agree to take or accept any military commission, or shall otherwise enter into the military service as a commissioned or non-commissioned officer, or shall enlist or enter himself to enlist, or shall agree to enlist or to enter himself to serve as a soldier, or to be employed, or shall serve in any warlike or military operation in the service of, or for, or under, or in aid of any foreign prince, state, potentate, colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise the powers of Government in or over any foreign country, colony, province, or part of any province or people, either as an officer or soldier, or in any other military capacity; or shall, without such leave or licence as aforesaid, accept or agree to take or accept any commission, warrant, or appointment as an officer, or shall enlist or enter himself, or shall agree to enlist or enter himself to serve as a sailor or marine, or to be employed or engaged, or

shall serve in and on board any ship or vessel of war, or in and on board any ship or vessel used, or fitted out or equipped, or intended to be used for any warlike purpose in the service of, or for, or under, or in aid of any foreign power, prince, state, potentate, colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people; or shall, without such leave or licence as aforesaid, engage, contract, or agree to go, or shall go to any foreign state, country, colony, province, or part of any province, or to any place beyond the seas, with an intent, or in order to enlist or enter himself to serve in any warlike or military operation whatever, whether by land or by sea, in the service of, or for, or under, or in aid of any foreign prince, state, potentate, colony, province, or part of any province or people, or in the service of, or for, or under, or in aid of any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people, either as an officer or soldier, or in any other military capacity, or as an officer, or sailor, or marine, in any such ship or vessel as aforesaid, although no enlisting money, or pay, or reward shall have been or shall be in any or either of the cases aforesaid actually paid to or received by him, or by any person to or for his use or benefit, shall incur the penalties of the class. (*x*)

(*x*) 59 Geo. III. c. 69, s. 2. The misdemeanors contained in this and the three following Articles are punishable by fine or imprisonment, or both, as to the Court shall seem meet.

ART. 27.

Engaging British subjects to enlist in the service of Foreign Powers.

Whosoever, within the United Kingdom of Great Britain and Ireland, or in any part of Her Majesty's dominions elsewhere, or in any country, colony, settlement, island, or place belonging to or subject to Her Majesty, shall hire, retain, engage, or procure, or shall attempt or endeavour to hire, retain, engage, or procure, any person or persons whatever to enlist, or to enter or engage to enlist or to serve, or to be employed in any such service or employment as in the last preceding Article is mentioned, as an officer, soldier, sailor, or marine, either in land or sea service, for, or under, or in aid of any foreign prince, state, potentate, colony, province, or part of any province or people, or for, or under, or in aid of any person or persons exercising or assuming to exercise any powers of government as in the said last preceding Article mentioned, or to go, or to agree to go, or embark from any part of Her Majesty's dominions, for the purpose or with intent to be so enlisted, entered, engaged, or employed as in the said last preceding Article is mentioned, whether any enlisting money, pay, or reward shall have been or shall be actually given or received, or not, shall incur the penalties of the class. (*y*)

(*y*) 59 Geo. III. c. 69, s. 2.

ART. 28.

Fitting out vessels to be employed in the service of Foreign Powers.

Whosoever, within any part of the United Kingdom, or in any part of Her Majesty's dominions beyond the seas shall, without the leave and licence of Her Majesty for that purpose first had and obtained as in Article 26 is mentioned, equip, furnish, fit out, or arm, or attempt, or endeavour to equip, furnish, fit out, or arm, or procure to be equipped, furnished, fitted out, or armed, or shall knowingly aid, assist, or be concerned in the equipping, furnishing, fitting out, or arming of any ship or vessel, with the intent or in order that such ship or vessel shall be employed in the service of any foreign prince, state, potentate, or of any foreign colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise any powers of government in or over any foreign state, colony, province, or part of any province or people, as a transport or store ship, or with intent to cruize or commit hostilities against any prince, state, or potentate, or against the subjects or citizens of any prince, state, or potentate, or against the persons exercising or assuming to exercise the powers of government in any colony, province, or part of any province or country, or against the inhabitants of any foreign colony, province, or part of any province or country with whom Her Majesty shall not then be at war; or shall within the United Kingdom, or in any of Her Majesty's dominions, or in any settlement, colony, territory, island or place belonging or subject to Her Majesty, issue or deliver any commission for any ship or vessel, to the intent that such ship or vessel shall be employed as aforesaid, shall incur the penalties of the class. (*z*)

(*z*) 59 Geo. III. c. 69, s. 7.

ART. 29.

Adding to the warlike force of vessels of war at the time of their arrival in the kingdom, being in the service of a Foreign Power.

Whosoever, in any part of the United Kingdom of Great Britain and Ireland, or in any part of Her Majesty's dominions beyond the seas, without the leave and licence of Her Majesty for that purpose first had and obtained as in Article 26 is mentioned, shall, by adding to the number of the guns (of such vessel), (*a*) or by changing those on board for other guns, or by the addition of any equipment for war, increase or augment, or procure to be increased or augmented, or shall be knowingly concerned in increasing or augmenting, the warlike force of any ship or vessel of war, or cruizer, or other armed vessel, which at the time of her arrival in any part of the United Kingdom, or any of Her Majesty's dominions, was a ship of war, cruizer, or armed vessel in the service of any foreign prince, state, or potentate, or of any person or persons exercising or assuming to exercise any powers of government in or over any colony, province, or part of any province or people belonging to the subjects of any such prince, state, or potentate, or to the inhabitants of any colony, province, or part of any province or country under the control of any person or persons so exercising or assuming to exercise the powers of government, shall incur the penalties of the class. (*b*)

(*a*) These are the words of the Act; but we submit that they should be omitted in order to render the sense of the enactment intelligible.

(*b*) 59 Geo. III., c. 69, s. 8.

ART. 30.

Exception.

Nothing in the last four preceding Articles contained shall extend or be construed to extend to subject to any penalty any person who shall enter into the military service of any prince, state, or potentate in Asia, with leave or licence, signified in the usual manner, from the Governor-general in Council, or Vice President in Council of Fort William in Bengal, or in conformity with any orders or regulations issued or sanctioned by such Governor-general or Vice President in Council. (*c*)

(*c*) 59 Geo. III. c. 69, s. 12.

ART. 31.

Administering or taking, without compulsion, oaths or engagements for some seditious purpose.

Whosoever shall administer, or cause to be administered, or aid, assist, or be present at and consenting to the administering or taking in any manner or form whatsoever, of any oath or engagement purporting or intending to bind the person taking the same, to engage in any mutinous or seditious purpose, or to disturb the public peace, or to be of any association, society, or confederacy formed for any such purpose, or to obey the orders or commands of any committee or body of men not lawfully constituted, or of any leader, or commander, or other person, not having authority by law for that purpose, or not to inform or give evidence against any associate, confederate, or other person, or not to reveal or discover any unlawful combination or confederacy, or not to reveal or discover any illegal act done or to be done, or not to reveal or discover any illegal oath or engagement which may have been administered, or tendered to, or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement, or shall take any such oath or engagement not being compelled thereto, shall incur the penalties of the class. (*d*)

(*d*) 37 Geo. III. c. 123, s. 1. The offence contained in the above Article is a felony, and punishable by transportation for any term not exceeding seven years.

ART. 32.

Provided that compulsion shall not justify or excuse any person taking such oath or engagement, unless he or she shall, within four days after the taking thereof, if not prevented by actual force or sickness, and then within four days after the hindrance produced by such force or sickness shall cease, declare the same, together with the whole of what he or she shall know touching the same, and the person or persons by whom, and in whose presence, and when and where, such oath or engagement was administered or taken, by information on oath before one of Her Majesty's justices of the peace, or one of Her Majesty's principal Secretaries of State, or Her Majesty's Privy Council; or in case the person taking such oath or engagement shall be in actual service in Her Majesty's forces by sea or land, then by such information on oath as aforesaid, or by information to his commanding officer. (*e*)

(*e*) 37 Geo. III. c. 123, s. 2.

ART. 33.

Unlawful Combinations and Confederacies.

Whosoever shall be guilty of an unlawful combination and confederacy, shall incur the penalties of the class. (*f*)

(*f*) 39 Geo. III. c. 79, ss. 2 and 8. The misdemeanor contained in this Article is punishable by transportation for any term not exceeding seven years, or imprisonment not exceeding two years, at the discretion of the Court.

ART. 34.

Every society, the members whereof shall, according to the rules thereof, or to any provision or agreement for that purpose, be required or admitted to take any oath or engagement which shall be an unlawful oath or engagement, within the intent and meaning of Article 31, or to take any oath not required or authorized by law; and every society, the members whereof, or any of them, shall take or in any manner bind themselves by any such oath or engagement, on becoming, or in consequence of being members of such society; and every society, the members whereof shall take, subscribe, or assent to any test or declaration not required by law, or not authorized in manner hereinafter, in Article 38, mentioned; and every society, of which the names of the members, or of any of them, shall be kept secret from the lodge at large, or which shall have any committee or select body so chosen or appointed that the members constituting the same shall not be known by the society at large to be members of such committee or select body, or which shall have any president, treasurer, secretary, delegate, or other officer so chosen or appointed that the election or appointment of such persons to such offices shall not be known to the society at large, or of which the names of all the members, and of all committees or select bodies of members, and of all presidents, treasurers, secretaries, delegates, and other officers, shall not be entered in a book or books to be kept for that purpose, and to be open to the inspection of all the members of such society; and every society which shall be composed of different divisions or branches, or of different parts acting in any manner separately or distinct from each other, or of which any part shall have any separate or distinct president, secretary, treasurer, delegate, or other officer elected or appointed by or for such part, or to act as an officer for such part, shall be deemed and taken to be unlawful combinations and confederacies; and every person who shall become a member of any such society, and every person who shall directly or indirectly maintain correspondence or intercourse with any such society, or with any division, branch, committee, or other select body, president, treasurer, secretary, delegate, or other officer or member thereof as such, or who shall, by contribution of money, or otherwise, aid, abet, or support such society, or any members or officers thereof as such, shall be deemed guilty of an unlawful combination and confederacy. (*g*)

(*g*) 39 Geo. III. c. 79, s. 2.

ART. 35.

Whosoever having been convicted of knowingly permitting any meeting of any society in the last preceding Article declared to be an unlawful combination or confederacy, or of any division, branch, or committee of such society, to be held in his or her house or apartment, shall, for any such offence committed after the date of his or her conviction for such first offence, be deemed guilty of an unlawful combination and confederacy. (*h*)

(*h*) 39 Geo. III. c. 79, s. 13. The first offence is punishable, on summary conviction, by forfeiture of £5.

ART. 36.

All societies or clubs, calling themselves *Spenceans*, or *Spencean Philanthropists* and all other societies or clubs, by whatever name or description the same are called or known, who hold and profess, or who shall hold and profess for their object the confiscation of the land and the extinction of the funded property of the kingdom; and also all and every other society or club now or hereafter to be established, the members whereof shall be required or admitted to take any oath or engagement within the meaning of Article 31, or of an Act passed in the 52d year of the reign of King George the Third, intituled, "An Act to render more effectual an Act passed in the 37th year of His present Majesty, for preventing the administration and taking of unlawful oaths," or to take any oath not required or authorized by law; and every society or club, the members whereof, or any of them, shall take or in any manner bind themselves by any such oath or engagement on becoming, or in order to become, or in consequence of being a member or members of such society or club; and every society or club, the members or any member whereof

shall be required or admitted to take, subscribe, or assent to, or shall take, subscribe, or assent to any test, or declaration, not required or authorized by law, in whatever manner or form such taking or assenting shall be performed, whether by words, signs, or otherwise, either on becoming, or in order to become, or in consequence of being a member or members of any such society or club; and every society or club that shall elect, appoint, nominate, or employ any committee, delegate or delegates, representative or representatives, missionary or missionaries, to meet, confer, or communicate with any other society or club, or with any committee, delegate, or delegates, representative or representatives, missionary or missionaries of such other society or club, or to induce or persuade any person or persons to become members thereof, shall be deemed and taken to be unlawful combinations and confederacies, within the meaning of Article 33; and every person who shall become a member of any such society or club, or who shall act as a member thereof; and every person who shall directly or indirectly maintain correspondence or intercourse with any such society or club, or with any committee or delegate, representative or missionary, or with any officer or member thereof as such, or who shall, by contribution of money or otherwise, aid, abet, or support such society or club, or any members or officers thereof as such, shall be deemed guilty of an unlawful combination and confederacy, within the intent and meaning of Article 33. (*i*)

(*i*) 57 Geo. III. c. 19, s. 25.

ART. 37.

Whosoever having been convicted of knowingly permitting any meeting of any society or club, by the last preceding Article declared to be an unlawful combination or confederacy, or of any division, branch, or committee of such society or club, to be held in any house or apartment, building, or other place to him or her belonging, or in his or her possession or occupation, shall for any such offence committed after the date of his or her conviction for such first offence, be deemed guilty of an unlawful combination and confederacy. (*j*)

(*j*) 57 Geo. III. s. 19, s. 28.

ART. 38.

Nothing in Articles 34 and 36 contained, shall be deemed to extend to any declaration to be taken, subscribed, or assented to by the members of any society, in case the form of such declaration shall have been first approved and subscribed by two or more of Her Majesty's justices of the peace for the county, stewartry, riding, division, or place where such society shall ordinarily assemble, and shall have been registered with the clerk of the peace or his deputy for such county, stewartry, riding, division, or place, for which there shall be paid a fee of one shilling and no more; but such approbation of the justice as aforesaid, shall remain valid and effectual no longer than until the next general session for such county, stewartry, riding, division, or place, unless the same shall, on application made by the parties concerned, be confirmed by the major part of the justices present at such general session; and if the same shall not be then and there so confirmed, the provisions of the said last three preceding Articles shall from thenceforth extend to such declaration, and to all societies or persons subscribing the same, in so far as may relate to all acts which may be done by them, or any of them, subsequent to the holding of such general session. (*k*)

(*k*) 39 Geo. III. c. 79. s. 3; 57 Geo. III. c. 19, s. 26.

ART. 39.

Neither shall anything in Articles 34 and 36 contained, be deemed to extend to any societies holden under the denomination of lodges of Freemasons, in conformity to the rules prevailing in such societies of Freemasons: Provided that this exemption shall not extend to any such society, unless two of the members composing the same, did within the space of two calendar months after the passing of an Act of the 39th year of the reign of King Geo. III., intituled "An Act for the more effectual suppression of societies established for Seditious and Treasonable purposes, and for better preventing treasonable and seditious practices," certify upon oath, before a justice of the peace or other magistrate, that such society or lodge had, before the passing of that Act, been usually held under the denomination of a lodge of Freemasons, and in conformity to the rules prevailing among the societies or lodges of Freemasons in this kingdom; and unless such certificate, duly attested by the magistrate before whom the same was sworn, and subscribed by the person so certifying, was, within the space of two calendar months after the passing of

the said Act, deposited with the clerk of the peace for the county, stewartry, riding, division, shire, or place where such society or lodge had been usually held: Provided also, that this exemption shall not extend to any such society or lodge, unless the name or denomination thereof, and the usual place or places, and the time or times of its meetings, and the names and descriptions of all and every the members thereof, were, within two months after the passing of the said Act, and since have been, and hereafter shall be, on or before the 25th day of March, in every year, registered with such clerk of the peace as aforesaid. (*l*)

(*l*) 39 Geo. III. c. 79, ss. 5 and 6; 57 Geo. III. c. 19, s. 26. It will be observed that the provisions of the above Article apply to such lodges of Freemasons only as were existing at the time of the passing of the 39 Geo. III. c. 79; but we would submit that they should be extended to the case of lodges erected since, or to be at any time hereafter established, on compliance, within some specified period, with regulations similar to those contained in the above Article.

ART. 40.

Provided that in case the justices for any such county, stewartry, riding, division, shire, or place, as in the last preceding Article is mentioned, or the major part of them, at any of their general sessions, shall, upon complaint made to them, upon oath, by any one or more credible persons, that the continuance of the meetings of any such lodge or society as in the said last preceding Article is mentioned is likely to be injurious to the public peace and good order, direct that the meetings of any such society or lodge within such county, stewartry, riding, division, shire, or place, shall from thenceforth be discontinued, then any such meeting held, notwithstanding such order of discontinuance, and before the same shall by the like authority be revoked, shall be deemed an unlawful combination and confederacy under the provisions of Article 33. (*m*)

(*m*) 39 Geo. III. c. 79, s. 7; 57 Geo. III. c. 19, s. 26.

ART. 41.

Nothing in Articles 34 and 36 contained shall be construed to extend to any meeting or society of the people commonly called Quakers, or to any meeting or society formed or assembled for purposes of a religious or charitable nature only, and in which no other matter or business whatsoever shall be treated of or discussed. (*n*)

(*n*) 57 Geo. III. c. 19, ss. 26 and 27.

ART. 42.

Inciting to Mutiny.

Whosoever shall maliciously and advisedly endeavour to seduce any person or persons serving in Her Majesty's forces by sea or land from his or their duty and allegiance to Her Majesty, or to excite or stir up any such person or persons to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever, shall incur the penalties of the class. (*o*)

(*o*) 37 Geo. III. c. 70, s. 1; 57 Geo. III. c. 7; 7 Will. IV. and 1 Vic. c. 91, ss. 1 and 2. The above offence is a felony, and punishable by transportation for life, or not less than 15 years, or imprisonment not exceeding three years, with or without hard labour, and with solitary confinement, not exceeding one month at a time and three months in a year.

ART. 43.

Endeavouring to compel the Queen to change her measures.

Whosoever shall, by any unlawful means not amounting to treason, endeavour to constrain Her Majesty the Queen to change her measures or counsels, shall incur the penalties of the class. (*p*)

(*p*) See 1 Hawk. P. C., b. 1, c. 23, s. 3; Cro. Jac. 37; Moor, 756; Noy, 101. The above offence is a contempt against the Sovereign, and all such contempts are highly criminal and punishable at common law with fine and imprisonment, and, before its abolition, were also sometimes punished with the pillory at the discretion of the judges, upon consideration of all the circumstances of the case. 4 Black. Comm. 123.

ART. 44.

Contemptuous words of the Queen.

Whosoever shall be guilty of any contempt against the person of Her Majesty the Queen or her royal dignity, by means of any contumelious, insulting, or disparaging words, acts, or gestures, shall incur the penalties of the class. (*q*)

(*q*) At common law, any contempt of the King's person amounts, on principles of policy too obvious for observation or comment, to a high misdemeanor. Such a contempt may either consist in the imputing to him the want of capacity or integrity (Hawk. P. C. c. 23. 4 Bl. Com. 120), in charging him with a breach of his coronation oath (Noy, 105. Hawk. Pl.Cr. c. 23. s. 5), cursing him, wishing him ill, or, in short, by maliciously asserting anything concerning him, which tends to lessen him in the esteem of his subjects, weaken his government, or raise jealousies between him and his people (Hawk. P. C. c. 23, s. 6). These are considered as high contempts and misprisions, and are punishable as misdemeanors at common law.

It is also by the 3 Edw. I. c. 34, a misdemeanor, punishable by imprisonment until the offender brings into Court him who was the first author of the tale, to tell or publish any false news or tales whereby discord, or occason of discord or slander, may grow between the King and his people or the great men of the realm. This enactment, except so far as it may be superseded by the above Article, appears to be virtually obsolete.

ART. 45.

Libels against the State.

Whosoever shall print or publish, or cause to be printed or published in any newspaper, or other paper containing public news or intelligence, or serving for the purpose of a newspaper, that shall be printed or published in that part of Great Britain called England, any matter or thing tending to excite hatred and contempt of the person of Her Majesty and of the constitution and government established in these kingdoms, as having been previously printed or published in some foreign paper or print, which hath not been previously so printed or published, shall incur the penalties of the class. (*r*)

(*r*) 38 Geo. III. c. 78, s. 24. This clause seems to be unnecessary, the false pretence would be evidence of a malicious intention, which coupled with any publication tending to excite hatred and contempt of the person of the sovereign, and of the established constitution and government, ought to be deemed penal. The punishment prescribed by the above statute, is imprisonment for any time not exceeding twelve, nor less than six months, and the offender to be liable to such other punishment as may by law be inflicted in cases of high misdemeanors. The offence of writing against the sovereign's person and government, is a high misdemeanor at common law, and punishable by fine, imprisonment, and infamous corporal punishment; and before the passing of the 56 Geo. III. c. 138, also subjected the offender to stand upon the pillory. *Vide* 1 Hawk. P. C. c. 5, s. 5. c. 73, s. 16; 4 Black. Comm. 123. That Act, however, having abolished the punishment of the pillory in all but the two cases of perjury and subornation of perjury, the other punishment referred to by the 38 Geo. III. c. 78, s. 24, appears to be limited to fine and corporal punishment.

ART. 46.

Whosoever shall maliciously compose, print, or publish (*s*) any seditious libel, expressing or signifying any matter or meaning tending to bring into hatred or contempt the person of Her Majesty the Queen, or the government or constitution of the United Kingdom, as by law established, or both Houses or either House of Parliament, or to excite Her Majesty's subjects to attempt the alteration of any matter in church or state as by law established otherwise than by lawful means, shall incur in respect of any first offence, the penalties of the class; and having been convicted of any of these offences shall incur, in respect of any subsequent offence, the penalties of the class. (*t*)

(*s*) As to what constitutes a *publication*, and when it shall be said to be made *maliciously*, see the Digest of Libel.

(*t*) 60 Geo. III. and 1 Geo. IV. c. 8, ss. 1 and 4; 11 Geo. IV. and 1 Will. IV. c. 73.

Persons offending against the provisions of the above Article can only be convicted before a Commission of Oyer and Terminer, or goal delivery, or in Her Majesty's Court of Queen's Bench. See the 60 Geo. III. and 1 Geo. IV. c. 8. The 60 Geo. III. and 1 Geo. IV. c. 8, contains no provision for the punishment of persons guilty of a first offence in publishing, &c., seditious libels, but only declares the punishment of such as offend therein a second time. The first offence, therefore, continues punishable at common law. For a second offence the punishment by the 60 Geo. III. and 1 Geo. IV. c. 8, is the same as in cases of high misdemeanors or banishment from the United Kingdom for such term of years as the Court shall award. So much of the 60 Geo. III. and 1 Geo. IV. c. 8, however, as relates to the sentence of banishment, has been repealed by the 11 Geo. IV. and 1 Will. IV. c. 73.

ART. 47.

Seditious Assemblies.

If several persons, to the number of three or more, shall unlawfully assemble, or, being assembled, shall unlawfully continue together with intent by public speaking, exhibiting of flags, inscriptions, or other means or devices whatsoever, to excite in the minds of the subjects of the realm, hatred or contempt of the person of Her Majesty the Queen, or of the government or constitution of the United Kingdom as by law established, or both Houses or either House of Parliament, or to excite Her Majesty's subjects to attempt the alteration of any matter in church or state as by law established, otherwise than by lawful means, every person so offending shall incur the penalties of the class.

ART 48.

Seditious Conspiracies.

If two or more persons shall conspire to excite in the minds of the subjects of the realm hatred or contempt of the person of Her Majesty the Queen, or of the government or constitution of the United Kingdom as by law established, or both Houses or either House of Parliament, or to excite Her Majesty's subjects to attempt the alteration of any matter in church or state as by law established, otherwise than by lawful means, every person so offending shall incur the penalties of the class. (*u*)

(*u*) In the case of R. *v.* Hunt and others, 3 Barn. and Ald. 566, the defendants were indicted (amongst other things) for conspiring together, with divers other persons unknown, unlawfully to meet together and to cause a great number of other persons to meet with them for the purpose of disturbing the peace, &c., and for the purpose of exciting discontent, &c., and for the purpose of exciting the subjects to hatred, &c. It appears to us that the terms of the present Article are sufficient to include such a charge, as they comprehend any conspiracy to produce hatred and contempt by any means whatsoever.

ART. 49.

Endeavouring to excite public disturbance.

Whosoever shall, by speech or writing, or other act or means whatsoever, maliciously endeavour to cause any rebellion, insurrection, or other unlawful and public disturbance within this realm, shall incur the penalties of the class. (*v*)

(*v*) It may be doubtful whether any express provision of this kind be necessary under this head, as every attempt or endeavour, or solicitation to commit a crime, ought in principle to be deemed criminal, and it is proposed to introduce a specific enactment to that effect. It is however to be observed, that a general clause of this nature supersedes at all events any necessity for continuing the statute 5 Eliz. c. 15, s. 2, which subjects to a fine of £10, and to imprisonment for one year for the first offence, and to imprisonment for life and forfeiture of all goods and chattels, real and personal, for any subsequent offence, any one guilty of advisedly and directly advancing, publishing, and setting forth by writing, printing, signing, or any other open speech or deed, to any person or persons, any fond, fantastical, or false prophecy, upon or by the occasion of any arms, fields, beasts, badges, or such other like things accustomed in arms, cognizances or signets, or upon or by reason of any time, year, or day, name, bloodshed, or war; to the intent thereby to make any rebellion, insurrection, dissention, loss of life, or other disturbance within this realm, and other the Queen's dominions.

ART. 50.

Libel against the Administration of the legislative, judicial, or executive Powers.

Whosoever shall maliciously publish (*w*) any libel expressing or signifying any matter or meaning tending to bring into hatred or contempt the administration of the legislative, judicial, or other executive authority, as by law established, or any judge, magistrate, or other public officer acting in his official capacity, shall incur the penalties of the class.

(*w*) As to what constitutes a *publication*, and when it shall be said to be made *maliciously*, see the Digest of Libel.

ART. 51.

Contempt of Courts of Justice or Magistrates.

Whosoever shall be guilty of any contempt of any court of justice, judge, magistrate, or other judicial officer, by uttering any insulting or opprobrious words, or by any acts or gestures, expressed, done, or committed in the face of the court, or in the presence of any such judge, magistrate, or other judicial officer whilst acting in his official capacity, shall incur the penalties of the class. (*x*)

(*x*) Contumelious and contemptuous expressions spoken to the judges of any courts in the execcution of their office, are indictable, 1 Sid. 144, Str. 420. 2 Rol. Ab. 78.

ART. 52.

Libels on foreign dignitaries.

Whosoever shall maliciously publish (*y*) any libel, expressing or signifying any matter or meaning tending to degrade, revile, or defame, (*z*) or to expose to hatred or contempt any foreign prince, potentate, ambassador, or other dignitary, with intent to interrupt or disturb the peace and friendship subsisting between any foreign country and the United Kingdom of Great Britain and Ireland, shall incur the penalties of the class.

(*y*) As to what constitutes a *publication*, and when it shall be said to be made *maliciously*, see the Digest of Libel.

(*z*) See, as to these terms, Lord Ellenborough's summing up in the case of The King *v.* Peltier, Howell's State Trials, vol. 28. p. 529, in which he says, "I lay it down as law that any publication "which tends to *degrade, revile, and defame* persons in considerable situations of power and dignity in "foreign countries may be taken to be and treated as a libel, and particularly where it had a tendency to "interrupt the amity and peace between the two countries." See also, as to the general doctrine of the law, the case of the King *v.* D'Eon, 1 Black. Rep. 510; and those of the King *v.* Lord George Gordon, Hil. T. 28. G. III., for a libel on the Queen of France, and the King *v.* Vint. for a libel on the Emperor of Russia.

ART. 53.

Scandalum magnatum.

Whosoever shall devise, speak, or tell any false news, lies, or other such false things of prelates, dukes, earls, barons, and other nobles and great men of the realm, and also of the chancellor, treasurer, clerk of the privy seal, steward of the King's house, justices of the one bench or of the other, and of other great officers of the realm, whereof discord or any slander might arise within the same realm, shall incur the penalties of the class. (*a*)

(*a*) 2 Rich. II. st. 1, c. 5, enforced by 12 Rich. II. c. 11. This provision seems to be virtually obsolete.

OFFENCES AGAINST THE PROTESTANT ESTABLISHMENT DECLARED TO BE TREASONS AND MISPRISIONS OF TREASON.

Prefatory Remarks.

Offences against the Protestant Establishment.

In addition to the various Treasons above digested, an important class of offences has been created by several ancient statutes, forming part of a series of restrictive laws, which were intended for the establishment and maintenance of the Protestant Religion as a part of the constitution, and which are still existing laws, although in modern times it has not been necessary to found any prosecution upon them.

The origin and history of these statutes are so well known, that it is unnecessary for us on the present occasion to do more than generally refer to them, in order to explain our reasons for the course which we propose to adopt. The earliest, in point of date, is the Statute of Supremacy, (1 Queen Elizabeth, c. 1, s. 30,) which enacts, that all persons, who (after having been twice previously convicted of a like offence) should, by writing or teaching, maintain the spiritual authority or jurisdiction of any foreign prince or prelate, or advisedly execute anything for the advancement or maintenance of such pretended authority or jurisdiction, should be deemed to be guilty of High Treason. The next of these laws in order of time, was the statute 5th of Queen Elizabeth, c. 1, s. 10, which, in some respects, appears to have superseded the provision of the earlier statute. By this enactment, the preamble to which complains of "the dangers by the fautors of the usurped power of the See of Rome, grown to marvellous outrage and licentious boldness, and now requiring more sharp restraint and correction of laws," it was declared, that, persons who had been once convicted of defending, by writing or teaching, the authority or jurisdiction of the Bishop of Rome within the realm of England or its dependencies, and again committed such offences, should be deemed guilty of High Treason. These two statutes were no doubt occasioned by the apprehension of danger to the Protestant Establishment then in its infancy upon the succession of Queen Elizabeth to the crown. They were, however, in those days, considered to be laws of unusual severity, and the expediency of them was doubted even by Protestant statesmen at the time of their enactment.* A third treason, belonging to the same class, was created by the statute 13th of Queen Elizabeth, c. 2, s. 2., and consisted "in using or putting in ure" within the Queen's dominions, any bull of absolution or reconciliation from the Bishop of Rome, or in pretending or promising, under colour of such a bull, to reconcile or absolve any person, or in receiving such absolution or reconciliation. Another section of the same statute, declared the obtaining of any manner of bulls from the See of Rome, or the publishing, or in any manner "putting in ure" such bulls to be Treason. This statute was founded upon the same general grounds as the two earlier Acts, and was particularly occasioned by the celebrated bull of Pius V., excommunicating and deposing the Queen in order to encourage the various rebellious schemes, which, about that time, were attempted with a view to restoring the Roman Catholic religion by means of Mary Queen of Scots. The statute of the 23rd of Queen Elizabeth, c. 1, recites that, since the passing of the statute of the 13th of Queen Elizabeth, "divers evil affected persons had practised by other means than by bulls, or instruments written or printed, to withdraw divers subjects from their natural obedience to Her Majesty to obey the usurped authority of Rome." It then enacts, that, persons who put in practice any pretended authority to withdraw others from their natural obedience to the Queen; or who, for that intent, withdraw them from the established religion to the Romish religion; or who move them to promise any obedience to the See of Rome; and also the persons so withdrawn, or who shall so promise, are to be adjudged guilty of Treason. The zeal and exertions of Campion and other emissaries from Rome, who appeared in England at this time in great numbers, as well as the incessant activity of the Popish refugees in Flanders and Spain, in encouraging disaffection among the English Roman Catholics, had occasioned the most lively alarm to Queen Elizabeth's Government, and were no doubt the motives for this severe enactment. A few years after the date of the last-mentioned statute, a new subject for fear and jealousy arose. The English priests, who had fled into Flanders soon after Queen Elizabeth's accession, formed themselves into a college at Douay; and being banished thence, another seminary

* See Hallam's Constitutional History, vol. i. p. 157. "I cannot like," (says Sir Thomas Smith in a letter to Cecil, dated March, 1563), "that our house is still so extreme in making more penal laws; and in my mind specially, it is not that that can advance religion, as we may see in France."—*Forbes's State Papers*, vol. ii. p. 352.

Offences against the Protestant Establishment

was erected at Rheims and a third at Rome. From these institutions, which were principally frequented by Englishmen—enthusiasts of the most dangerous character—young men, hastily put into holy orders, fully imbued with the doctrines of the Roman church, and inspired with conscientious hatred to the Protestant establishment, began, soon after the execution of Campion, to issue in great numbers; and, coming into England, zealously distributed among the Roman Catholics the seeds of disaffection. In addition to these persons, who were called Seminary Priests, the Jesuits, soon after the year 1580, began to come into England, who, as they were supposed to contemplate similar objects, were the cause of equal anxiety to the Protestant Government. Various proclamations, according to the practice of the times, having been made without effect against these persons and those who entertained them, the statute of the 27th of Queen Elizabeth, c. 2, was passed. By this it was enacted that all Jesuits, Seminary Priests, and other priests whatsoever, made or ordained out of the Queen's dominions, or within such dominion, by any authority from the See of Rome, since the first year of the Queen's reign, should depart the realm within forty days after the end of the Parliament; and that if any Jesuit, Seminary Priest, or other priest, deacon, or religious, or ecclesiastical person whatsoever, being born within the realm, and ordained as abovementioned, should come into or remain within the realm after those forty days, he should be adjudged guilty of High Treason.

The last of this class of laws, still unrepealed and constituting Treasons, is the the statute of the 3rd of King James I., c 4, ss. 22 and 23. This contains a provision, which is indeed little more than a re-enactment of the statute 23d of Queen Elizabeth, c. 1, s. 2, that if any person shall put in practice to absolve or withdraw any of the king's subjects from their natural obedience, and to reconcile them to the See of Rome, and also if any person shall be willingly so absolved, or reconciled, or shall promise such obedience, all such offenders shall be guilty of Treason. The recital in the preamble of this Act of Parliament shows that it was passed in consequence of the recent discovery of the Gunpowder Plot, and the apprehensions entertained of formidable designs by the Roman Catholics against the Protestant establishment.

The offences above referred to are the only treasons of this character which still continue to form a part of the Criminal Law. We have experienced great difficulty in determining what would be the proper course for us to adopt with respect to these laws. It would be foreign to our object to discuss the policy and justice of passing these Acts in the reigns of Queen Elizabeth and King James I.; it is obvious, however, that they arose from emergencies peculiar to the periods in which they were enacted, and we think it is probable that if legislation were now to be applied to subjects of this nature for the first time, such laws as those which we have just noticed would not be enacted. The attention of Parliament has been called to these enactments on many occasions during the last century; but although extensive relief has been given to Roman Catholics by several statutes, and particularly by the statute of the 31st of King George III., c. 32 (the Roman Catholic Toleration Act) and the statute of the 10th of King George IV., c. 7 (the Roman Catholic Relief Act), the Legislature has expressly refused to repeal the restrictive laws, and has confined the measure of relief to the exemption of Roman Catholics from the penal consequences of a transgression of the ancient statutes upon taking certain oaths and making certain declarations.

The general policy of the Legislature appears to have been, on the one hand, to accept the conscientious obligation incurred by Roman Catholics on taking the oaths as a sufficient security for the State; and, on the other hand, to insist that the ancient penal statutes shall remain in force, as constituting a kind of compulsion to take the oaths;—so that, at all events, the State should be provided with the security either of the oaths, or of the penal laws.

The improvement of the penal laws against the Roman Catholics involves purely political considerations, which are exclusively for the determination of the Legislature; it appears to us that we should not be justified, in the discharge of our duties under Your Majesty's Commission, in attempting to discuss them. Indeed it would be impossible for us to suggest any means by which these laws could be improved, without opening a great national question of much delicacy and difficulty, which has already been solemnly settled by the Legislature. We are, however, deeply impressed with the opinion that the whole branch of the Criminal Law relating to offences arising out of the exercise of the Roman Catholic religion requires revision.

With this view of the subject, we have not reduced the laws relating to Treasons connected with the exercise of the Roman Catholic religion into the form of Articles in our Digest; but have merely given the words of the statutes in order that they may be placed before the Legislature in a connected form.

OFFENCES AGAINST THE PROTESTANT ESTABLISHMENT DECLARED TO BE TREASONS AND MISPRISIONS OF TREASON.

The 1st Queen Elizabeth, cap. 1.

The statute 1 of Queen Eliz. c. 1, after enacting (amongst other things) that if any person or persons dwelling or inhabiting within this realm, or in any other Her Highness's realms or dominions of what estate, dignity, or degree soever he or they be, shall by writing, printing, teaching, preaching, express words, deed, or act, advisedly, maliciously, and directly affirm, hold, stand with, set forth, maintain or defend the authority, pre-eminence, power, or jurisdiction, spiritual or ecclesiastical, of any foreign prince, prelate, person, state, or potentate whatsoever, theretofore claimed, used, or usurped within this realm, or any dominion or country being within or under the power, dominion, or obeisance of Her Highness, or shall advisedly, maliciously, and directly put in ure or execute any thing for the extolling, advancement, setting forth, maintenance, or defence of any such pretended or usurped jurisdiction, power, pre-eminence, and authority, or any part thereof, that then every such person and persons so doing and offending, their abettors, aiders, procurers, and counsellors being thereof lawfully convicted according to the due order and course of the common laws of this realm, should for the first and second offences incur the penalties therein mentioned, Enacts by section 30, "That if any such offender or offenders at any time after the "said second conviction and attainder, do the third time commit and do the said "offences, or any of them, in manner and form aforesaid, and be thereof duly con- "victed and attainted as is aforesaid, that then every such offence or offences shall "be deemed and adjudged *high treason*; and that the offender or offenders therein, "being thereof lawfully convicted and attainted acording to the laws of this realm, "shall suffer pains of death, and other penalties, forfeitures, and losses, as in cases "of *high treason*, by the laws of this realm." And then by section 31 enacts, "That no manner of person or persons shall be molested or impeached for any of "the offences so committed or perpetrated only by preaching, teaching, or words, "unless he or they be thereof lawfully indicted within the space of one half-year "next after his or their offences so committed; and in case any person or persons "shall fortune to be imprisoned for any of the said offences committed by preaching, "teaching, or words only, and be not thereof indicted within the space of one half- "year next after his or their such offence so committed and done, then the said "person so imprisoned shall be set at liberty and be no longer detained in prison "for any such cause or offence."

The 5th Queen Elizabeth, cap. 1.

The statute 5 of Queen Eliz. c. 1, after enacting (amongst other things) that if any person and persons dwelling, inhabiting, or resiant within this realm, or within any other the Queen's dominions, seignories, or countries, or in the marches of the same or elsewhere, within or under her obeisance and power, of what estate, dignity, pre-eminence, order, degree, or condition soever he or they be, shall by writing, ciphering, printing, preaching, or teaching, deed or act, advisedly and wittingly hold or stand with, to extol, set forth, maintain, or defend the authority, jurisdiction, or power of the Bishop of Rome, or of his See, theretofore claimed, used, or usurped within this realm, or in any dominion or country being of, within or under the Queen's power or obeisance, or by any speech, open deed, or act, advisedly and wittingly attributing any such manner of jurisdiction, authority, or pre-eminence to the said See of Rome, or to any bishop of the same See for the time being, within this realm, or in any the Queen's dominions or countries, that then every such person or persons so doing or offending, their abettors, procurers, or counsellors, and also their aiders, assisters, and comforters, upon purpose and to the

intent to set forth, further, and extol the said usurped power, authority, or jurisdiction of the said Bishop or Bishops of Rome, and every of them, being thereof lawfully indicted or presented within one year next after any such offences by him or them committed, and being lawfully convicted or attainted at any time after, according to the laws of this realm, for every such default and defence shall incur the penalties therein mentioned, Enacts by section 10, "That if any such offender "or offenders as is aforesaid, of the first part or branch of this estatute, that is to "say, by writing, ciphering, printing, preaching, or teaching, deed or act, advisedly "and wittingly hold or stand with, to extol, set forth, maintain, or defend the "authority, jurisdiction, or power of the Bishop of Rome or of his See, heretofore "claimed, used, or usurped within this realm, or in any dominion or country being "of, within, or under the Queen's power and obeisance, or by any speech, open "deed, or act, advisedly and wittingly attribute any such manner of jurisdiction, "authority, or pre-eminence, to the said See of Rome or to any Bishop of the same "See for the time being within this realm, or in any the Queen's dominions or "countries, or be to any such offender or offenders abetting, procuring or coun-"selling or aiding, assisting, or comforting, upon purpose and to the intent to set "forth, further, and extol the said usurped power, authority, or jurisdiction, after "such conviction and attainder as is aforesaid, do eftsoons commit or do the said "offences or any of them, in manner and form aforesaid, and be thereof duly con-"victed and attainted as is aforesaid, shall forfeit, lose, and suffer such like and "the same pains, forfeitures, judgment, and execution as is used in cases of *high trea-"son.*" (*a*) And then by section 12 provides, "That this Act nor anything therein "contained, nor any attainder to be had by force and virtue of this Act shall not "extend to make any corruption of blood, the disinheriting of any heir, forfeiture "of dower, nor to the prejudice of the right or title of any person or persons other "than the right or title of the offender or offenders during his, her, or their natural "lives only." And by section 18 further provides, "That charitable giving of "reasonable alms to any of the offender or offenders above specified, without fraud "or covin, shall not be taken or interpreted to be any such abetment, procuring, "counselling, aiding, assisting, or comforting, as thereby the giver of such alms "shall incur any pain, penalty, or forfeiture appointed in this Act."

(*a*) The decisions upon this statute have been carried to an extreme extent. It is laid down in a text-book of authority (Hawk. P. C. book i. c. 17, s. 93), that he who, hearing the report of a book written beyond sea, commends it, or, having read the book, does afterwards, in discoursing of it, allow it to be good, is within the statute. It has also been holden (says Mr. Serj. Hawkins, P.C. book i. c. 17, s. 94,) that if one who is convicted and condemned for an offence of this nature, being afterwards demanded by the judges whether he be still of the same opinion, answer that he is, he is guilty of high treason, as having advisedly maintained the Pope's power a second time: two, however, of the judges dissented from this doctrine.

The 13th of Queen Elizabeth, cap. 2.

The statute 13 of Queen Eliz. c. 2, after reciting (amongst other things) that divers seditious and very evil-disposed people had lately procured and obtained to themselves from the Bishop of Rome and his See, divers bulls and writings, the effect whereof had been and was to absolve and reconcile all those that would be contented to forsake their due obedience to the Queen's Majesty, and to yield and subject themselves to the said feigned, unlawful and usurped authority, Enacts, by sections 2 and 3, "That if any person or persons shall use or put in ure, in any "place within this realm, or in any the Queen's dominions, any such bull, writing, "or instrument, written or printed, of absolution or reconciliation, at any time "heretofore obtained or gotten, or at any time hereafter to be obtained or gotten "from the said Bishop of Rome or any of his successors, or from any other person "or persons authorized or claiming authority by or from the said Bishop of Rome, "his predecessors or successors, or See of Rome, or if any person or persons shall "take upon him or them, by colour of any such bull, writing, instrument, or authority, "to absolve or reconcile any person or persons, or to grant or promise to any "person or persons within this realm, or any other the Queen's Majesty's dominions, "any such absolution or reconciliation by any speech, preaching, teaching, writing, or "any other open deed; or if any person or persons within this realm, or any the "Queen's dominions, shall willingly receive and take any such absolution or recon-"ciliation: or else if any person or persons shall obtain or get from the said Bishop "of Rome, or any his successors, or See of Rome, any manner of bull, writing, "or instrument, written or printed, containing any thing, matter or cause whatso-"ever, or shall publish or by any ways or means put in ure any such bull, writing, or

" instrument, that then all and every such act and acts, offence and offences, shall be " deemed and adjudged by the authority of this Act to be *high treason*, and the " offender and offenders therein, their procurers, abettors, and counsellors, to the fact, " and committing of the said offence or offences, shall be deemed and adjudged high " traitors to the Queen and the realm, and being thereof lawfully indicted and " attainted, according to the course of the laws of this realm, shall suffer pains of " death, and also lose and forfeit all their lands, tenements, heredits, goods and " chattels, as in cases of *high treason*, by the laws of this realm ought to be lost and " forfeited."

By section 5 of the same statute it is provided and enacted, "That if any person " or persons to whom any such absolution, reconciliation, bull, writing, or instru- " ment as is aforesaid, shall be offered, moved, or persuaded to be used, put in ure " or executed, shall conceal the same offer, motion, or persuasion, and not disclose " and signify the same by writing or otherwise within six weeks then next fol- " lowing, to some of the Queen's Majesty's Privy Council, or else to the President " or Vice-President of the Queen's Majesty's Council established in the north parts " or in the marches of Wales for the time being, that then the same person or per- " sons so concealing and not disclosing or not signifying the said offer, motion, or " persuasion, shall incur the loss, danger, penalty, and forfeiture of *misprision of* " *high treason*."

And by section 6 it is enacted, "That no person or persons shall at any time " hereafter be impeached, molested, or troubled in or for misprision of treason for " any offence or offences made treason by this Act, other than such as by this Act " are before declared to be in case of misprision of high treason."

The 23d of Queen Elizabeth, cap. 1.

The statute 23d of Queen Elizabeth, c. 1, s. 2, enacts, "That all persons whatsoever " which have or shall have, or shall pretend to have power, or shall by any ways or " means put in practice to absolve, persuade, or withdraw any of the Queen's " Majesty's subjects, or any within Her Highness' realms and dominions from " their natural obedience to Her Majesty, or to withdraw them for that intent from " the religion now by Her Highness' authority established within Her Highness' " dominions to the Romish religion, or to move them or any of them to promise any " obedience to any pretended authority of the See of Rome or of any other prince, " state, or potentate, to be had or used within her dominions, or shall do any overt " act to that intent or purpose, and every of them, shall be to all intents adjudged " to be traitors, and being thereof lawfully convicted shall have judgment, suffer, " and forfeit as in case of *high treason*. And if any person shall by any means be " willingly absolved or withdrawn as aforesaid, or willingly be reconciled, or shall " promise any obedience to any such pretended authority, prince, state, or potentate " as is aforesaid, that then every such person, their procurers, and counsellors there- " unto, being thereof lawfully convicted, shall be taken, tried, and judged, and shall " suffer and forfeit as in cases of *high treason*."

And by section 2 of the same Act it is enacted, " That all and every person and " persons that shall wittingly be aiders or maintainers of such persons so offending " as is above expressed, or any of them, knowing the same, or which shall conceal " any offence as aforesaid, and shall not within 20 days at the furthest, after such " person's knowledge of such offence, disclose the same to some justice of peace, or " other higher officer, shall be taken, tried, and judged, and shall suffer and forfeit " as offenders in *misprision of treason*."

The 27th Queen Elizabeth, cap. 2.

The statute 27th of Queen Eliz. c. 2, (amongst other things) enacts as follows:

By section 2, " That all and every Jesuits, seminary priests, and other priests " whatsoever made, or ordained out of the realm of England, or other Her High- " ness' dominions, or within any of Her Majesty's realms or dominions, by any " authority, power, or jurisdiction derived, challenged, or pretended from the See " of Rome, since the Feast of the Nativity of St. John Baptist, in the first year of " Her Highness' reign, shall within 40 days next after the end of this present " session of Parliament depart out of this realm of England, and out of all other " Her Highness' realms and dominions, if the wind, weather, and passage, shall " serve for the same, or else so soon after the end of the said 40 days as the wind, " weather, and passage, shall so serve."

By section 3. "That it shall not be lawful to or for any jesuit, seminary priest, "or other such priest, deacon, or religious or ecclesiastical person whatsoever, "being born within this realm or any other Her Highness' dominions and heretofore, "since the said Feast of the Nativity of St. John Baptist, in the first year of Her "Majesty's reign, made, ordained, or professed or hereafter to be made, ordained, "or professed by any authority or jurisdiction derived, challenged, or pretended, "from the See of Rome by or of what name, title, or degree soever, the same shall "be called or known, to come into, be, or remain in any part of this realm, or any "other Her Highness' dominions, after the end of the same 40 days, other than "in such special cases, and upon such special occasions only, and for such time "only as is expressed in this Act; and if he do, that then every such offence shall "be taken and adjudged to be *high treason;* and every person so offending shall "for his offence be adjudged a traitor, and shall suffer, lose, and forfeit, as in case of "*high treason.*"

By section 5. "That if any of Her Majesty's subjects, (not being a jesuit, a "seminary priest, or other such priest, deacon, or religious or ecclesiastical person, "as is before mentioned,) now being, or which hereafter shall be of, or brought up "in, any college of jesuits, or seminary already erected and ordained, or hereafter to "be erected or ordained, in the parts beyond the seas, or out of this realm in any "foreign parts, shall not within six months next after proclamation in that behalf "to be made in the city of London under the great seal of England, return into "this realm, and thereupon within two days next after such return before the "bishop of the diocese, or two justices of peace of the county where he shall arrive, "submit himself to Her Majesty and Her laws, and take the oath set forth by Act in "the first year of Her reign; that then every such person which shall otherwise "return, come into, or be in this realm, or any other Her Highness' dominions, "for such offence of returning or being in this realm, or any other Her Highness' "dominions, without submission as aforesaid, shall also be adjudged a traitor, and "suffer, lose, and forfeit as in case of *high treason.*"

By section 10. "That this Act, or anything herein contained, shall not in any-"wise extend to any such jesuit, seminary priest, or other such priest, deacon, or "religious or ecclesiastical person as is before mentioned, as shall at any time within "the said forty days, or within three days after that he shall hereafter come into "this realm, or any other Her Highness' dominions, submit himself to some archbishop "or bishop of this realm, or to some justice of peace within the county where he "shall arrive or land, and do thereupon truly and sincerely before the same arch-"bishop, bishop, or such justice of peace, take the said oath set forth in *anno primo,* "and by writing under his hand confess and acknowledge, and from thenceforth "continue his due obedience under Her Highness' laws, statutes, and ordinances, "made and provided or to be made or provided in causes of religion."

By section 12. "That if any such jesuit, seminary priest, or other priest above-"said, shall fortune to be so weak or infirm of body that he or they may not pass "out of this realm by the time herein limited, without imminent danger of life, "and this understood as well by the corporal oath of the party as by other good "means, unto the bishop of the diocese and two justices of peace of the same county "where such person or persons so dwell or abide; that then and upon good and "sufficient bond of the person or persons with sureties of the sum of £200 at the "least, with condition that he or they shall be of good behaviour towards our "sovereign lady the Queen and all her liege people, then he or they so licensed and "doing as is aforesaid shall and may remain, and be still within this realm, without "any loss or danger to fall on him or them by this Act, for so long time as by the "same bishop and justices shall be limited and appointed, so as the same time of "abode exceed not the space of six months at the most: and that no person or "persons shall sustain any loss or incur any danger by this Act, for the receiving "or maintaining of any such person or persons so licensed as is aforesaid, for and "during such time only as such person or persons shall be so licensed to tarry "within this realm, any thing contained in this Act to the contrary notwithstanding."

By section 16. "That if any person so submitting himself as aforesaid do at any "time, within the space of 10 years after such submission made, come within 10 "miles of such place where Her Majesty shall be, without especial licence from "Her Majesty in that behalf to be obtained in writing under her hand, that then "and from thenceforth such person shall take no benefit of his said submission, but "that the same submission shall be void as if the same had never been." (*b*)

(*b*) It may be a question whether the above Act is not incidentally repealed, so far as relates to jesuits and other such priests coming into and tarrying in the kingdom, by the 10 Geo. 4. c. 7. s. 29. *et seq.*

The Third King James I., cap. 4.

The statute 3d of King James I., c. 4. (amongst other things) enacts as follows:

By section 22, "That if any person or persons shall, either upon the seas or "beyond the seas, or in any other place within the dominions of the King's Majesty, "his heirs or successors, put in practice to absolve, persuade, or withdraw any of "the subjects of the King's Majesty, or of his heirs and successors of this realm "of England, from their natural obedience to His Majesty, his heirs or successors, "or to reconcile them to the Pope or See of Rome, or to move them or any of "them to promise obedience to any pretended authority of the See of Rome, or to "any other prince, state, or potentate, that then every such person, their procurers, "counsellors, aiders, and maintainers, knowing the same, shall be to all intents "adjudged traitors, and being thereof lawfully convicted, shall have judgment, "suffer and forfeit as in cases of *high treason*."

By section 23. "That if any person as aforesaid, shall be either upon the seas "or beyond the seas, or in any other place within the dominions of the King's "Majesty, his heirs or successors, willingly absolved or withdrawn, as aforesaid, "or willingly reconciled, or shall promise obedience to any such pretended "authority, prince, state, or potentate, as aforesaid, that every such person or "persons, their procurers and counsellors, aiders and maintainers, knowing the same, "shall be, to all intents, adjudged traitors, and being thereof lawfully convicted, "shall have judgment, suffer and forfeit, as in cases of *high treason*."

By section 24. "That the last-mentioned clause of this branch, or anything "therein contained, shall not extend or be taken to extend to any person or persons "whatsoever, which shall hereafter be reconciled to the Pope or See of Rome as "aforesaid (for and touching the point of so being reconciled only) that shall return "into this realm, and thereupon within six days after such return before the bishop "of the diocese, or two justices of the peace, jointly or severally, of the county "where he shall arrive, submit himself to His Majesty and his laws, and take the "oath set forth by Act in the first year of the reign of the late Queen Elizabeth, "commonly called the oath of supremacy, as also the oath before set down in this "present Act."

LIBEL.

Prefatory Remarks.

Libels and other illegal communications form a large and important class of offences distinguishable from all others by plain characteristics. They consist simply in some expression of facts or opinions, tending to some public or private grievance, and proceeding from a malicious intention to injure, or from such a culpable disregard of consequences as is usually termed implied malice.

The laws relating to this class of offences are necessarily of great importance to the public; not only because they concern the ordinary and daily intercourse of society in all its varied transactions, but also on account of the great influence such communications, especially those made through the medium of the press, necessarily have upon every subject of public or private interest.

Whilst the law of libel is one of the most important parts of penal legislation, it is also perhaps one of the most difficult, in consequence of the conflicting interests which must be adjusted before its legitimate objects can be attained. To reconcile freedom of writing with the right of all men of unblemished character to keep inviolate the esteem and consideration of their fellow-men,—to secure the character of citizens from malicious calumny, and at the same time to respect the right of every man to express the truth when he does so without hatred or malice,—to induce individuals to refer the cognizance and reparation of injuries and insults committed against them to the law, instead of making themselves the avengers of attacks upon their characters,—the attainment of all these ends is the proper object of the penal law respecting libel; and the discovery of the best means of attaining them constitutes a problem which has been found to be extremely difficult of solution, in all civilized countries where attempts have been made to legislate upon the subject.

It is with great diffidence that, in the necessary prosecution of the duty confided to us, we observe and suggest alterations upon a branch of the law of such paramount importance and difficulty; the more especially because it is one upon which popular opinion has been in some degree opposed to the existing law, and one which has already been frequently discussed in Parliament. We cannot also but observe that mere penal restraints, such as ought to regulate communications by writing or printing generally, form but a portion of a system of rules calculated to secure the liberty of the press, and at the same time to prevent its abuses; objects which cannot possibly be well and effectually framed independently of each other, or otherwise than as parts of a general and uniform scheme, which embraces the subject in all its relations, whether they be simply restrictive, remedial, or penal.

Under these impressions we propose, in conformity with our course of proceeding on other occasions, to state the principles on which this branch of the criminal law depends; to refer to such rules of the law of England as are necessary with a view to the suggestions afterwards made; and lastly, to make some suggestions concerning the rules of the present law, which appears to be susceptible of improvement.

In order to attain to satisfactory conclusions on a subject which has given rise to much conflict of opinion, it is desirable to divest it of all extrinsic considerations, and to reduce it, for the purpose of minute examination, into its simple elements.

A man's thoughts, as regards penal consequences, are free; but where injury may result to society from allowing unlimited freedom of communication by writing or speaking, the licence may and must be restrained, with a view to public safety, peace, and convenience. Where the immediate end and object of communications, whether oral or written, is the total subversion of the civil constitution, they necessarily rank, in degree, with other treasonable practices against the state. Where they amount to direct incitements to commit some specific violation of a particular law, the offence must necessarily be nearly of kin to an actual violation of that law; if an actual breach of the law be the consequence of such a solicitation

or incitement, the act amounts to an absolute and complete transgression of the law, and even though that result should not follow, yet a deliberate attempt to break the law must necessarily constitute an offence, which, in principle, calls for penal visitation.

The necessity for restraint applies to indirect as well as direct solicitations to violate the law; the latter may be as dangerous as the former, and ought, therefore, to be equally prohibited. Offences of this description may be regarded simply as accessorial, being criminal merely as the means of committing or endeavouring to commit some other independent crime.

We proceed to notice those which are of a substantive character, from their own direct and immediate tendency to produce mischief.

Political libels.

The security of a state may be endangered not only by direct and immediate attempts to subvert it, but also by bringing its establishments, civil and religious, or its ministers and officers, into disgrace and contempt.

Malevolent attempts to bring the constitution, or the character and conduct of those by whom it is administered into public odium and contempt, tend to public injury, because they tend to impair the constitution by diminishing the vigour which is necessary for carrying it into effect. Such attempts are also injurious in their direct tendency to breed discontent, and to promote violent, sudden, and ill-advised changes. This class of injuries comprises not only publications tending to render the constitution and its laws odious or ridiculous, but also such as are inconsistent with the reverence and respect due to the person of the sovereign, and also such as are calculated to bring either house of Parliament, the administration of justice, and other branches of the executive power, into public hatred and contempt. Offences of the latter description are nearly connected with some others to which we have already adverted in our Fifth Report; that is, to such as consist in obstructions of the executive authority. For all such attempts to render the executive power odious or contemptible tend to encourage a spirit of resistance to its authority, and so to impair its efficacy. Publications, consisting of speeches made to numbers, and which are injurious to the public peace, as encouraging a multitude of persons to acts of violence and outrage, may amount to overt acts of treason; in other cases they are properly classed and made cognizable either as constituting a seditious offence, or as evidencing an unlawful assembly. Where the communication amounts to an unlawful solicitation to do any act contrary to the duty or allegiance of the subject, or inconsistent with public peace, it is usually made penal by some specific enactment.

The interests of the public may also be affected and prejudiced by publications reflecting on the conduct or characters of foreign potentates; for by such means enmity and discord may be occasioned between the two nations.*

Personal libels.

Communications prejudicial to the characters of private persons may be regarded, first, as injurious to the individual; secondly, to the public. To the individual, as depriving him of that good name on which his advancement and prosperity so frequently depend, and as excluding him from that commerce with society, the enjoyment of which is one of the main objects of social union. To the public, because no other private injury so directly and forcibly tends to disturb the public peace by provoking injured parties, or their friends or adherents, to retaliate by acts of personal violence; and also because by the unjust aspersion of the characters of meritorious individuals the public may thereby be deprived of their services.

As laws without moral aid constitute a very insufficient and inadequate restraint upon conduct, it cannot but be matter of public concern amply to protect that love of reputation which supplies one of the most powerful and salutary of those motives by which mankind are influenced and preserved from evil.

Libels on personal character admit of distinctions, the consideration of which is not unimportant. Such a libel may charge the commission of some illegal act, or may impute some habit or disposition which involves the charge of corresponding acts, although none are specified, and such acts may either constitute offences in respect of which the agents are liable to punishment, or offences against religion or morals; or the libel may merely impute some evil disposition or inclination of an illegal or immoral nature, without implying any act; or may allege propensities, acts, or circumstances which, although not either illegal or immoral, are such that the allegation, if believed, would tend to render its object either contemptible or ridiculous.

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* See the trial of Peltier, for a libel on Bonaparte when First Consul of France.

Libels against religion or morality.

As mere positive laws are of little avail, without the powerful aid of religion and morality, it is of great importance to the well being of society that its interests should be protected against the pernicious influence of communications tending generally to extinguish men's religious faith, and to eradicate from their minds the principles of morality.

For although the operation of human laws, which ought to be definite and precise, and which command not but where they can compel, must necessarily be far less extensive than the obligations of morality; and although by far the greater part of the ordinary duties of a member of society fall not within the scope of any mere prohibitory law, but must be left to every man's sense of propriety and his conscience, and to a salutary dread of public censure, yet positive laws may restrain generally such communications as tend to instil bad principles, or extirpate good ones. To restrain such offences is the more necessary, when it is considered that for the performance of most of the common duties of life, undefined by positive law, and for the preservation of decency and good order, religious and moral principles and the dread of public censure, are the only securities.

Such considerations become infinitely more strong and important, when they are considered in reference to the facility of communication, supplied by the art of printing, especially where its operation is still further extended by general education, which, in effect, subjects to its power the great mass of the public.

The press is, indeed, a mighty instrument for the diffusion of knowledge, capable of being applied to the best, or perverted to the worst of purposes; eminently useful in promoting the interests of religion, morality, science, and social happiness, it may be abused as the instrument of impiety, vice, error, and malice. When, therefore, it is considered how much, not merely the opinions, but the feelings and passions of the public, are capable of being influenced and excited by means of this powerful agent, how few there are who think for themselves, and who are not (it may be insensibly) guided and moved by the opinions of others, how great a dominion may be exercised by one strong mind over the minds of millions, how prone the generality of mankind are to the reception of the most calumnious charges, how credulous in listening to the most improbable misrepresentations, and how greatly every calumny, directed against an individual, is aggravated by increased publicity; when these things are considered, it will readily appear of what supreme importance it must be in every system of municipal law, on the one hand to protect the liberty of communication, and on the other to exclude the complicated and frightful mischiefs which are likely to emanate from a corrupt and licentious press.

Freedom of intellectual communication and discussion ought to constitute the general rule, and any limitation of that right the exception. The abridgment of this right requires the more anxious attention, when it is considered that any unwarranted or unnecessary restraint would be attended with peculiar inconvenience to society on account of its constant operation, and the danger and risk of exposing parties to vexatious prosecutions. The mischiefs which render penal restraint necessary result from the abuse of the liberty of free communication,—on the other hand, splendid and incalculable advantages flow from the natural and proper use of that liberty to religion, morals, and science; the freedom of political discussion is absolutely inalienable from a free constitution, is one of its best supports, and one of the most effectual safeguards that can be devised for the protection of the state from seditious practices, on the one hand, or encroachments on the liberty of the subject, on the other. Whilst the reputation of an individual ought, as well as his person or property, to be protected from malicious injury, yet as a general proposition it may be stated that it is highly essential to the interests of the community and the protection of the innocent, that the real characters of delinquents should be exposed.

We now proceed to make some remarks on the nature of those limits which may be conveniently adopted in reference to this class of offences.

On the principles by which the limits are to be defined.

Such limits must depend either, 1st. On the nature, quality, and consequences of the communication; 2ndly. The act of the party making it, and the means of communication used; 3rdly. On his motive in doing the act, either simply, or in reference to the occasion of doing the act, or the circumstances under which it was done.

1. As to the nature, quality, and consequences of the communication. It is, in the first place, essential that the matter published should be in its own nature injurious, as tending to produce mischief to the public or to a private person, such as has already been described.

But as the very object of coercion is the *prevention* of public mischief, it is by no means essential to an offence of this nature, that the criminal object of a noxious publication should have been actually accomplished, it is sufficient that the communication should directly and immediately *tend* to produce mischief to the public.

And this, for several reasons, 1st. Because actual proof of evil consequences to the public would, from the very nature of the case, be frequently impossible, though highly presumable; and, 2ndly. Because where great mischief is to be apprehended, it is far more politic to interfere at an early stage, and to arrest the progress of the evil, than to wait for its consummation; and, 3rdly. Because, as far regards the moral guilt of the offender, his offence is completed by the very act of publication.

Hence, so far as the evil consequences of a publication are concerned, it is necessary that the offence against the public should be defined and limited, not by the *effect* actually produced, but by the *tendency* of the matter published to produce it. If an individual, with a view to his own private gain, were to publish an address, inciting a discontented populace to burn all stacks of corn within a particular district, the law of the country would be absurd and contemptible, which provided no punishment for so daring an outrage until proof could be given that some incendiary had on such recommendation destroyed his neighbour's property. The very attempt to excite others to the commission of such outrages is in itself a dangerous violation of the principles of morality and natural justice:—on the question whether the attempt ought to meet with immediate reprobation and punishment, no conflict of opposite advantages and disadvantages could possibly occur—it would clearly be for the benefit of the community, that so atrocious an endeavour should be checked by penal visitation at the very earliest opportunity. And it is obvious, that it must not only be necessary to restrain communications which tend directly to a breach of the law, by inciting others to the actual commission of crimes, but also those which tend to the subversion of religion, or, in general, to the destruction of the principles of virtue and morality, which are essential to good conduct, order, and decency.

Again, it is plain, that the *degree* of tendency cannot be material, as a limit, to the offence, whatever its operation may be in adjusting the quantum of punishment. First, because *any* tendency to produce public mischief must, *pro tanto*, be injurious to society; and, secondly, because the extent to which the mischief may be tolerated is *not capable* of any precise definition.

Complaints have not unfrequently been made, that the law of libel in this country is too vague, and that neither the common nor the statute law sufficiently define what constitutes a libel.

It may be of use to consider whether absolute and certain prohibitions are not excluded by the very nature of the subject matter; and whether, if such were imposed, they must not consist either in general and peremptory rules, which would encroach greatly on the freedom of communication, or in minute and specific ones, the particularity of which would subject them to the easiest evasions. The law may either totally prohibit all discussion on a particular and specific subject, or may go the length of tolerating all that can be said or written upon it; but there is scarcely any question, either of general or individual interest, in respect of which total prohibition or entire toleration would not be prejudicial to the community. A total prohibition would, in most cases, if not in all, be inconsistent with the great principle of civil liberty, for a penal restraint would be imposed to a greater extent than was necessary for the welfare of society; on the other hand, unrestrained licence of communication would be liable to much abuse, and open the door to great mischief.

Where it is beneficial to society that freedom of communication should be tolerated to a great extent, but where it would be highly inconvenient and mischievous to permit unbounded licence, to the abuse of that liberty, and, consequently, where a boundary is necessary, the establishment and preservation of a proper limit must always be a work of nicety and difficulty. It is, however, clear that the line of interdiction cannot be regulated by any prohibition of particular sentiments or language. Injurious modes of expression are far too variable to admit of any precise rules or regulations; the laws which descend to particulars on such subjects, and which forbid specific expressions, otherwise than by way of example, are usually the work of early and inexperienced legislators, and cannot possibly be of any practical utility, subject, as they necessarily are, to the easiest evasions. Such offences, in truth, admit of no sufficient

description, except in respect of the *effects* which they produce, or which they immediately *tend to produce*. Any attempt to enumerate, with a view to express and prohibit all the offensive means by which an ill-disposed person might attempt to destroy the public sense of modesty and decency, would be impracticable and absurd; if it be necessary that such practices should be restrained by the municipal law, it is, if not impossible, at least difficult, that the offence should otherwise be described than generally by a prohibition to publish that which, being immodest and indecent, directly tends to corrupt and vitiate the morals of the public. It may be objected, that any such general description is uncertain and indefinite. Admitting this to be so, no other inference seems to result than that human laws do not admit of perfection, and that no general definition can be framed which shall be applicable, with absolute certainty, to acts capable of infinite variety.

Restraints against offensive communications to be effectual must necessarily be very general, so as to exclude all possible modes of offence, and must therefore usually be commensurate with the injury to be prevented. This can only be done by framing the prohibition generally, according to the nature of that injury. The various modes by which a man may be rendered ridiculous and contemptible cannot be enumerated, but a general prohibition may include all publications tending to that result and designed for that purpose. Neither can any limitations be founded on the mere quantity or intensity of the mischief produced. A rule properly made for restraining publications, because they are likely to produce mischievous results, can no more be limited as to the extent of the evil than any other law can be which is designed to prevent any public or private injury. A law which overlooked small injuries to reputation, whilst it punished greater ones, would be as absurd, indefinite, and impracticable as a law which disregarded small injuries to person or property.*

Truth or falsity of the communication.

The truth or falsity of the matter published is a consideration of the greatest importance to the due adjustment of this branch of the law. In order justly to appreciate the bearing and weight of this distinction, it is necessary to remember that although the injuries at present under consideration are, by the characteristics already adverted to, connected in their qualities and necessary incidents, the injuries so connected vary much from each other in particulars very important to the present purpose. As regards mere personal injury, the offence, as has been seen, may be considered either as it concerns the public, in its tendency to disturb the peace, or the individual, as tending to his private detriment. Here, then, the distinction as to the truth or falsity of the matter published may have a very different application. With a view to the preservation of the public peace it cannot be very material whether the personal imputation be true or false; ill-blood and a thirst for vengeance may be excited by a publication of that which is true as well as of that which is false, according to the common adage, "the greater the truth the greater the libel," or in other words, where the imputation is just, the more likely may the party be to resort to retaliation by force, and thus disturb the peace. It is therefore obvious that it would be contrary to the principle of a law devised for the preservation of the public peace to limit its operation to the publication of merely false imputations. If, on the other hand, it should be deemed to be just and expedient that the penal law should in principle extend to the protection of private character from aggression, it becomes most important to consider whether that protection ought not to be confined to false imputations. The injuries to be provided against in the two cases are perfectly distinct in their nature; in the one case the injury is done to society by endangering the public peace, in the other it is done to the individual as tending to deprive him of that which he has a right to enjoy,—in which latter case, although the injury be of a private nature as affects the individual sufferer, it may yet be properly the subject of penal cognizance on the same principle of necessity or convenience which visits the spoliation of private property as a public offence. As regards the defamed party, the truth or falsity of the statement makes a wide difference as to the nature and extent of the injury. The mere publication of the truth may under particular circumstances be a very vexatious act, but to destroy the character of another by a wilful misrepresentation is a *fraudulent* as well as malicious act; it is not simply

* The difficulties of precise definition on the subject of libel are very clearly stated by Lord Brougham, in the evidence which he is understood to have given when Lord Chancellor before the Committee of the House of Commons, appointed in 1834, to consider the state of the law as regards libel and slander. We have inserted in the Appendix (p. 150,) that which is stated to have been the substance of the evidence given by his Lordship on that occasion.

an attempt to destroy reputation, but to do so under the semblance of truth. As regards, therefore, the mere act of the offender, there is a great difference in respect of the truth or falsity of the matter published. In reference to the party who is the object of the charge, the distinction materially affects the nature of the injury. The right of a criminal to compel the rest of the world to silence is questionable, and bears little resemblance to the right of an innocent person to protection from false and injurious aspersions. This distinction may therefore very reasonably influence the law so far as the protection of private character is concerned. The truth may operate either to exclude criminal liability, and that either absolutely or sub modo, or to mitigate the penalty. To found no distinction in such cases between truth and falsehood would be as little consistent with moral as with legal principles, and it could scarcely be expected that laws which so confounded, or at least so entirely overlooked the wide moral distinction between truth and falsehood, should ever meet with general respect and approbation. With a view to the public peace, the case is widely different. Open, malicious, and unnecessary imputations, though true, are properly of criminal cognizance, because, notwithstanding their truth, they still tend to the disturbance of the peace; but, as regards the principle of merely preserving the public peace, the truth or falsity of the matter published being indifferent, and not a ground of justification or even of extenuation, it is obvious that, to be consistent, the principle ought to prevail throughout, and that, if by virtue of such considerations the evidence of the truth were to be entirely excluded, no higher penalty ought to be inflicted than should be inflicted in case the imputation were true,—to inflict any higher would be not merely to give weight to a bare assumption, it would be unjust in the extreme to punish a party as for a false statement, without allowing him to prove it to be true.

From such considerations we think that the following conclusions may properly be deduced: That in reference to one principal object in restraining defamatory communications, viz., the preservation of the public peace, the rule may with perfect consistency and correctness be adopted, that the truth or falsity of the statement shall be deemed to be indifferent, punishment being inflicted in respect of the mischief and danger to the public peace, and that only. But that if the law also interferes, as we think it ought, on a distinct ground, viz., for protecting private reputation from defamatory injuries, then it would be inconsistent with the principle thus adopted to regard the truth or falsity of the statement as indifferent; for upon that question must the right to expect protection from the criminal law, as well as the right to a remedy in damages, essentially depend. For these reasons we also conclude that the offence, as regards the public, ought to be regarded as distinct from that which concerns the injury to private reputation, and the treating them in this manner would, we think, tend to remove difficulties and anomalies with which the English law of libel is at present encumbered.

It may perhaps be objected that were a defamatory communication to be made penal, not strictly on the narrow principle of protection to the public peace, but on the more extensive one of protection to private reputation for reputation's sake, the consequence would be that an indefinite multitude of offences against morality, of which the penal law takes no direct cognizance, would thus indirectly become subject to legal investigation.

This objection, however, would apply also to the case of an action to recover damages. And although, so long as the principle of penal restraint were simply the preservation of the public peace, there would be no inconsistency in excluding all consideration of the truth or falsity of the offensive statement, yet if the law recognized the principle of protection to private reputation, independently of that of danger to the public peace, the necessary consequence would be the regarding the falsity of the charge as of the essence of the wrong, just as much in the criminal as in the civil proceeding by one who complained of *injury* done to his reputation. The question, therefore, really resolves itself into this, whether the law ought to recognize the injury to private reputation by a false and malicious calumny as a substantive offence, or as an aggravation of the offence committed by endangering the public peace.

By way of illustration of the preceding observations, let it be supposed that A, a tradesman, indicts B, another tradesman, for having published in a newspaper that he, A was a swindler, and had endeavoured to defraud, by means specified in the libel. As the law stands, on not guilty being pleaded by B, the sole question would be, whether B had in fact published the libel; he would not be allowed, for any purpose, to prove that what he so published was true. A, on the other hand,

would be excluded from evidence to show that the imputation contained in the libel was false. And the publication having been proved, B would be found guilty, and would not be permitted to show, by affidavit or otherwise in mitigation, that the charge in the libel was true. Under these circumstances it is presumed that the punishment would be regulated by the principle of danger to the public peace resulting from the provocation offered to A to break the peace in revenge for the imputation on his character, (the truth or falsity of that imputation being wholly indifferent,) and consequently that no greater punishment could properly be inflicted than would have been inflicted, had it been admitted or proved that the imputation was true. To inflict any greater punishment upon the presumption of the charge being false, or on a mere speculation of its being false, when B was ready to prove the contrary, would be opposed to every man's common sense of justice. B then would be liable to such punishment as such a provocation to a breach of the peace might deserve, assuming the charge to be true, and to no greater.

The question whether A was guilty or innocent has hitherto been left out of consideration; it has been considered only as between B and the public, between which parties the merits of A and the private injury to his reputation are regarded as wholly indifferent. Now, however, let the case be considered as it regards A and B. If A were innocent, and B guilty of a false and malicious invention, which he published to destroy A's character, it is obvious that the law might justly be regarded as defective, in not affording to A a sufficient protection against such an injury, and as being indeed not at all adapted to the purpose; the injury meant to be prevented being simply that likely to be occasioned to the public; so far is this from being an adequate and beneficial protection to A's character, that the injury is carefully excluded from consideration, and A has it not in his power even to vindicate his character, and repel the charge by evidence. It may be said that he may resort to his action for damages,—that course, however, may be out of the question; his calumniator may be a mere pauper: and it may again be observed, that it is difficult to suggest any good reason for making penal restraints for the protection of property, or for the safety of the person, which would not be equally applicable to the providing for the protection of reputation. Again, still supposing the libel to be false, B is punished, but his punishment is wholly inadequate to the real nature and mischief of the offence; he is punished for an indirect endeavour to provoke another to break the peace; the wicked means, the malignant attempt to destroy reputation are disregarded; the law, contemplating only the narrow technical principle of tendency to disturb the peace, makes no distinction between one who oversteps the legal boundary for an honest purpose, and the destroyer of another's reputation by deliberate falsehood. Whilst it is difficult to carry so apathetic a doctrine into effect with strict regard to the conditions essential to justice, it is not remarkable that the principle should be misunderstood, and that a law should be unpopular which apparently confounds truth with falsehood, or even deems the former to be more criminal than the latter.

The doubts which have been entertained upon the question, whether, with a view to penal consequences, truth may constitute a libel, relate principally, if not exclusively, to libels which impute moral blame to individuals, and not to those which do not reflect upon any person in particular, but which are deemed to be criminal, from their tendency to endanger the security of society by extirpating, or at least weakening, that sense of religious and moral obligation, upon which the happiness and well-being of society so essentially depend. To assert that blasphemous, obscene, and criminal acts may be freely described and represented, because they are true, that is, because such things have been acted, would be too absurd a position to be advanced, or if advanced, to need refutation. Again, where an individual was subject to any personal defect or misfortune, or was unfortunate in any of his relations, if any one on that account were to expose him from day to day, and hold him out as the object of public contempt and ridicule, it could not be doubted that the truth, as was justly observed by a celebrated statesman,* would rather be an aggravation than an excuse, the world being too apt to consider men as contemptible for their misfortunes than as odious for their vices.

Mode of publication

2dly. As to the act and mode of publication. The truth of the general abstract proposition is undeniable, that when the subject of publication is in its own nature noxious and offensive, any mode of publication must be objectionable, and can be material only as regards the extent and degree of the mischief likely to be occa-

* Mr. Fox, in the debate on the Libel Bill.

sioned. If it be injurious to a man's character to publish before a multitude of people that he is an adulterer or drunkard, it must, although to a less extent, be injurious to make the same charge in the hearing of a single individual. If a slander conveyed in writing be injurious to reputation, the same must be injurious when published orally, the more especially if that be done before a great number of hearers. The means of conveyance may be more or less prejudicial, in being the ducts of a greater or less portion of virulent and scandalous matter, but that consideration affects not the quality, but only the quantity of the poison.

It is therefore obvious that distinctions founded merely on a consideration of the particular mode of communication must be in a great measure arbitrary and artificial, and dependent on reasons of collateral policy and convenience. There can, however, be no doubt that such distinctions are frequently of great use; although, on the one hand, they limit the operation of a principle adopted for the protection of reputation, yet on the other they prevent it from being carried to an extent which might be attended with collateral inconvenience, and they establish a plain and definite limit of criminal liability.

The restraining the criminal offence to written defamation is a provision which, whilst it leaves the ordinary communications incident to the daily business of life unfettered, at the same time guards against the mischiefs which would result from unlimited licence, by subjecting to punishment all such as are guilty of the more deliberate, studied, and therefore more malicious, attacks upon character,—the more dangerons and injurious, as being more permanent in their nature, and more capable of extensive circulation. This, therefore, is a mode of restraint which, whilst it leaves open considerable channels for communications affecting character, yet visits all those attacks upon reputation to which the foregoing remarks on the necessity for penal restraint more particularly apply. To make mere oral communications penal, when they reflected on the characters of individuals, would be a heavy restraint on the ordinary intercourse of mankind, and would necessarily and unavoidably occasion much and vexatious litigation, and would weaken the great securities for the discharge of legal as well as moral obligations, the love of reputation, and the fear of public censure and disgrace.

There is, no doubt, a marked distinction between oral and written communications, both as regards in ordinary cases the mind and intention of the publisher and the effect of the thing published.

The committing of injurious and defamatory matter to writing evinces a more determined and deliberate purpose than is ordinarily to be inferred from mere words spoken. Communications by writing are, therefore, likely to make stronger impressions than such as are merely oral. They are permanent, and capable of wider diffusion. Such qualities and consequences are, however, dependent on circumstances, which may in particular cases invert the mischief likely to arise from a publication of the very same matter; as where a libel is published but to one person, and the same slander is spoken in the hearing of a large assembly, the oral may frequently be more mischievous in every respect than the written communication. Each mode of publication may, in truth, be more pernicious than the other, when the comparison is made in respect of different injurious consequences. Slanderous and abusive language may be much more likely to provoke the party to whom it is applied when spoken in the presence of many others than if addressed to him by letter, where an interval was allowed for the subsidence of sudden resentment. Publications of an impious or indecent character are rendered more mischievous, and are published with greater security to the offender, when they are diffused through the medium of the press, than they could possibly be made by mere oral communication.

The defining the particular species or quality of those communications to which such a restraint ought to be applied must depend on the greater or less degree of inconvenience which would result from the absence of such a limit. Thus assuming, for the sake of illustration, that any written communication, the effect of which was to render another person odious or contemptible, was properly constituted a crime, little doubt can be entertained that, were the law to be extended indefinitely to all oral communications, the consequence would be highly inconvenient, in fettering ordinary conversation affecting the characters of individuals, and in greatly multiplying occasions for frivolous and vexatious prosecutions.

On the other hand, a law which, with a view to the public peace, merely prohibited written insult, would be incommensurate with its object, viz., the preser-

vation of the peace, which is quite as likely to be broken in consequence of an oral as of a written insult.

When, however, considerations of extrinsic policy are taken into the account and allowed to operate in restraint of criminal liability, it is obvious that a distinction, founded on the mode of publication, including within its scope such modes as, by their capability and facility of diffusion and their permanency, must ordinarily be considered as the more dangerous, and excluding such as are merely oral, may well consist with general convenience.

Whatever distinction, as concerns the civil remedy, may be made between oral and written slander, there are several reasons for confining penalties in respect of personal defamation to written publications. In the first place, to extend the offence to oral defamation generally would be inconvenient, as above stated. In the next place, the proof of an offence committed by the writing and publishing of illegal matter, is far more definite and complete than where the offence is merely oral, when so much depends on tone and manner, the situation of the speaker, the circumstances under which he spoke, the understanding and memory of the hearers. On this account it is that the municipal laws of different countries so frequently found a distinction between that which is written and that which is merely spoken.*

This distinction, however, founded as it is on a principle of convenience, cannot properly be extended beyond those communications which usually occur in the ordinary intercourse of society, in which the character and reputation of some particular member must necessarily and frequently be involved. It would be highly inconvenient that men's tongues should be fettered on such occasions, by the perpetual apprehension of criminal prosecutions. It is plain that no direct solicitation to violate the law can by possibility fall within any principle of expediency, so as to derive protection from it. The law of England has not only made a distinction in respect of the means of communication, but has also adopted the word "Libel" as a particular and technical term, by which communications of an immoral or illegal tendency, made by means of writings, pictures, or signs, are distinguished from those which are merely oral.

Another question which presents itself is whether the mere acts of composing and writing noxious and injurious matter, with a view to, but without, publication, ought to constitute an offence. The law of England, as will be seen, is by no means clear or consistent on this point.

For extending the penal law to the mere act of composing with intent to publish noxious and injurious matter, which is never in fact intentionally published, it may be urged that this may properly be the subject of penal censure, inasmuch as a criminal intention is coupled with a distinct and decisive act done in furtherance of that intention; that the case is analogous to that of forgery, of which an offender is guilty by the mere act of making the false instrument with a criminal intention, although he never, in fact, publishes the writing so forged; that where the extension is consistent with admitted ordinary principles of penal law, it is desirable to extend the law widely, in order to the more complete prevention of injurious practices; that no one can compose and write libels without incurring the risk of injury to others by an accidental and involuntary publication, and that if such writings be kept and not destroyed, a publication sooner or later must usually take place.

It may, on the other hand, be said that writings undivulged are like a man's secret thoughts, which unless manifested by some outward act which injures or tends to injure the public, do not properly become the subject of penal visitation; that were it to be held that the composing should not be deemed penal unless done with the criminal intent of publishing, still the law would be objectionable, because it would be very difficult in such a case to ascertain the existence of such a prospective intention as a matter of fact,—that it would be like punishing a man for his secret intentions not manifested by any overt act.

It is therefore probable that to punish with strictness and effect the mere writing and printing of a libel, would be attended with more of mischief than of benefit to the community. Unless means were devised for subjecting men's private closets to rigorous examination, founded on mere suspicion, such a law would, in a great

* See Montesquieu's Spirit of Laws, b. 12, c. 12. Hence it is, that, according to the law of England, mere words spoken do not constitute an overt act of treason. See the Prefatory Remarks on Treason.

measure, be nugatory,—it would rarely indeed be known that a man had composed and written a libel unless he had himself in some way published or divulged it, and where that was the case the law would cease to be necessary. On the other hand, the hardship and insecurity which would result to society from subjecting their private muniments and writings to examination, by police officers, would be a public inconvenience of the most intolerable description. And though no power should be given to search on mere suspicion, yet would it frequently happen that the inferior ministers of the law would be ready to run the risk of consequences in the expectation of detecting cause for accusation against suspected or obnoxious persons.

3dly. As to the intention of the publisher, and the occasion of the publication. Intention.

Assuming this class of offences to be ever so well defined and limited as regards the nature of the injury to be prevented, the acts of composing and publishing that which is so injurious, and its truth or falsity, a most important distinction still remains in relation to the mind and intention of the composer or publisher. A criminal intention, or at least a state of criminal indifference as to consequences, is usually an essential test of guilt. But in ordinary cases the guilty state of mind is required to be evidenced by acts or circumstances essential to the offence, which are usually indicative of the guilty intention. In respect of the present class of offences a more than ordinary difficulty occurs as to intention, for whilst the intention is most peculiarly the test of criminality, the mere acts essential to the offence, such as composing, writing, printing, or otherwise publishing, are of no use as tests of guilt. And although the very contents of the writing published may often afford very strong evidence of intention, it frequently happens that they are inconclusive, and that the inquiry as to intention requires light from collateral circumstances.

Ignorance of the contents of the matter published by a party, or to the publication of which he was instrumental, must in principle be regarded as a sufficient legal excuse, provided the want of knowledge be not in itself wilful, with a view to impunity, or otherwise culpable. In such cases the total absence of all criminal design or neglect ought to exempt from penal consequences. Excuse—Ignorance.

As regards the main distinctions, it is not difficult to conclude that every legal code must in respect of this branch of the law recognise three distinct classes of cases in reference to the intention of one who publishes that which is injurious. These distinctions, it will be seen, are necessary ones, arising out of the very nature of the facts themselves to which legal principles are to be applied.

The 1st comprises, those where the intention must be regarded as immaterial.

The 2d those where the offence depends upon the real motive of the offender, and where it lies on the prosecutor to prove actual malice.

The 3d those where an evil motive is to be presumed from a noxious act unexplained, and where it lies on the party charged to rebut the implication of malice.

In the first place, exemption from penal liability must in many instances be expedient, without regard either to the injurious quality of the communication, or the motive of the party who made it. It would obviously be attended with great mischief to allow a judge to be responsible, either civilly or criminally, for anything which he had published in the course of his official duty; the effect is precisely the same whether his non-responsibility were to be referred at once to the real principle of expediency, or attributed to one more technical, viz., that the occasion of the publication conclusively repelled the presumption of malice.

To allow a party to be subject to a prosecution for matter sworn or deposed to in the course of a judicial inquiry, would be manifestly inexpedient, if not unjust. This would necessarily operate to discourage the attendance of witnesses, and the free delivery of their testimony, and it would be attended with frequent hardship that a witness should be subject to a prosecution in respect of testimony which he could not withhold without incurring punishment as for a contempt or committing perjury.

In the next place, it must be necessary under every legal system to recognize a numerous class of cases where the illegal quality of the act depends upon the actual intention of the party. This happens where the occasion and circumstances of the publication are such as ought to justify one who acted *boná fide*, but ought not to protect one who acted out of mere malice. In such cases it would be inexpedient either to give no protecting effect to such an occasion and circumstances, or to give them a conclusive effect. Were a charge of dishonesty to be made in giving the character of a servant, common convenience requires that such a com-

munication, if made *bonâ fide*, should be privileged; no one would be willing to answer inquiries as to character were it to be done at the hazard of a prosecution: but it would, on the other hand, be unjust and oppressive that a malicious injury should be committed to the destruction of a man's reputation, under the cloak of answering an application as to his character. The only just course in such a case consists in privileging such a communication, when it is made *bonâ fide*, but in affording no protection where it is made maliciously, and the occasion is used but as a colour. Within this general principle are naturally comprehended all communications made in the *bonâ fide* prosecution of any legitimate object in which either party has an interest; a narrower rule would be inconvenient, in limiting too much that freedom of communication and intercourse which is useful to society; a more extensive protection would encourage malicious attacks on reputation, without any adequate reason.

As in this class of cases the quality of the act is to depend on the existence or absence of malice, the occasion itself warrants a legal presumption in favour of the party who professes to act upon it, and it naturally lies on the prosecutor to prove the evil intention.

There necessarily exists a third class of cases, including all which do not fall within either of the two preceding, that is where the communication is not privileged either absolutely or sub modo, in which case, if the matter published be in its own nature, or in reference to known circumstances, injurious and noxious, it must, if wilfully made, be attributable either to an actual malicious intention, or, which must in legal contemplation be deemed equivalent, to a criminal disregard of consequences. In all such cases the offender must be considered to have acted either of malice in fact, that is from a motive of actual ill-will and a design to injure, or of malice in law, which consists in the wilful doing of a prohibited or injurious act without lawful excuse. It seems, on the one hand, that a mere wicked and mischievous intention, unless it be conjoined with some publication of noxious and illegal matter, cannot amount to an illegal communication. If a man, intending to publish a most atrocious libel, were by mistake to deliver the gospel instead of the book in which the libel was contained, though, in a moral point of view, his guilt would be just the same as if he had published the libel, yet he would have committed no crime against the law, unless that law took cognizance of mere abstract intention, unaccompanied by any definite criminal act. On the other hand, it appears to be equally manifest that where any act is by law defined to be illegal and criminal, every one is punishable who voluntarily does the prohibited act, without some legal justification or excuse, furnished by the occasion and circumstances, and without regard to his real motive and intention. To hold that a man should be absolved from penal responsibility merely because his motives were benevolent, would be to set private opinion above the law. For the same reason, it is plain that mere abstract intention and motive, where the act is voluntary, cannot, without reference to the occasion and circumstances of the communication, constitute any justification or excuse which the law can safely recognize. These distinctions concerning intention are therefore inherent in the subject matter; they are common to all times and to all countries, and can never without inconvenience be disregarded by the legislator.

What cases shall be included within the first and what within the second class are however questions on which legislators may differ, and upon which a great variety of opinions has been entertained.

As connected with the present subject, it may not be improper to remark in this place that where the criminal quality of the particular transaction turns upon the actual intention of the party making the publication, the truth or falsity of the alleged libel furnishes a most important, not unfrequently a decisive test, for determining that quality. The offender's knowledge that what he published was false must usually be absolutely conclusive upon the question of malice; on the other hand, proof that what he published he knew to be true, although not absolutely conclusive as to the fact, cannot but be regarded as a strong indication of sincerity in a doubtful case, where the act is capable of being referred to an innocent and proper motive, suggested by the circumstances of the particular transaction.

Law of England.

We now advert to some of the provisions of the law of England relating to this subject, so far as may be necessary to illustrate the remarks which we propose to add, and to elucidate and justify the enactments which we shall afterwards submit.

In adverting to the law of England we refer to an observation already made, that we labour under some difficulty from being confined to a very partial and narrow view of the general policy of the law concerning libels and other illegal communications. We may add that the provisions of the Criminal Law of England regarding these offences, are much less artificial and far less perfect than those which regulate the remedial branch of the law in respect of oral slanders. Whilst the latter are now moulded on sound principles to meet the exigencies of society, and rules have been at last established upon a beneficial adjustment of conflicting principles, the few provisions which concern criminal liability remain for the most part in their ancient inartificial state. It is not difficult to account for this state of things. With respect to slander as the subject of a civil remedy, the frequency of suits induced the necessity of continual discussion of the subject, and the natural result has been that by slow degrees, and after great fluctuations and the lapse of many centuries, many rules and distinctions have been established conducive to practical convenience, and the law presents a more systematic form than might have been expected. In respect of the criminal branch the case has been widely different. The law in its ancient simplicity contained few regulations in the way of criminal restraint; many were not essential when few could write, and none as yet could print. The wider diffusion of the first rudiments of education among ranks to which learning was before unknown, the invention of the press, and the sweeping away of those restrictions by which its action was first fettered, are circumstances from which material changes in the criminal branch of the law might have been expected to result. Such, however, has not been the consequence, and the simple principle of penal restraint in respect of defamatory injuries, and the law by which they are prohibited, remains, with slight exception, what it was many centuries ago.

In our observations upon the law of England we propose to adopt the order which we have already prescribed in remarking generally upon the principles peculiar to this class of offences.

First, therefore, as to the nature, quality, and consequences of the prohibited communication. It will be seen from the authorities which we are about to adduce, that whilst the definitions of the offence recognized by the law of England are very extensive, the principles on which they are founded are peculiarly narrow, as regards one of the most important of the classes which this branch of the law includes: viz., that which concerns injury to personal reputation. It is to this class, therefore, that our attention has been chiefly directed; the provisions of the common and statute law in respect of irreligious, immoral, and seditious publications, seem to be based on sound and satisfactory grounds, in respect of which but few remarks are requisite.

We find among the authorities the following description of libel as a criminal offence. In Sir W. Blackstone's Commentaries, vol. iv. p. 150, the law is thus stated:— "Of a nature very similar to challenges are libels, *libelli famosi*, which taken in "their largest and most extensive sense signify any writings, pictures, or the like, of an "immoral or illegal tendency, but in the sense under which we are now to consider "them are malicious defamations of any person, and especially a magistrate, made "public by either printing, writing, signs, or pictures, in order to provoke him to "wrath, or expose him to public hatred, contempt, and ridicule. The direct "tendency of these libels is *the breach of the public peace*, by stirring up the objects "of them to revenge and perhaps to bloodshed. The communication of a libel to "any one person is a publication in the eye of the law, and therefore the sending "an abusive private letter to a man is as much a libel as if it were openly printed, "for it equally tends to a breach of the peace. For the same reason it is immaterial "with respect to the essence of a libel whether the result of it be true or false, "since the provocation and not the falsity is the thing to be punished criminally, "though doubtless the falsehood of *it may aggravate its guilt and enhance its* "*punishment*.* In a civil action we may remember a libel must appear to be false

* The observation of the learned writer of the Commentaries, that the falsity of the libel may aggravate its guilt and enhance the punishment, is remarkable when it is considered that upon the very principle on which the criminality of the offence is founded, truth is immaterial; and, consequently, no evidence can be admitted on either side to show either the truth or the falsity of the alleged libel. Probably the rule at the time when the learned author wrote was not so well settled on this subject as it now seems to be. In the case of the King *v.* Halpin, H. T. 1829, the Court refused to allow a defendant, who had been convicted of a libel imputing perjury, to read either his own affidavit or that of any other person, setting forth circumstances which amounted to an assertion of the truth of the libel. And they said that the utmost latitude that ever had been or could be allowed to the defendant in such case was to read his own affidavit, stating that at the time when he published the libel he had reasons for believing and did believe the contents of it to be true; that to go the length

"as well as scandalous; for if the charge be true the plaintiff has received no pri-
"vate injury, and has no ground to demand a compensation for himself whatever
"offence it may be against the public peace, and therefore upon a civil action the
"truth of the accusation may be pleaded in bar of the suit. But in a criminal
"prosecution the tendency which all libels have to create animosities and to disturb
"the public peace is the whole that the law considers. And therefore in such pro-
"secutions the only points to be inquired into are, first, the making or publishing
"of the book or writing, and secondly, whether the matter be criminal; and if both
"these points are against the defendant, the offence against the public is complete."

In Hawkins's Pleas of the Crown, book i. c. 73, the law is thus expounded:—

"Sec. 1. It seemeth that a libel in a strict sense is taken for a malicious defama-
"tion expressed either in printing or writing, and tending either to blacken the
"memory of one who is dead or the reputation of one who is alive, and expose him
"to public hatred, contempt, or ridicule.

"Sec. 2. But it is said that in a larger sense the notion of a libel may be applied
"to any defamation whatsoever, expressed either by signs or pictures, or by fixing
"up a gallows against a man's door, or by painting him in a shameful and igno-
"minious manner.

"Sec. 3. And since the chief cause for which the law so severely punishes all
"offences of this nature is the *direct tendency of them to a breach of public peace,*
"by provoking the parties injured and their friends and families to acts of revenge,
"which it would be impossible to restrain by the severest laws, were there no
"redress from public justice for injuries of this kind, which of all others are most
"sensibly felt; and since the plain meaning of such scandal as is expressed by
"signs or pictures is as obvious to common sense and as clearly understood by every
"common capacity, and altogether as provoking as that which is expressed by
"writing or printing, why should it not be equally criminal?

"Sec. 6. And from the same ground it further doth appear that it is far from
"being a justification of a libel that the contents thereof are true, or that the person
"on whom it is made had a bad reputation, *since the greater appearance there is*
"*of truth* in any malicious invective *so much the more provoking it is.*" *

It has appeared to us, after attentive consideration, that the law of England, in thus making the criminal branch of the offence to depend on the tendency of the libel to provoke to a breach of the peace, is constructed on too narrow a basis. And we apprehend that some incongruities which are to be found in the practical application of this branch of the law, are attributable to this defect.

Although it be true that the danger to the public peace is one ground for penal restraint, it is not, we think, an exclusive one. The injury to private reputation is beyond all doubt a sufficient ground of legal interposition for the protection of reputation, by giving a remedy in damages; and there seems to be no satisfactory reason why that protection should be so limited to civil reparation any more than there is in the case of mere spoliation of property. The law which gives a remedy in damages in respect of trespass to property, is confessedly insufficient for the protection of proprietors against the fraudulent abstraction of property; and in many instances severe penal restraints against malicious destruction or damage are deemed to be necessary to the extent even of subjecting offenders to the penalty of transportation. Although it be not necessary to punish a malicious libeller in respect of the destruction of private reputation with so much severity, the law might

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proposed would be to allow the defendant to charge the prosecutor with perjury, and in effect to compel the Court to try him for that offence upon affidavits; and that the adoption of such a course would place the prosecutor in a degree of peril and hardship, and would militate against the substantial principles of justice. 4 Black. Comm. (Mr. Ryland's edition) p. 150, in the note by the learned editor. The decision of the Court is strictly in conformity with the limited principle on which the penal law of libel, as expounded by Mr. Justice Blackstone, professes to be founded, viz. the tendency of the publication to disturb the public peace; but if this be so, it obviously follows that the falsehood of a libel cannot, without injustice, aggravate its guilt and enhance its punishment. For how can it be known whether the charge be true or false if all evidence of the fact be excluded in practice, because in principle the fact is deemed to be immaterial? To enhance the punishment by reason of the *falsity* of the charge would in itself be a direct violation of the very fundamental principle of the law. To assume the falsity whilst the party was excluded from proving the truth of the charge would be to punish a man on a gratuitous assumption of guilt without allowing him to make his defence.

* In Dalton's Justice 289, a libel is defined as tending to a breach of the peace. In Sir Baptist Hicks's Case, Hob. 224, it is called a provocation to a breach of the peace. In the case of the King *v.* Summers, Lev. 139, it was held to be cognizable before Justices, because it tended to a breach of the peace. In the case of the King *v.* Wilkes, 2 Wils. 150, the Court of Common Pleas gave a judgment to the same effect.

justly be regarded as inconsistent and defective which thus carefully protected property, but afforded no more than the mere civil remedy in respect of wilful injuries to reputation. In the former case the injury is made penal, simply because the giving a remedy by action affords no adequate protection against injuries of a fraudulent or malicious nature, perpetrated, it may be, by offenders unknown, or, where known, irresponsible through poverty or other circumstances. But precisely the same reason, viz. the inadequacy of the civil remedy, suggests the expediency of also affording protection to private reputation by the like means against malicious attacks so easily and frequently made by otherwise irresponsible authors.

The law of England does not, however, recognize the injury to the private right of reputation as a ground of penal restraint, but founds its prohibitions and penalties mainly, if not wholly, on the ground of protection to the public peace against those interruptions which injuries to reputation are so likely to occasion. It will be seen from the definitions of the offence, and the authorities referred to, that this is the great, we may almost state the exclusive, principle of the criminal law of libel. One important and direct consequence from the adoption of so narrow a principle is, that the truth or falsity of the matter published becomes wholly immaterial. This in itself is a perfectly just deduction from the original principle. For, as a violation of the peace is as likely to result from a publication of that which is true as of that which is false, to a law designed for effectuating that principle the truth or falsity of the matter published must be indifferent.

Conformably with this inference the law of England excludes both parties, the prosecutor as well as the defendant, on a charge of personal libel, from adducing any evidence as to the falsity or truth of the charge. And in reference to the same principle, a defendant convicted of a personal libel is not permitted, even in mitigation of punishment, to show that what he published was true. This again is a just deduction from the original principle. It is, however, to be emphatically observed, that it is one which is subject to the condition that no greater degree of punishment is to be inflicted on a convicted party than ought to have been, or would have been inflicted on the supposition that the matter published was true. A punishment adapted to that supposition gives the defendant all the benefit which he could derive from actual proof. If, however, the punishment were not to be modified by that condition, if the rule were not strictly adhered to of punishing merely for the offence against the public peace, without regard to the truth or falsity of the matter published—that is, if the truth or falsity were to be regarded as material, the rule would be inconsistent with its principle, and highly unjust. It would be inconsistent with principle to make the punishment for an attempt to disturb the peace to depend at all on a circumstance purely collateral; and it would be manifestly unjust to make the punishment greater than it ought to have been had the truth been proved, and at the same time to exclude the defendant from the benefit of such proof. Assuming, however, the principle to be respected, and the condition to be observed, the objection to the law would be, not that it was inconsistent or unjust, but simply, that it was founded on too narrow a principle. It is, however, here necessary to observe that, although evidence of the truth or falsity of the matter published be properly excluded in reference to the principle on which the law of England is founded, viz. the protection of the public peace, yet that in some instances such evidence cannot be excluded without an inconvenient violation of other principles. For, assuming the law to be properly based on the principle of protection to the public peace, a class of cases must of necessity be recognized by the law where the quality of the act must depend on the actual intention of the party who composes or publishes the alleged libel. This happens in the case already used for the purpose of illustration, where a character is given of a servant. In this and similar cases the law, although founded on the narrow basis on which it proposes to stand, must still make the question of guilt or innocence to depend on the existence or absence of actual malice. This, however, is a question in respect of which the truth or falsity of the matter published is, if not conclusive, of high importance; and therefore, although according to the avowed principles of the law of England, such evidence be immaterial as regards the tendency to disturb the public peace, it is yet most material in order to ascertain whether the defendant be or be not within an important exception of that law.

In order to illustrate this doctrine, let the case, already put as one of ordinary occurrence, be supposed:—A., a trader, publishes that B. has swindled him out of a sum of money, under the pretence of dealing in the way of trade; B. causes A. to be indicted. It appears that A. has made the communication under

such circumstances that it was privileged in point of law, provided it were made *bonâ fide*, and whether in truth it was made *bonâ* or *malâ fide* is the sole question in the case. According to the existing law, evidence of the truth on the one hand and falsity on the other is excluded, and the jury are called upon to decide on A.'s motives, without knowing whether he stated what was true or was guilty of a deliberate falsehood with the malignant intention of destroying B.'s reputation. It is manifest that in such a case, where A. must necessarily have known whether the fact was true or false, the issue must virtually depend on the truth or falsity of the fact. If A. published what was false, the fact must be decisive as to malignity of intention; if the fact were true, it cannot be doubted that it would usually be decisive as to goodness of intention. Now, the law and justice of the case being clear, the only question is, whether that evidence which can alone lead to a just and certain conclusion shall be admitted or rejected. It appears to us that to define what is just, and then to exclude evidence of what is just, is a strange anomaly. There are some few instances to be found where, on grounds of collateral policy, particular evidence of a fact in issue is rejected; these cases, however, depend on grounds of general public policy, none of which are applicable to the present case. In all such instances, it will be observable that the evidence is excluded by reason of some objection to the use of the evidence itself, on the ground that the using of it would be generally prejudicial, not on the ground that evidence to prove the issue itself ought to be excluded. The exclusion, therefore, does not involve what we cannot but regard as an inconsistency, viz., that a case should, in point of law and justice, depend on a fact, evidence of which is altogether excluded. We refer to some examples of the exclusion of particular evidence on special grounds of policy, to show that these can have no application, even by remote analogy, to the present case. On grounds of general policy, neither a husband nor wife can give evidence for or against each other: but even here the policy of the law yields to necessity for the purposes of justice; and where it is essential to justice that such evidence should be given, the general rule of policy gives way. Another instance of the same kind occurs where the particular evidence would involve some disclosure prejudicial to the interests of the public, in which case it becomes necessary to incur the less in order to exclude a greater evil. In the present case there is no conflict whatsoever, and the rule of exclusion is even inconsistent with the ordinary practice in receiving evidence in a civil case in proof of the very same fact. Suppose that in the case already suggested, the party reflected on should proceed, as he may, at once, by a civil action and indictment. On the trial of the former, it would undoubtedly be competent to the defendant, under proper pleas to give evidence of the truth of his statement, and to make use of such evidence to show that he acted *bonâ fide*; and, though he failed to prove the truth of the fact precisely as stated, he would be entitled to make use of all the facts proved, in order to establish the goodness of his motives. It is therefore inconsistent to exclude such evidence when offered to prove precisely the same fact, where its decision is to determine the guilt or innocence of the party indicted. Could such a distinction be made, it should seem that the greater latitude ought rather to be allowed where a party is to defend himself against a criminal charge, than where he has merely to repel a claim for damages. The inconsistency, then, stands simply thus:—that in a civil action, where the question turns upon actual motive, the real state of the facts is admissible, in order to ascertain that motive; whilst in a criminal proceeding in respect of the same alleged libel, and when the same question depends on the same motive, the very same means of ascertainment are rejected. This is such a manifest incongruity as to require strong support from some collateral reasons of policy; none such, however, exist, and the distinction is in reality an unwarrantable deduction from a principle probably in itself defective, but which, were it ever so well founded, would not warrant the exclusion. The only ground of distinction is this, that in respect of the action for damages the truth of the matter published is a good answer to the action, whilst, as concerns the criminal offence, the truth or falsity of the matter published is immaterial. Now, assuming this to be a sound and beneficial distinction, and that the truth ought to be no bar to a criminal charge, it is no legal or reasonable consequence that the truth or falsity of the statement should be excluded as evidence to prove a fact, viz., the motive of the party, when it becomes material. The truth is used, not as a bar, but as evidence of a fact which the law itself recognizes as material, and when the law makes criminality to depend on the actual motive of the party, the exclusion of evidence which would show that which in point of law it is essential

to know, is in effect to hinder and frustrate the object of the law itself. It is to make the law declare, first, that the motive of the party shall be deemed material, but at the same time to declare that the best means for ascertaining the party's real motive shall be excluded.

A remarkable instance to show the injustice of rejecting evidence of the truth of the statement contained in an alleged libel on a prosecution with a view to repel the presumption of malice, is understood to have been mentioned by the Lord Chancellor (Lord Brougham) in his evidence before a Select Committee of the House of Commons on the law of libel, in which his lordship (before he left the bar) had been counsel. The publisher of a newspaper was prosecuted by indictment for having stated a fact, namely, that a person teaching in a public institution had been convicted of forgery in France, and sent to work in irons. The learned counsel rested his case on negativing malice, and for this purpose offered to prove that the statement was merely a reference to a known fact. He produced with that view the most satisfactory evidence that could be given, an exemplification under the seal of the Court of the record of the conviction, by which it appeared that the prosecutor had been tried for forgery, convicted and sentenced to work in the galleys, or in the streets with a chain round his leg. The learned judge who presided at the trial rejected the evidence, which by the law he was undoubtedly bound to do, and the defendant was convicted just as if he had been the author of a false, scandalous, and malicious libel.

Whilst the exclusion of the distinction between truth and falsehood is, with the exception alluded to and subject to the condition which has been noticed, consistent with the operation of the limited principle avowed by the law of England, such exclusion would obviously be inconsistent with the adoption of a larger principle, viz., the protection of the private individual, in his private capacity, in the enjoyment of his reputation; for there the very nature and character of the injury itself depends, as has been seen, on the truth or falsehood of the charge, and the truth of the charge must either be a conclusive answer to the complaint of injury to reputation, or must at all events greatly diminish the extent of the offence and mitigate the guilt of the offender. Regarding the offence simply as it concerns injury to the individual, it is difficult to say that any one ought to be protected in the enjoyment of that reputation which exists only through ignorance of the truth, and which is therefore in itself false and deceptive. In such a case a guilty individual may suffer privation, but it is impossible to say that he suffers injury from publicity, unless ignorance of the characters of individuals, which cannot possibly be of advantage to the public, can constitute a private right. The law of England, so far from acknowledging the existence of any such right, positively disclaims it, in making the truth of the alleged libel to constitute an absolute and peremptory bar to a civil action to recover a remedy for the defamation in damages. Were the principle of rejecting evidence of the truth of an alleged libel to be ever so well preserved, and, which is more difficult to suppose, to be ever so well appreciated by the generality of people, the law would still be defective in moral effect, as making no distinction between a statement of the truth and the publication of a false and wicked invention. This however is a distinction which the law of England recognizes, although at the expense of some inconsistency; for it is the practice of the Court of Queen's Bench to refuse a criminal information in respect of a personal libel, unless the applicant deny its truth by affidavit.

The law of England therefore confines itself to the principle of restraining personal calumniators in order to the protection of the public peace. And although so long as the equitable condition already adverted to is observed, the law so limited may not be inconsistent, yet it may justly be considered as insufficient and defective for the reasons already urged, in not adopting larger principles, and extending its operation to the protection of personal reputation for its own sake, and not merely incidentally in providing for the maintenance of the public peace. If the infliction of punishment be not strictly limited by the condition already observed, the law operates unjustly and inconsistently in professing to disregard a distinction which is in fact made, and presuming guilt without due inquiry; if on the other hand punishment be so limited, personal reputation is left exposed to danger and destruction without adequate protection. In addition, we may observe that the practical application of a law based on so inefficient a principle must always be difficult and unpopular. It must be difficult for the Court in the infliction of punishment always to bear in

mind that the defendant has had no means of establishing the truth of the charge, and therefore that no greater penalty can justly be inflicted than would have been proper had the charge been confessedly true. The generality of mankind are not likely to estimate highly even the just administration of a law which professes to make no distinction between truth and falsehood, but visits, or professes to visit, the unwarranted publication of either with cold indifference, and affords no greater protection to the innocent than the guilty, so far as concerns the falsity and malice of invention. The practice on criminal informations for libel is by no means consistent with the ordinary principles by which this branch of the penal law is regulated, for whilst according to those principles, and to ordinary practice, the truth or falsity of the alleged libel is deemed to be immaterial, yet, as we have already observed, on an application for a criminal information, a solemn denial of the truth of the alleged libel is an indispensable preliminary. The party against whom the rule nisi is granted has of course the liberty of answering this, as well as any other affidavits on which the motion is founded. But here, as afterwards, he by no means stands on equal terms with his adversary. The applicant to whom the libel relates always has it in his power to swear as to the truth or falsity of allegations which concern his own conduct, but the party against whom the application is made, may have no actual personal knowledge of the facts,—although they may be true he may have to depend for proof of their truth entirely on the testimony of others, and no means are provided by which he can compel others to make affidavits on the subject. and therefore for the purpose of the application, the contents of the alleged libel in such a case, though true, must be taken to be false; the information would consequently be granted, and the party put upon his trial. Upon the trial the defendant being able, as in other cases, to enforce the attendance of witnesses, might also be able to prove the truth of the alleged libel, but this would be denied him on the ground that the truth was immaterial. It is, however, impossible that the defendant should not be prejudiced by the previous proceedings, for although proof of the falsehood of the imputation be excluded on the trial, it is well known that the information would not have been granted, if the truth of the alleged libel had not been negatived; and if the truth be in reality immaterial, it is remarkable that a circumstance wholly immaterial should have been made the indispensable condition of granting the criminal information.

The case then stands thus: if the truth or falsity of the alleged libel be deemed to be immaterial to the offence, the granting or refusing of the criminal information is made to depend on a fact wholly immaterial to the object for the attainment of which the information is to be granted. But it is a fact exceedingly likely to create an undue prejudice against the defendant, and it is one which the defendant has frequently no means of rebutting in answer to the application, and which he is not allowed to rebut where he has the means by calling witnesses upon the trial. If, on the other hand, the truth or falsity of the alleged libel be *material*, either to the granting the information, or to the essence of the offence, the defendant is placed in a disadvantageous position in the first instance, by not having the means afforded him of proving the truth, and rebutting an *ex-parte* statement, which usually rests on the mere affidavit of the prosecutor; and he is subject to still greater injustice, in not being allowed to prove upon the trial facts which are material to the merits of the case, or which at least show that the information ought not to have been granted, and so to remove a prejudice against him. The exclusion of such evidence constitutes the most apparent deviation from principle when the defence to a criminal information for libel consists of that species of modified justification recognized by the law, where the act is partially but not wholly justified by the occasion, when the publication has been made under circumstances which justify it, provided the publisher acted with a *bonâ fide* intention, and did not use the occasion as a mere cloak for wreaking his malice. In all such cases the exclusion of the truth is contrary to principle, whatever be the form of proceeding, but the error is greater when the proceeding is by criminal information than in the case of an indictment, for the very nature of the proceeding carries with it a presumption that the contents of the alleged libel are false.

Truth of libellous charge.

The question how far the truth of a defamatory publication of a personal nature ought to be available to protect the publisher from legal consequences, is a subject upon which a great discrepancy of opinion has obtained amongst able lawyers, and concerning which the laws of different nations have established opposite rules. We

therefore deem it right to make a few observations on the subject, so far as it relates to the distinctions which we propose to make, believing that although we may differ from many, for whose opinions we entertain great respect, in thinking that the rule of English law, as regards the action for damages, is founded on just principles, yet that even those who do not assent to this position, would approve of the distinction we propose to make in this branch of the criminal law. As regards civil actions for any slander or libel, it is an established rule of the law of England, that the truth of the matter complained of, shall constitute an absolute and complete defence. The English law in this respect differs from the laws of Scotland, France, and some other nations, which whilst they do not exclude a defence by establishing the *veritas convicii*, as it is termed in the Civil Law, do not regard it as an absolute and peremptory defence, but only as a circumstance which may, subject to particular conditions, and in connexion with other circumstances, constitute a defence. Some to whose judgment much deference is due, are of opinion that although the truth of a publication should always be admissible for the purpose of enabling a jury to form a just estimate of the publisher's motives, the truth of the publication ought not to operate as a conclusive bar to a prosecution; and in this opinion we coincide so far as concerns any prosecution founded simply on the tendency of the publication to produce a breach of the public peace; for whether the statement be true or not, it ought not generally and without some special reason to be tolerated when it tends to the disturbance of the peace. Others, however, think it proper that the truth of the matter published ought not to constitute an absolute defence to a prosecution although it be founded simply on the principle of protection to private reputation, but only in the absence of express malice or under defined circumstances, which, co-operating with the truth, shall constitute a complete defence. This further limitation of the effect to be attributed to the proof of the truth of the alleged libel is, we think, subject to the following amongst other objections.

First, that in such a case the benefit of protection to a wrong doer would be purchased at a certain public inconvenience by preventing the true characters of delinquents from being known; the effect of which would be to diminish the importance of reputation, and tend to place the profligate on a level in this respect with the most deserving. Secondly, that the proposition assumes that one really guilty of the delinquency imputed, and whose enjoyment of character rests simply upon other people's want of knowledge, has a legal claim to protection—a position which, for the reasons above stated, appears to us to be fallacious. Cases of hardship may no doubt be strongly urged in support of this position; as where a delinquent has by many years of penitence and exemplary conduct retrieved his character in society. In such a case, the giving a wanton, malicious, and unnecessary publicity to the circumstances of the offence might be productive of no real benefit to the public, whilst it would overwhelm the penitent offender with ruin and disgrace. It is further urged, that the affording a possibility to those who have acted criminally, of retrieving their characters, and reinstating themselves in society by a course of good conduct, affords an inducement favourable to the interests of morality. A striking instance illustrative of the hardship of such a case was adduced by the Solicitor-General* upon the occasion of his making a motion in the House of Commons (18th March, 1834) for "a Committee to consider the present state of the law of libel, and to "report their opinion to the House." "He would next," he said, "mention a case "which would strikingly exemplify the inconvenience of the libel law as regarded "proceedings by civil actions. The transaction to which he was about to refer, "occurred many years ago, but it had made a deep impression on his mind at the "time, and, therefore, he had no doubt that he should be able to state the circum-"stances connected with it correctly. A young woman had, in early life, been "seduced by a man of title; but after living with him for a certain time, she became "ashamed of the course of life she was pursuing, and taking the opportunity of "escaping from it, she retired into a distant part of the country, where her seducer "was unable to discover her. She obtained a situation, in which she conducted "herself with so much propriety, that she not only gained the good-will of her em-"ployers, but was appointed to a responsible situation in a public establishment. "Some years after, her seducer discovered the place of her retreat; and having in "vain made proposals for the renewal of their intercourse, he hit upon the expedient

* The present Lord Chancellor.

" of depriving her of the means of subsistence, thinking that he should then succeed " in his attempt to possess himself again of her person. He, therefore, published " in the town where she resided the history of her early life. The consequence " was, that the unfortunate woman lost the esteem of the friends whom her subse- " quent good conduct had procured her, and she was deprived of the appointment " by means of which she obtained her livelihood. Was not this woman entitled to " compensation? Yet, if she had brought an action against her persecutor, he " would have justified, and she would have been turned out of court, with the " aggravation to her misfortune of having incurred a useless expense. Was it fit ' that the law should remain in such a state?" * Whilst it may be admitted that the act of a party who without necessity, and for malicious purposes, deprived even a delinquent of the benefit of a good reputation subsequently earned, is highly immoral, we are by no means disposed to disapprove of the rule of the law of England, which even in such a case admits a plea of the truth as an absolute bar to an action to recover damages. As a general principle, we conceive it to be clear that a party really guilty of an imputed offence cannot be said to have any *right* to that which exists only through other men's ignorance of the truth. No arguments derivable from the special circumstances of hardship peculiar to any particular case are, we think, available to establish such a claim. If, in accordance with general principles of convenience, the conduct of delinquents may be made known without incurring the hazard of an action for damages, it is evidently impracticable to prescribe any reasonable limit, either in respect of time or other circumstances, which shall for the future enjoin all mankind to silence. It is, however, no part of our duty to consider any question of this nature as it concerns the remedy by action, and we conceive that the distinction which we mean to propose in respect of criminal liability will be free from the objection against admitting the truth of a malicious attack upon personal character to constitute a defence, and at the same time will remove the objection of a contrary nature to which this branch of the law is at present subject, viz., that the truth or falsity of the communication is regarded as immaterial. Thirdly, that the recognizing such a right would be wholly inconsistent with the branch of the law which concerns the civil remedy, and which constitutes the truth an absolute bar to an action to recover damages for any personal libel; a principle recognized also by the statutes of " Scandalum Magnatum," which have a criminal as well as civil operation.† Fourthly, that it would be very difficult if not impracticable to define the circumstances which ought in conjunction with the truth of the offensive statement to constitute a complete justification, and great uncertainty and confusion in the administration of the laws of some other countries have resulted from the admitting and requiring these mixed ingredients of defence.

For the truth of this position we refer to Mr. Borthwick's Treatise on the Law of Libel and Slander, as applied in Scotland, sec. 3, where he treats of the plea of *veritas convicii*. He says, " Having considered most of the situations in which a defender in an action for defamation may be placed which entitle him to plead privilege, we come next to advert to a very important circumstance in every case of libel or slander which we have had occasion to mention by anticipation, as an

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* See Hansard's Parl. Deb. vol. xxii. See also Mr. Borthwick's Treatise on the Law of Libel and Slander in Scotland, who refers to the following case in the Causes Célèbres, vol. vi. " Le Parlement " de Toulouse a decidé ainsi :—Une fille qui auroit mis clandestinement au jour un fruit de l'amour à " qui elle auroit conservé la vie, pourroit se plaindre en justice du médisant qui révéleroit son déshon- " neur, parceque la défamation la dépouille de l'honneur dont elle jouissoit par un faux tître, *mais qui* " *ne faisoit tort à personne;* sa possession étoit légitime avec ce tître coloré. *Le fore interne* " s'accorde encore ici avec *le fore externe.*" Histoire du Proces des Sieurs Saurin et Rousseau. The defendant acted dishonourably in disclosing the secret, but it is not to be argued that because he was culpable he was liable to make reparation in damages: the fallacy is in assuming that her possession of a merely colourable title to character was lawful, if lawful be taken to imply a right of action. It is incorrect and fallacious to say that the placing a woman who has once departed from habits of virtue on the same footing with the most virtuous is no wrong to society.

† We may here observe that Lord Brougham, in the evidence which he is understood to have given before the Committee of the House of Commons on the law of libel in 1834, intimates an opinion that the law of England is in this respect too favourable to a defendant. We have given in the Appendix (p. 151), what has been stated to be the substance of his Lordship's opinion as delivered on that occasion. We also understand that M. Dupin, who gave evidence before the same Committee, intimated a strong opinion that the law of France, which excluded proof of the truth in cases of imputation on private character, was founded on just grounds. We have given in the Appendix (p. 154), the substance of what M. Dupin is stated to have said on the subject.

auxiliary in some of the cases of privilege where the presumption of law on the ground of privilege is not completely exculpatory of the defender. This circumstance consists in the *truth* of the fact for the imputation of which the action is brought."

Mr. Borthwick intimates that the question as to the *veritas convicii* has given rise to more discussion and diversity of opinion in Scotland and other countries than any other point connected with the doctrine of verbal injuries. And he attributes much of this dispute to the conflicting and unsatisfactory opinions which the commentators upon the Roman law regarding this subject have delivered. Hence (he says) we may account for the opposite opinions as to the right to plead, and the effect of proving the *veritas convicii*, which have been supported by Scottish lawyers amidst the great learning and infinite ingenuity to be found in the printed pleadings which have taken place in some of our cases on the subject of defamation. After commenting on the general and peremptory rule of the law of England which constitutes the truth an absolute bar to an action for damages, the learned writer states a long list of cases litigated in the Scotch courts, from which he concludes that the law of Scotland does not even yet possess any definite settled rules on this important subject.

Secondly, we proceed to notice some provisions of the existing law, in respect of the act of the party making the communication, and the means used. Offences of this description, as regards personal reputation, are limited to written communications or libels, as contradistinguished from such as are merely oral. Such distinctions are, for reasons which have already been adverted to, of an artificial character, but are strongly supported on grounds of convenience. Other injurious communications, and particularly such as are of a blasphemous or seditious description, are not limited by the same strict rule, and are declared to be criminal, although they be merely oral. It is remarkable that the question whether the mere composing and writing a libel be sufficient to constitute a crime, without any actual publication, does not appear to have ever been completely settled. It was one much discussed in Sir Francis Burdett's case,* but as there had in that case been a publication, although some doubt existed whether it could be regarded as a publication within the county in which the offence was alleged to have been committed, the abstract question whether the mere act of composing and writing a libel without any publication, was not decided.† After having investigated the subject with great attention, we have not been able to attain to the conclusion that the offence was ever deemed to be complete at common law without some publication. The law of libel as received in the ordinary criminal courts was undoubtedly an emanation from the Court of Star Chamber. The doctrine of the Star Chamber was borrowed from the Imperial Law of Rome, concerning the *libellus famosus*, to which the libel of the English law was supposed to bear a close resemblance. After having diligently examined these sources,‡ as well as the modern decisions said to be founded upon them, we have not discovered any authority which we have deemed sufficient to warrant us in including this offence in the Digest.

It will be seen from our Digest that even the statute law is not uniform on this point. Some offences are made to consist simply in composing and writing, or printing; whilst in others, publication is essential to the crime.

Thirdly, we are to consider the provisions of the law of England as regards the materiality of the motive of the party, and the occasion of publishing. The law

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* 4 Barn. and Ald. 95.

† Mr. Justice Holroyd expressed an opinion upon the abstract proposition in the affirmative.

‡ It is to be observed that the *libellus famosus* of the Roman law, which was a secret denunciation of an alleged offender on a capital charge, bears but a remote analogy to the modern offence of publishing a libel. The following are the principal authorities of the imperial law on this subject:—

"Si quis famosum libellum sive domi sive in publico vel in quocunque loco ignarus offenderit, aut discerpat priusquam alter inveniat, aut nulli confiteatur inventum; nam quicunque obtulerit inventum, certum est ipsum reum ex lege retinendum, nisi prodiderit auctorem; nec evasurum pœnas hujusmodi criminibus constitutas, si proditus fuerit cuiquam retulisse quod legerit." (Theod. Cod. lib. 9, tit. 34.)

By the edicts of the Emperors Valentinian and Valens:—"Si quis famosum libellum ignarus repererit, (Cod. lib. 9, tit. 36,) aut corrumpat priusquam alter inveniat, aut nulli confiteatur inventum. Si vero non statim easdem cartulas corruperit vel igne consumpserit, sed earum vim manifestaverit, sciat se quod auctorem hujusmodi delicti capitali sententiæ subjugandum."

Again, in the Codex Justinianus de famosis libellis, "Famosis libellis si quis scripserit quod pertineat ad injuriam alterius, (Cod. tit. 36,) de quâ est publica accusatio et pœna capitalis, non tantum in auctorem famosi libelli, sed etiam in eum qui invenit nec combussit *sed evulgavit;* quia iste auctor præsumitur esse libelli, qui eum *sparsit in vulgus* non prodito auctore."

admits the three classes of cases to which in the discussion of principles we have adverted, and which, as we have already intimated, are founded on distinctions essentially inherent in the subject matter. In the first place, the law recognizes numerous instances in which the occasion renders it necessary to exempt the party from the ordinary penalties to which a libeller is subject. This distinction is founded on the principles to which we have already adverted; it would manifestly be highly inconvenient that the judge, juror, or witness, should be answerable in this form of proceeding, in respect of matter which he was bound to publish in the course of his duty.

The law does not, however, afford any very definite rule or test for determining the extent to which the principles which render this distinction necessary are to operate. We have, therefore, pursued the following as the safest course. We have endeavoured to extract from precedents and authorities such a general and comprehensive rule upon the subject as they seem to warrant. We have also digested the decided cases to be found in the books of reports, relating to this branch of the subject. It will remain for subsequent consideration, whether it will be convenient to retain the one or the other of these, or both of them, adopting the decided cases so digested, and also the further general rule to be applied to any other instances which may fall within the same principle.

With respect to this class of communications, where the occasion wholly exempts the parties who make them from criminal liability, there is one instance which peculiarly calls for remark, as well on account of its importance as the discrepancy of authority on the subject. We advert to the rule so frequently recognized, which justifies or excuses, or perhaps more properly warrants and authorizes, true reports of judicial proceedings. The principles which support such a rule are too plain to require observation or comment, they apply with peculiar force to the exigencies of a country where a system of unwritten law prevails to a great extent, and consequently where it is most essential that those proceedings which are evidence of the law itself should be known to all, and that except in some instances of exception, where restraint is necessary on special and peculiar grounds, great latitude ought to be afforded in respect of such communications.

We have, in the Digest, stated the law as we find it laid down by Lord Chief Justice Eyre, upon the trial of the case of Curry *v.* Walter,* and afterwards by the Court of Common Pleas, on a motion for a new trial. This case was afterwards cited and approved of by Mr. J. Lawrence, in the case of the King *v.* Wright;† observing that "though the publication of such proceedings may be to the disad- "vantage of the individual, the having these proceedings made public more than "counterbalances the inconvenience to the private persons whose conduct may be "the subject of such proceedings." The truth of this position has no doubt been questioned, and to a certain extent directly impugned, and particularly by the decision and language of the court in the case of the King *v.* Carlile.‡ That was the case of a criminal information against the defendant Mary Carlile, for a libel entitled "the mock trial of Mr. Carlile," but which contained a correct account of what had taken place upon the trial, in the course of which the whole of Paine's "Age of Reason" had been read. And the Court held, that though as a general position it was certainly lawful to publish the proceedings of courts of justice, yet it must be taken with this qualification, that what is contained in the publication must neither be *defamatory of an individual*, tending to excite disaffection, nor calculated to offend the morals of the people; for if its contents were calculated to produce such effects, instead of disseminating useful knowledge, it would produce great mischief. And in the same case Bayley and Best, J. J. observed, that the case of Curry *v.* Walter must be taken with great qualifications. These opinions tend to impugn the generality of the doctrine expounded in Curry *v.* Walter. It is, however, to be observed, that in that case the complaint against the alleged libel was, that it contained matter defamatory of an individual; and it is difficult to suppose that in respect of blasphemous, immoral, or seditious publications, the Court of Common Pleas, had their attention been called to reports of trials on which libels of these descriptions had been read, would not have expressed an opinion similar to that afterwards given by the Court of King's Bench in Carlile's case. As the privilege in such cases is founded upon grounds of public policy and convenience, it ceases

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* 1 Bos. & Pul., p. 525. † 8 Term Rep. 203. ‡ 3 Barn. & Ald. 167.

where the nature of the investigation is such that to publish it would obviously be offensive and injurious to the public, as where it involves blasphemous or indecent matters. Where the very object of the inquiry was to protect the interests of religion, morality, decency, and good order, by repressing impious, blasphemous, and obscene or seditious publications, it would not only be impolitic, but inconsistent, to allow the same matters to be afterwards published with impunity, as parcel of the judicial proceeding. The opinion of the Court of King's Bench, however, wa not confined to blasphemous, seditious, or immoral publications, but extended to such as are defamatory of individuals; in this respect the opinion of the Court is at variance with that of the Court in the case of Curry *v.* Walter. Considering, however, that the decision of the Court in the latter case was not only a direct one, but under the circumstances, a very strong one, inasmuch as the proceeding reported was *ex parte* against the plaintiff, Mr. Curry, and that the general doctrine of the court in that case was afterwards sanctioned by the Court of King's Bench in Carlile's case, and has never been overruled, we conceive ourselves to be bound to treat the decision in that case, as consonant with the existing law. We think that we are justified in respectfully expressing our opinion that the restriction attributed to the Court in the case of the King *v.* Carlile; viz. that no report of a trial which involves matter defamatory of an individual can be justified, would be almost destructive of the principle on which the general exemption in such cases is founded. If the rule admitted to exist is applicable only where nothing defamatory is published, it is nugatory as a protection,—in such a case no exemption is wanted. If, however, such a restriction were to prevail it would seldom happen, especially in criminal cases, that any report of a judicial proceeding could safely be published.

We have next to advert to a class of communications, with respect to which, although a rule of law seems to have been established, it is one which is at variance with every day's practice and experience. It has in several instances been held that even a true report of an *ex parte* proceeding before a magistrate, which reflects on the character of an individual, is illegal, and is the subject as well of a civil action to recover reparation for the injury to reputation, as of a criminal prosecution, inasmuch as the law not only does not recognize the right to publish such preliminary proceedings, but even deems them to be *per se* criminal, on account of their tendency to create prejudices inconsistent with the impartial administration of justice. In this respect every day's open and ordinary practice is strangely at variance with a direct and settled rule of law, which professes to be founded on a principle of excluding a practice prejudicial to the course of justice. It is notorious that no preliminary inquiry takes place before a magistrate or coroner, of the slightest public interest, the particulars of which are not immediately communicated to the public by means of the daily press. It must be wrong either that the rule should exist or that its open and daily violation should be tolerated. If the mischievous consequences which are alleged to be the foundation of this criminal rule do in reality result from the practice, it is no slight reproach to the practical administration of the criminal law that the practice should be permitted to exist almost without restraint. If, on the contrary, no such inconvenience results as ought to constitute a prohibition, the rule is not merely useless, but may be abused for unjust and oppressive purposes in particular instances, and a party who has done no more than is daily allowed to be done with impunity would have just ground for complaining of a deviation from the ordinary course to serve particular purposes. Finding that such a rule is sanctioned by several authorities, we have accordingly introduced it into the Digest. We cannot, however, but think that either the law ought to be subject to some limitation, or that, if really found to be essential to the ends of justice, it should, for the attainment of those ends, be better enforced.

It cannot be doubted, as a general principle, that the proceedings in courts of justice ought to be open, and that publicity is valuable as affording a security for the just administration of the law, as conducive to the knowledge of right, and as essential to give due effect to judicial decisions, especially such as inflict punishment on delinquents by way of example to others. To this general rule there may no doubt be some exceptions,—some particular cases in which, for special reasons, it may be expedient, or even necessary for the purposes of justice, that proceedings of a preliminary nature should be conducted in secrecy. In such cases, and for such a purpose, it may be very fitting that the court or magistrate should have a

discretionary power to proceed accordingly; and, as essential to the same object, should have authority to prohibit the publication of the proceedings, in which case any such publication would constitute an indictable offence, as being in violation of an order made by competent authority for the advancement of justice.

The offence thus far would rest on very plain principles. In ordinary cases, where no such special grounds exist, and where the public are not excluded from the preliminary inquiry, we are disposed to think that very little inconvenience is likely to result from a public report of the proceedings; indeed, it sometimes happens that such reports further the ends of justice, in drawing forth important information which otherwise would not have been obtained. We may further remark, that where the public are not excluded from such an inquiry, there is some degree of inconsistency in prohibiting a publication of the proceeding. Where nothing but want of space prevents all who choose from being present, it is difficult to say on what grounds those excluded may not receive information from those who are present; it is besides almost certain that those likely to make any improper use of such knowledge would be present to obtain it.

The observation which we have just made is also in some measure applicable to the publication of proceedings from time to time during the course of a protracted trial. Such publication has not unfrequently been prohibited by an order of the court. It may, however, well be doubted whether such an interdiction be not in some degree inconsistent with the principle of an open public court, and whether danger or inconvenience to justice can reasonably be apprehended from publications of the proceedings in parts, previously to their conclusion. It is but, in fact, to communicate to the portion of the public excluded by want of space that knowledge which all possess who find admission, and amongst them those in particular who alone are likely to make an ill use of that knowledge.

The law of England also recognizes the class of cases where, so far as intention is concerned, the offence depends on the actual intention of the party who makes a communication which is in itself injurious, but where it is made upon an occasion which justifies or excuses the party making it, provided that he acted *bonâ fide* in reference to such occasion, in making a fair representation. Whether the occasion be such as to constitute the communication a privileged one is a question of law for the decision of the court; whether the party, in making the communication, acted with an honest motive, or took advantage of the opportunity to gratify a malicious intention, is a question of fact to be decided by a jury. We have in respect of this class of cases proposed such general rules as appear to be warranted by the cases which have occurred and been decided on this subject.

The law of England having thus recognized the two classes of cases in which the occasion either supplies an absolute defence to a prosecution for libel, or a defence subject to the condition that the party acted *bonâ fide* without malice, a third class is left, where the occasion neither constitutes an absolute defence nor a qualified one, dependent on the absence of actual malice. In such cases, although the law in this as in all others deems a malicious publication to be essential to the offence, it also deems the publication of illegal matter without lawful justification or excuse to be malicious. Malice in such case is a legal inference, to be made from the doing an illegal act without justification or other excuse from circumstances. We proceed to make a few observations on this subject, as preparatory to some remarks on the history of the law of libel in connexion with the Libel Act. The charge against a defendant in a case of libel consists in the allegation that he published the matter stated to be libellous,* and the further allegation that he published it *maliciously*. If, then, there be no doubt as to the fact of publication, the only question is, whether the defendant published the matter *maliciously;* and, in the absence of any circumstances which supply an absolute or qualified defence, the question is simply whether he was guilty of malice in law,—that is, whether he wilfully published that which it was illegal to publish. The ultimate question, therefore, depends wholly on the nature and quality of the matter published. In case it were a libel, the act of publication would be malicious in law; but if the matter published were not illegal, then there could be no malice in law and no malicious publishing, and the defendant would not be guilty of the offence charged, to which malice is essential; for malice in law cannot possibly be inferred

* Of course with such allegations as are essential to its application, but which for the present purpose need not be adverted to.

from the doing of an innocent act. Let it be supposed, by way of illustration, that the defendant has published of A. B. that he has been guilty of fraud by cheating at cards; that the publication is proved; and consequently that the only remaining question is, whether the act was done maliciously. In the absence of any justifying occasion, the matter published, being in its own nature injurious and illegal, would be deemed to be malicious, and the defendant would properly be convicted. Let it be supposed, however, that the matter published had been simply this:—"A. B. is "an unskilful player at whist." On the publication having been proved, the question would be, whether it was a malicious publication, and such it clearly would not be. Such an assertion would be injurious to no man's character: the matter published could not be deemed to be illegal, and consequently the publication could not be regarded as a malicious publication. Malice in law, as we have already had occasion to observe, cannot result as an inference of law from the doing of a legal act; it is properly an inference from the doing an illegal act (not merely an act alleged by the prosecutor to be illegal) without lawful justification or excuse. Unless, therefore, the matter published were illegal and libellous, there would be no foundation for an inference or verdict of *guilty*; for such a verdict includes a finding guilty of all that is essential to the charge, and consequently of the allegation of malice, where there was no malice either in fact or in law. Although such a verdict would be unjust in case the matter published were not libellous, the defendant would have it in his power to arrest the judgment or to reverse it upon error; not, indeed, on the precise ground that an act in itself innocent could not supply an inference of malice, but because, according to the technical form of proceeding, it would appear on the face of the indictment that the matter charged as libellous was no libel,—as for instance in the case put, of charging the prosecutor not with fraudulent practices, but only with unskilfulness at play,—and the judgment would accordingly be arrested or reversed. This would not afford a remedy, it would only show that injustice had been done. If there was no libel, there was no malicious publication, and so the party was not guilty of the alleged offence; he ought, therefore, to have been acquitted; he ought not to have been put to the expense and trouble of extricating himself from an unwarranted verdict; and, at all events, ought not to have been subjected to the obloquy of a recorded conviction, from which, indeed, even the arrest or reversal of the judgment does not entirely relieve him, as the malice of his conduct stands recorded. For these reasons it seems to be clear, that in the case of an indictment for publishing a libel, as in every other case, a party is entitled to his acquittal unless all the allegations put in issue by the plea of not guilty are decided against him, as well in point of law as in fact. So long as it is doubtful whether a fact essential to guilt be proved, or whether the quality of such facts as are proved be such as to constitute guilt, a speculative verdict of guilty cannot be adversely founded.*

A defendant, therefore, if these observations be correct, cannot be found guilty where the case turns on implied malice, unless the matter published be a libel in point of law. Upon the question of libel or no libel, no doubt seems to have been entertained previously to the Libel Act, and no essential alteration seems to have been made by the Act in that respect, that the Court is to decide upon it as a mere question of law. It must be so decided on demurrer, on motion in arrest of judgment, on a writ of error brought, and on a special verdict whenever the jury find one. We now advert to the practice which previously to the Libel Act in cases where the publication of the alleged libel having been proved, and no justification arising from the occasion, the question depended on malice in law. Under these circumstances several very learned judges successively held that as the question really depended on the quality of the alleged libel as stated upon the record, the proper mode of deciding the question would be by reference to the Court above, who would decide on inspection of the record, and that a verdict of guilty under such circumstances would be but equivalent to a special verdict in other cases, and the whole matter would be decided by the opinion of the Court upon the alleged libel as it stood on the record. But although it be true that the judgment of the Court above when given would decide the whole case, and that if the publication were not libellous the defendant would be able to arrest the judgment, the objection to this course was not by that means removed, viz. that the defendant was entitled to his acquittal at once upon the trial, for if the matter was

* In the case of a special verdict, or a verdict by consent, in order to the more convenient determination of a question of law, the objection of course does not arise; the party is not really found guilty until the matter has been adjudged against him.

not libellous and illegal there could be no implied malice, and so he was entitled to an acquittal, issue having been joined on malice as well as upon other essential allegations. The assimilating a verdict of guilty in the case of libel to a special verdict in other instances was obviously fallacious, in this respect, that in the ordinary case of a special verdict the defendant is not found to be guilty until the Court has decided on the facts specially found; whereas upon a general verdict of guilty in the case of libel the defendant would be deemed to be guilty, unless he arrested the judgment or reversed it on error. In taking the course which the Court did in directing a verdict of guilty to be found on the mere proof of the publication of the libel and truth of the innuendos, they seem not to have sufficiently considered that although the question of libel or no libel was upon the record, it was one also essential to an issue raised by the defendant's plea of not guilty, and that without a finding against him on the denial of malice he could not legally be found guilty. As the malice, which was an essential ingredient in the offence, depended wholly on the quality of the matter published, that being legal there could be no malice by implication, in other words the defendant was innocent. If in such a case the judge had informed the jury at the trial that the matter published was not libellous, he must have told them that no malice in law was proved, and consequently that the defendant was entitled to his acquittal.

It is, no doubt, occasionally conducive to the ends of justice that a special verdict should be found, in order that the law in a case of difficulty may afterwards be applied; but in such cases no fact is found but on sufficient evidence, no presumption of intention made on legal grounds which is not sanctioned by the Court, and the jury is in no case compellable to return such a verdict. But according to the practice in the case of libel, a general verdict of guilty was required to be found in all such cases; the jury were not allowed to exercise any option, and the inference of guilt, so far as regarded malice, was required to be made without the sanction of the judge's opinion, that it was one which was warranted by the facts. It was, we apprehend, with a view to the removal of these anomalies that the Libel Act was passed, without any intention to enlarge the province of juries, by investing them with any judicial authority to determine what shall constitute a libel. A jury could not exercise such a power of judging without inconsistency and a probable conflict of decisions, unless they were invested with conclusive authority. If their finding the publication not libellous ought to be conclusive for the purpose of acquittal, it should seem that a contrary finding ought to be conclusive for the purpose of conviction.

The course of directing juries, in the class of cases under consideration, to find the defendant guilty on proof of the act of publication and truth of the innuendos, having been in several instances adopted,* though not without much resistance and discussion, gave rise to the st. 32 of King Geo. III., c. 60. In that Act it is recited that doubts had arisen, whether, on the trial of an indictment or information for the making or publishing any libel, where an issue or issues are joined between the King and the defendant or defendants, on the plea of not guilty pleaded, it be competent to the jury impannelled to try the same to give their verdict upon the whole matter in issue; and it is then *declared* and *enacted* that on every such trial the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed by the Court or judge before whom such indictment or information shall be tried, to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information. By the second section it is provided, "That on every such "trial the Court or judge before whom such indictment or information shall be "tried, shall, according to their or his discretion, give their or his opinion and direc- "tion to the jury on the matter in issue between the King and the defendant or "defendants, in like manner as in other criminal cases." By the third section it is also provided, "That nothing herein contained shall extend, or be construed to "extend, to prevent the jury from finding a special verdict, in their discretion, as in "other criminal cases." And by the fourth section, "In case the jury shall find "the defendant or defendants guilty, it shall and may be lawful for the said defendant "or defendants to move in arrest of judgment, on such ground and in such manner

* By Lord Mansfield, in Woodfall's Case, 5 Burr. 2661; by Buller, J. in the Case of the Dean of St. Asaph, 3 T. R. 428, note; Rex *v.* Withers, 3 T. R. 428.

"as by law he or they might have done before the passing of this Act, anything "herein contained to the contrary notwithstanding."

The object of that statute, as well as its effect, appears to consist simply in putting the trial for libel on an information or indictment on the same footing with an information or indictment for any other offence. The essence of this declaratory statute consists in the negative enactment, that the jury shall not be required or directed to find the defendant guilty merely on proof of the publication of the alleged libel, and of the truth of the innuendos; an enactment which, we apprehend, was fully justified by the reason already given, that the facts so proved could not of *themselves* constitute guilt.

The statute leaves the question of libel or no libel a mere question of law. It was clearly considered to be such before the passing of the Act, for the very grounds for calling on the jury to pronounce a verdict without reference to the contents of the alleged libel, was in order to have that question considered as raised by the Record. And there is nothing in the Act which at all warrants the jury in dealing with this question as one of fact. They are indeed enabled to give a general verdict, including law and fact, but so they may in any other case. And the fourth section expressly provides that in case of a verdict of guilty, the defendant may, as before the Act, move in arrest of judgment. So the defendant may, if he please, demur to the indictment, or bring a writ of error, in which cases also the question is one of law for the consideration of the Court. So it is competent in any case for the jury by finding a special verdict to leave the question to the judgment of the Court.

In the case of the King *v.* Burdett,* Mr. Justice Best observes, "It must not "be supposed that the statute of George the Third made the question of libel a ques- "tion of fact; if it had, instead of removing an anomaly it would have created one. "Libel is a question of law, and the judge is the judge of the law in libel, as in all "other cases; the jury having the power of acting agreeably to his statement of the "law or not. All that the statute does, is to prevent the question from being left to "the jury in the manner in which it was left before that time. Judges are, in "express terms, directed to lay down the law *as in other cases*. In all cases the "jury *may find* a general verdict; they do so in cases of murder and treason, but "then the judge tells them what is the law, though they may find against him, "unless they are satisfied with his opinion."

By the second section the Court shall, *according to their discretion*, give their opinion and direction to the jury on the matter in issue between the King and the defendant, as in other criminal cases. As a general rule, so far as our experience extends, it is usual for the judge to inform the jury in respect of the legal quality of all the facts proved, or which the evidence tends to prove, so far as the legal quality of such facts is essential to the issue; that is, to the guilt or innocence of the accused. In the case of libel, where the circumstances neither bar the indictment nor show the communication to be a privileged one, so as to render proof of express malice essential to the offence, the questions are, whether the defendant published the alleged libel in the sense attributed by the innuendos, and whether he acted of implied malice: such malice depends wholly on the question whether the matter published is or is not libellous, it being clear that malice cannot be implied in law from an act wholly innocent. In order then to warrant a jury in finding a verdict which includes malice, they ought to be satisfied either by information from the Court or of their own knowledge, that the matter published is libellous; and certainly, in conformity with the ordinary practice in criminal cases, they ought to act on the information of the Court. To what extent a Court is bound to give such information we presume not to inquire; it is a point on which, by the express terms of the Libel Act, the Court is to exercise a discretion. It is, however, manifest that in all such cases, the verdict in justice depends simply on the quality of the alleged libel, that is, on a question of law; and that the more a jury is exposed to doubt and error in such cases from being left to decide what is not properly within their province, the greater danger must there be of an erroneous conclusion; one which may, it is true, be set right at some expense and trouble to the defendant, in case the jury find him guilty of publishing that which turns out not to be libellous, but which admits of no remedy in case of an erroneous acquittal.

Although the history of the former practice upon trials for libels, which gave rise to the Libel Act, is more immediately connected with the branch of criminal

* 4 Barn. and Ald. 131; and see 4 Bing. 195.

procedure than with the present subject, yet its intimate connexion with, and illustration of the doctrine of implied malice will, we trust, justify the above observations on the present occasion.

It is of the highest importance that the provinces of the Court and jury should be kept perfectly clear and distinct; great and inevitable confusion must else obstruct the administration of justice through the medium of this ancient and popular tribunal. The rule of distinction has been established from very early times: "*Ad quæstionem facti respondent juratores, ad quæstionem juris respondent "judices.*" As libel is a matter of legal definition, it must universally be a question of legal judgment whether the facts found are or are not comprehended within that definition.

To make so important a question as that of libel an exception would constitute an anomaly, and, as appears to us, an unfortunate one, for no other case can be selected in which the just application of the law to the facts is so difficult; consequently there is none in which the delegation of the duty to a jury would be more likely to occasion confusion and inconvenience. We should not have extended these observations so far had we not apprehended that some discrepancy of opinion exists on this subject, and had we not considered it to be most important that any doubt on this head ought to be laid at rest by legislative authority.

When the simple rules as to libel were first established, that is, when printing was yet unknown, when few could read and fewer still could write, the offence of publishing a libel was of rare occurrence. The vastness of the change which a different state of education and society have wrought in this respect may be in some measure estimated by the consideration that there are few, if any, of the higher or middle classes of life who are not, in legal strictness, amenable for transgressions of these rules. Every one who delivers to another any book, magazine, or newspaper, containing any libellous matter is, in point of law, guilty of an illegal publication. The libraries of the Universities and of numerous persons of literary attainments usually contain many books, ancient as well as modern, of a very libellous description. It is true that many reasons may be urged for allowing books or engravings to be contained in such depositories for the purposes of study, or of literary or scientific research, although much mischief might result to religion or morals from their more public exhibition. The law, however, knows no such distinction, but subjects all who are concerned in the publication of the same illegal matter to the same penalties. A law which thus includes within its scope the subjects of the realm by thousands, which would, if rigidly enforced, consign to the flames and subsequent oblivion many works, ancient as well as modern, which not unfrequently find a place in distinguished libraries, would, if so enforced, be scarcely tolerable. The reason why so indiscriminate a law is less oppressive than might have been expected seems simply to be this, that it is but rarely put in force. In stating this we of course confine the remark to the criminal branch of the law, for undoubtedly instances have occurred of civil proceedings of a very harassing nature, where successive actions have been brought against mere vendors of newspapers in respect of the very same personal libel. But as regards civil actions such practices receive a considerable check from the provision which may prevent even a successful plaintiff from obtaining costs where the damages recovered do not amount to 40*s*. In respect of the criminal proceeding there is still less temptation to prosecute, inasmuch as the prosecutor can obtain no costs, and the fine, if one be imposed, belongs to the Crown. Although less of inconvenience than might have been expected thus results from the operation of so very extensive a law, it is one which sometimes bears harshly upon booksellers. It has generally been considered that the sale of a book in a bookseller's shop, although it be by an agent in the ordinary course of dealing, is *primâ facie* evidence of a sale by his authority and of his knowledge of the contents of the book, and consequently of an illegal publication where the contents are libellous. This may, in many instances, be productive of hardship. In the case of a very extensive dealer, or in the ordinary case of an auctioneer who sells a library, it may be harsh to infer a knowledge of the contents or even character of every book that he sells for the purpose of founding upon it an inference of guilt. It is the less easy to suggest any remedy against hardship in such cases, inasmuch as it does not arise from any peculiar severity of the law specially aimed against persons so situated, but from an application of the ordinary rules of evidence which cannot be avoided without the risk of incurring an opposite inconvenience. As a general rule an agent employed to conduct the business of the principal may be presumed to act by his authority, so long as he

acts within the apparent scope of his duty—a contrary rule, or one which required express proof of authority in respect of each distinct act of dealing, would be, in a great measure, to exempt such a principal from liability for the acts of his agent, and would be sufficient to afford almost entire impunity to a principal dealer in libels. It seems to us that it might be desirable, in cases where a principal was indicted in respect of the sale of a book by an agent, that the penalty should be small, unless knowledge of the contents of the libel were expressly proved. Whilst it seems to be harsh and unreasonable on the one hand to make even a *primâ facie* presumption that every bookseller, however great the number of his agents, is acquainted with the contents of every book sold or disposed of in the ordinary course of trade; it is, on the other hand, but reasonable that those through whom noxious works are dispersed, and without the aid of whose exertions and capital offensive works could not be extensively circulated, should be required to use due caution to prevent injury to the public.

There is no doubt a difference, in point of morals, between the deliberate publication of a pernicious book, and a mere want of due caution in not exercising that degree of vigilance which might have prevented the sale of such a book, to the detriment of society. It is not, however, very material whether men's morals are depraved intentionally, or through negligence in such cases. And in reference to the ordinary principles of criminal jurisprudence, it is difficult to distinguish between an injury wilfully inflicted, and one occasioned by culpable negligence. We do not, therefore, conceive that it would be expedient, were it even practicable, to found any distinct provision simply against culpable negligence on the part of booksellers. But in case of the sale of a libellous work after express notice, or in case of actual knowledge of the illegal nature of the book published, we think that the punishment might reasonably be extended, as the offence in such case undoubtedly derives an aggravation from the responsible situation of the defendant as regards the public.

We find that, amongst other provisions contained in a Bill, entitled "A Bill to alter and amend the laws respecting libels," ordered by the House of Commons to be printed, 29th March, 1833, is the following:—"And whereas doubts have "been entertained as to the liability to criminal prosecution of proprietors, printers, "and publishers of newspapers, books, and other publications in certain cases, be "it further enacted, that any criminal prosecution for libel against any proprietor, "printer, or publisher of any newspaper, book, or other publication containing "any libel, it shall be competent to such proprietor, printer, or publisher to give "in evidence, on the trial of the indictment, that at the time of the publication of "such libel, and previous thereto, he was incapable of participating in, or con-"trolling, or was not cognizant of the writing, printing, or publishing thereof; and "if it shall appear upon such evidence, to the satisfaction of a jury, that such "proprietor, printer, or publisher was, at the time of the publication of such libel, "and previous thereto, incapable of participating in, or controlling, or was not "cognizant of the writing, printing, or publishing of such libel, the jury may "return a verdict of 'not guilty' as against such proprietor, printer, or publisher." And in another proposed Bill, entitled "A Bill to secure the liberty of the press," and ordered by the House of Commons to be printed, 2d March, 1837, it was (by clause 21) proposed to be enacted, "That in any prosecution for a libel, "whether public or personal, it shall be lawful for the defendant to give in evidence "that such libel was made and published without his privity, consent, or know-"ledge, the better to enable the jury to decide whether or not, under all the "circumstances of the case, the defendant be guilty."

It appears to us, as regards the latter proposed enactment, and also so much of the former as relates to the power of giving the matters suggested in evidence on the part of a defendant, that the only possible objection is, that where a principal is sought to be charged by proof of sale by an agent, such evidence is admissible by the present law, for such evidence against the principal is but matter of presumption for the consideration of the jury, and as such is liable to be rebutted by any evidence whatsoever which tends to negative that presumption; and with respect to the latter part of the former proposition, viz., that on such proof as there suggested having been given, the jury *may* return a verdict of not guilty. We also think that such a provision is unnecessary, inasmuch as under the existing law a jury would, we conceive, be warranted in finding a verdict for the defendant, if they were convinced upon the evidence that he had neither directly authorized the illegal act, nor been guilty of culpable negligence in not preventing its being done by another.

Should it be deemed proper, in order to take away the force of some former decisions on this point, which might seem to warrant a different conclusion, it would, we conceive, be proper to express the reason for a declaratory enactment, the object of which would simply be to allow a defendant, charged with having maliciously published a libel, to show that it was published by another without any blame attributable to himself, or, as the case may be, even against his will, and contrary to his express directions.

Acting upon the grounds which we have above suggested, we now proceed to submit the following recommendations:—

Recommendations.

We recommend that in respect of personal libels, two distinct classes of offences should be constituted. That one of these should be founded on the general principle of protection to private reputation against such defamatory imputations as are *false* as well as malicious, That the second should be founded on the principle already established, of protection to the public peace by preventing the publication of libels on private persons, tending to the disturbance of the peace.

That in respect of the former class, the truth of the matter published, when it either directly or by implication contained a charge of misconduct, should be a bar to the prosecution. That in cases within the latter class, the truth of the matter published should in no case be available by way of defence to the publisher of the libel.

But that in either case, and generally, evidence of the truth or falsity of the matter published should be admissible where the occasion of the publication was a privileged one, such as legally to raise the question as to the actual intention of the defendant, whether he acted *bonâ fide* in reference to the particular occasion, or with an actually malicious intention independently of the occasion.

That none but a party defamed, or some other person with his consent, should be allowed to prosecute for the publication of a libel alleged to be false.

The grounds for these suggestions have already been adverted to. As regards the first, it has already been observed that the present avowed foundation of the Criminal Law in the case of personal libels is too narrow, as being confined in its object, principally, if not solely, to the protection of the public peace ; we think that it ought to be extended to the protection of reputation as a valuable private possession, against a malicious injury, the remedy afforded by a civil action to recover damages being wholly inadequate to afford the protection which is necessary.

The natural consequence of such an extension of the law is the commensurate admission of the truth of the alleged libel by way of justification ; the extension is founded on the notion of injury to private character, and no such injury exists, at least none such as requires restraint by the Criminal Law with a view to protect character, where the imputation is true, although it may still be necessary that such libels should be restrained, *sub modo*, for a different purpose, viz. the protection of the public peace. The truth of the matter published ought, therefore, to be a bar where the publication within the first of the above classes is alleged to be *false* as well as malicious. A different rule in respect of libels held to be criminal on the principle of protection to reputation, would be inconsistent with the law which provides a civil remedy for such an injury ; that law denies the remedy where the imputation is true, either because no injury is sustained, or because it would be contrary to sound policy to award a remedy in such instances, according to the celebrated response, *Peccata nocentium nota esse et oportere et expedire.* These principles, whether they ought to prevail separately or conjunctively, apply equally to protection through the medium of penal restraint.

We see no objection in such cases, and so far as concerns personal libels, to allow the truth to be a bar, as in the case of a civil action.

Where the contents of the libel are not alleged to be false, but it is written with intent to provoke another to commit a breach of the peace, or where its terms are such as naturally and immediately tend to a breach of the public peace, it seems to us that the truth of the contents of the libel ought not to constitute a bar to the indictment. This stands on the principle recognized by the present law,—it is essential to public peace and tranquillity to prevent their disturbance by the unnecessary publication even of that which is true ; truth itself ought not to be made use of as a colour and pretence for wreaking private malice and producing public discord.

Again, it seems to us that in all cases where, on its being admitted or proved that the party published the alleged libel on some occasion or under circumstances

recognized by the law as affording a qualified justification, dependent on the question whether he acted honestly and *bonâ fide*, in reference to the occasion, or *malâ fide*, and out of mere malice, the truth or falsity of the alleged libel ought to be admitted in evidence, the better to enable the jury to decide on the real motives and intention of the party. It is, we think, plainly inconsistent that in the first place the innocence or guilt of the party charged with libel should be made to depend on the actual disposition of mind and intention at the time of publication, and yet that one of the best and surest tests for deciding that fact should be withheld from the consideration of the jury. It is obvious that to exclude such evidence must often occasion the conviction of the innocent, and still more frequently the acquittal of the guilty; no evidence can possibly be more cogent to show that the party was acting *malâ fide* than the fact that he knew that the injurious matter published was false.

These provisions, we may observe, seem to unite, so far as union is practicable, the ancient with the modern law in respect of personal libels,* and at the same time remove an unseemly anomaly to the general rules and principles of the law of evidence.

Provision for protecting the Editor of a Newspaper, &c., who discloses the name of the Author and Publisher without actual malice.

We further recommend that it should be competent to any person responsible as editor, publisher, or otherwise, of any newspaper or other periodical work, either before or after any prosecution commenced against him in respect of any personal libel contained in such work, to disclose to the party libelled the name of the author of the libel, and to supply him with such evidence as may be sufficient to prove the fact, and in case such disclosure shall be made and proof be given after such prosecution commenced, then to pay or tender to the prosecutor the costs of the prosecution then incurred; and that if such prosecutor shall, after such disclosure made and evidence supplied, and in case such disclosure be not made and evidence supplied before the commencement of the prosecution, also after tender of such expenses, proceed with the prosecution, the defendant, on proof of those facts, shall be entitled to an acquittal, unless the prosecutor shall prove that the defendant published out of actual malice. And that in case the prosecution shall be forborne or suspended by such prosecutor, and he shall by the means of the evidence supplied prosecute the author, whose name shall have been disclosed, the party so having disclosed the author's name shall not be liable to any prosecution, none having been commenced at the time of such disclosure or information, or to any further prosecution, in case of a prosecution suspended as aforesaid, unless the disclosure made and evidence supplied shall be insufficient to occasion the conviction of the party whose name shall have been so disclosed. And that, in case of failure from the insufficiency of the evidence so supplied, the prosecutor shall be entitled to commence a prosecution, or to continue a prosecution already commenced against such original publisher, and to recover from him the costs of such ineffectual prosecution.

We found this recommendation upon the following grounds:—

It very frequently happens that a party responsible, or the editor or publisher of a newspaper or periodical work containing news, may, through inadvertence, without any malicious motive, publish libellous matter. The injurious quality of the libel may frequently depend on circumstances to which he is an entire stranger. In such cases it is obviously politic that the real author of the calumny should be made responsible for his misconduct, and that the instrument of publication, against whom no charge of personal ill-will or malice is made, should not be further amenable. On the other hand, where the party so responsible was himself actuated by malicious feeling in publishing the libel, he ought not, we conceive, to be allowed to discharge himself merely by disclosing the name and furnishing the means of convicting an ostensible author of the libel; there would be danger of collusion, and a publisher actuated by malicious motives in propagating the calumny suggested by another ought, we think, to be dealt with as a principal in effecting the injury.

Some recommendations of minor importance will be found in the Digest and Notes. It will be observed, that the above suggestions are confined to personal libels. To what extent the truth is material upon a charge of a political libel on the administration of the Government, reflecting on the conduct or measures of

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* It is highly probable that by the ancient law of this country the falsehood of a libel was essential to its criminality. We should not deem ourselves to be justified in entering, on this occasion, upon any historical statement in support of this position.

public functionaries, is a question of importance, which properly belongs to the class of offences against the State. Such libels consist more usually in intemperate and inflammatory comments, than on any false allegation of facts. Mere assertions as to public measures which are false in point of fact, can seldom be of any real importance; all such acts are usually of public notoriety, and false statements are easily contradicted and confuted by means of the public press. It appears to us, however, that, independently of any considerations of this nature, proof of the truth of any such allegation ought not to be allowed to operate in bar of any charge of such an offence; for, although the fact be true, the publisher may still be guilty of a malevolent intention to injure society by defaming the Government. The truth, we think, ought no more to be allowed to operate as a complete defence in such a case, than when a personal libel is published with intent to provoke the party reflected on to a breach of the peace. The question, however, whether on a charge for a political libel, evidence of the truth ought to be admitted, with a view to negative a material fact of the charge, viz., the intention to bring the Government into hatred or contempt, is one of a different nature: the truth ought, we think, for that purpose and that only, to be admitted. Prosecutions, however, for such libels are, as we have observed, more usually founded on violent language and comments than upon any mis-statements of facts. The question whether such remarks are made in a seditious and malicious spirit for the purpose of defaming the Government, or are made *bonâ fide* in the exercise of that right to discuss and criticise the conduct and measures of public functionaries, which is the undoubted privilege of the subject, does not admit of proof by evidence as a matter of fact. We may further observe in this place, that the question whether the truth in such cases shall be admitted to the limited extent stated in proof of the *animus*, does not alter or qualify the definition of the offence, but is more properly a question of evidence to be considered under the head of procedure.*

Criminal information.

The subject of proceeding by criminal information will more properly fall under the head of process. We may here however observe that this course of proceeding seems at all events to call for some modification. We think that if the prosecutor be allowed to state the falsity of the imputation as a ground for the application, the defendant ought to be allowed to give evidence upon the trial of the truth of the alleged defamation. We think also that if this mode of proceeding be productive of peculiar advantages, it ought to be rendered more generally available.†

After having attentively considered the grounds upon which the criminal law of libel at present stands, and traced the causes which have given rise to objections against that law, and having submitted what appears to us to be the most expedient course for obviating those objections and removing existing prejudices, we deem it to be proper to state, on the other hand, such objections as suggest themselves to us against any deviation from the present rules and practice of the law of libel. We do this for the purpose of drawing attention to every view of the subject which occurs to us, and also for the purpose of inviting and procuring, so far as we are able, such critical remarks from experienced persons as may serve either to confirm us in our own views, or as may suggest something more desirable, or show that the present state of the law on this subject is such as to require no alteration. The main distinction which we propose is this, viz., to constitute two classes of offences as regards personal libels—the one founded on the principle recognized by the existing law—the preservation of the public peace, the other on a principle of protection to reputation analogous to that of securing property, or any other valuable right, from malicious injury. It would be a necessary consequence of this distinction that the truth of the alleged libel could not be admitted as a bar to the former charge, but ought to be

* The law of France (as stated by M. Dupin) distinguishes between a libel on a private person and one on a public functionary. In the former case, evidence of the truth is excluded; in the latter, it is always admitted. (See the Appendix, p. 155.)

† The advantages of proceeding by criminal information were enlarged upon by Lord Brougham, in the evidence which he is understood to have given before the Committee on the law of libel, in 1834, before alluded to. We believe that his Lordship expressed on that occasion the following remarks:—"The advantage of proceeding by criminal information is this: it erects the Court of "King's Bench (and this was also Lord Erskine's opinion, entitled to great deference on all subjects, "but on none more than on this) into a Court of Honour; which may well administer the law of "honour between party and party, with a due attention both to the wounded feelings of the individual "and to the preservation of the peace. But it has this singular advantage besides, that it enables the "party defamed, on his oath, to purge himself of the offence charged, and gives him an opportunity "of defying his adversary to prove the truth of his accusation." We have inserted in the Appendix (pp. 151 and 152) some further observations which Lord Brougham is stated to have made on this subject.

so admitted in answer to the latter. It may be objected that if this were so, it would rarely happen that any one whose character had been assailed would prosecute for a libel within the first class, as merely tending to a breach of the peace. For if the imputation contained in the libel were false, the aggrieved party would of course endeavour to vindicate his reputation by giving the aggressor the opportunity of proving it to be true,—he would therefore proceed against him for having published a false libel. If, on the other hand, the imputation were true, still the party reflected on would be little likely to prosecute merely for the endeavour to excite to a breach of the peace, such a course would naturally be construed into an admission that the charge was true, and it would be inferred that he dared not venture to challenge inquiry upon the subject. It must be admitted that this would be the probable consequence. What degree of importance is to be attached to that consequence is another question. As regards the party really guilty of the imputation, the objection is weak: being guilty he can have no real claim to protection in respect of character, and were he really placed in a situation of hardship or difficulty, yet as that would be a consequence of his own delinquency, it could afford no reason for withholding protection to those whose characters deserved it. As concerns the public, the consideration would be of little importance; although the party reflected on declined to prosecute, any other person would be at liberty to do so were it necessary, with a view to the interests of the public; and it is probable that the public would derive greater benefit from the exposure of delinquency, than loss from any apprehension of danger to the public peace. We have further to observe that whatever danger or inconvenience is likely to flow from this source already exists. Any inference of guilt which might be made from the election of a party libelled to pursue a course which excluded proof of the truth of the fact, rather than one which admitted such an inquiry, may even now be made, from the election to prosecute by indictment rather than proceed by action or criminal information. Again, the distinction proposed would render some restriction necessary in regard to the prosecutor. It might be attended with great inconvenience if any one were allowed to prosecute in respect of the private offence except the party injured, or some one acting under his authority; for otherwise there might be great danger to the character of an individual by means of a collusive prosecution. If A, a stranger, could prosecute B for an alleged libel on the character of C, who was no party to the proceeding, and B were entitled to set up a justification of the truth of the alleged libel, great injustice, it is plain, might be done to C, (who had no means of becoming party to the proceeding,) either from ignorance of the facts, or from actual collusion. The adoption of such an alteration would therefore render it expedient that it should be accompanied by some provision for the purpose of excluding any inconvenience of this nature. Such, we apprehend, may easily be made; it would consist principally in confining the power of prosecuting in respect of the false libel, or of the injury to reputation, to the party defamed, or some other person who should prosecute with his consent. It might perhaps further be advisable to provide that no one should prosecute for the more general offence in respect of the injury to the public peace without giving previous notice to the party injured, in order to give him an opportunity, if he chose to do so, of becoming the prosecutor.

We have added in the Appendix, by way of illustration, extracts from the code of crimes and punishments, prepared for the State of Louisiana by Mr. Livingstone; and from the penal code prepared by the Indian Law Commissioners; and a statement of the Roman, French, Bavarian, Austrian, and Prussian law of slander and libel.

LIBEL.

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Art. 1.

Definition of Libel.

The essentials to a libel are,—

1st. Some injurious matter or meaning defined by law to be libellous.

2nd. The expression or signification of such matter or meaning by any one or more of the means following, viz., by written, printed, painted, or other visible characters or signs, or by effigies, dramatic representations, (*a*) or other visible devices.

(*a*) See the definitions of the offence cited in the Prefatory Remarks. It may, perhaps, be questioned whether it be not a strained extension of the term "libel" to make it even by definition to include a representation by effigy, but it will be seen that the definition given in Mr. Serjeant Hawkins's Pleas of the Crown, which includes such practices as the fixing up a gallows at a man's door, goes to this extent. The civil law distinguished, and the law of Scotland at the present day distinguishes between verbal and real injury—the former including written as well as oral communications, the latter such as are effected by pictures. Heineccius, lib. 47, tit. 10,in explaining the title in the Digest, "De injuriis et famosis libellis," observes, "Injuriam aliam esse verbalem si quis alteri convicium adversus bonos mores facit vel fieri curat, aliam realem quæ re et facto infertur. Ad priorem etiam, injuria scripturâ, ad posteriorem et per picturam illata refertur." There seems to be little either of principle or practical utility in this distinction of the civil law which constitutes defamation by means of a *picture* a real injury, whilst it regards a calumny in writing, though it convey precisely the same ideas and is equally permanent in its nature, as a verbal one.

Art. 2.

The expression or signification of any matter or meaning so defined to be libellous shall be deemed to constitute a libel, whether such matter or meaning be expressed or signified directly or indirectly, and whether the application of such matter or meaning to persons or things can be collected either from such libel alone, or from such libel by the aid of extrinsic circumstances.

Art. 3.

The wilfully or negligently exposing of any libel to the view of any other person, or the pronouncing aloud of the contents of any libel in the hearing of any other person, or otherwise dealing with any libel, whereby in any of the said cases the matter or meaning of the said libel is made known to any other person; or the sending, delivering, placing, or otherwise disposing of any libel with intent in so doing to make known the matter or meaning thereof to any other person, shall be deemed to be a publication of such libel. (*b*)

(*b*) It is proposed, under the head of Procedure, to introduce an Article for defining the place at which a libel shall be said to be published.

Art. 4.

Every person who shall by composing, dictating, writing, or in any other way contribute to the making of any libel shall be deemed to be a maker of such libel; and in case any libel shall be published, every maker of such libel with intent to publish the same, and every one who shall in any other manner contribute to such publication, shall be deemed to be a publisher thereof.

Art. 5.

Publication when Malicious in Law.

A publication of a libel is of implied malice or malice in law, where the libel is published without lawful justification or excuse.

It is of express malice or malice in fact, where the libel is published with the actual intent to injure. (*c*) When Malicious in Fact.

(*c*) See Prosser *v.* Bromage, 4 Barn. and Cres. 247, and the judgment therein given by Bayley, Justice; in which he says the law recognizes the distinction between these two descriptions of malice, malice in fact and malice in law, in actions of slander. R. *v.* Lord Abingdon, 1 Esp. C. 228; R. *v.* Phillips, 6 East, 470; Brown *v.* Croome, 2 Starkie's C. 297; R. *v.* Creevy, 2 Mau. and Sel. 273; R. *v.* Almon, 5 Burr., 2686; R. *v.* Harvey, 2 Barn. and Cres., 258. As no publication is criminal which is not in its own nature injurious, and as in such cases implied malice is sufficient, it follows that malice in fact is never material to the offence, except in cases of privileged communication, when the occasion would constitute a defence, unless actual malice were proved. It is thus essential to rebut a defence supplied by the special occasion. Malice in law may be answered by showing the occasion of publishing to be a privileged one, but that defence may again be rebutted by showing that the occasion was used but as a cloak for actual malice.

Art. 6.

The act of publication is justifiable where the communication is privileged in respect of the occasion, and is made *bonâ fide* in reference to the occasion, without express malice, and is expressed in no other terms, and published in no other manner, and to no greater extent, than the occasion reasonably requires. Publication when justifiable.

Art. 7.

A publication is excusable where the act is done by a party ignorant, in fact, of the matter or meaning of the libel, and acting with due caution, and having no reason for supposing or suspecting the matter or meaning published to be libellous. Publication when excusable.

Art. 8.

Whensoever evidence shall be given against any defendant for the purpose of charging him with any act of publication by any other person by his authority, it shall be competent to such defendant to adduce evidence to show that such publication was made either against his will, or without his authority, consent, or knowledge, and that there was no want of due care or caution on his part. (*d*) Evidence in defence.

(*d*) An article to this effect properly belongs to the head of "Procedure;" and we have already intimated our doubts whether any such article be necessary, it being, as we conceive, already competent to any defendant whom it is proposed to charge as having acted criminally by the agency of another to repel that charge by any evidence which the case affords. The case of booksellers is one of some difficulty, and occasionally it may be of some hardship; and it may frequently happen that the real offence which the proprietor of a shop has committed is not the deliberate act of vending a criminal book, but of want of care in not exercising such a degree of vigilance and caution as would have prevented the publication. It has occurred to us that, in order to meet such cases, it might be desirable to provide that, "except in cases where a jury should expressly find that the defendant, in "the case of a sale by a shopman or other agent, had actual knowledge of the contents or libellous nature "of the thing published, or had received notice of its libellous nature, he should not be liable to incur "a higher penalty than, &c." Although we have deemed it proper to make this suggestion, we are not at present so far convinced of its propriety as to introduce any formal article to that effect into the Digest.

Art. 9.

It shall be lawful in any criminal proceeding to be commenced or prosecuted for printing (or publishing) (*e*) any extract from or abstract of such of the reports, papers, votes or proceedings of either House of Parliament, as such House of Parliament may deem fit or necessary to be published, to give in evidence under the general issue any such report, votes or proceedings, and to show that such extract or abstract was published *bonâ fide*, and without malice; and if such shall be the opinion of the jury, a verdict of not guilty shall be entered for the defendant or defendants. (*f*) In proceedings for publishing extracts from Parliamentary Papers, it may be shown that such extracts were made *bonâ fide*.

(*e*) These words are not in the statute; but it is plain that the statute was intended to apply to a publishing as well as a printing.

(*f*) 3 & 4 Vic. c. 9, s. 3. Besides the above enactment, the 3 and 4 Vict. c. 9, contains the following provisions, which are referable to the head of Procedure:—"That it shall and may be lawful for "any person or persons, who now is or are, or hereafter shall be, a defendant or defendants in any "civil or criminal proceeding, commenced or prosecuted in any manner soever, for, or on account, or "in respect of, the publication of any such report, paper, votes, or proceedings (of either House of "Parliament, as such House of Parliament may deem fit or necessary to be published) by such person "or persons, or by his, her, or their servant or servants, by or under the authority of either House of "Parliament, to bring before the Court in which such proceeding shall have been or shall be so com-"menced or prosecuted, or before any judge of the same (if one of the superior Courts at Westminster), "first giving twenty-four hours' notice of his intention so to do to the prosecutor or plaintiff in such "proceeding a certificate under the hand of the Lord High Chancellor of Great Britain, or the Lord "Keeper of the Great Seal, or of the Speaker of the House of Lords for the time being, or of the Clerk "of the Parliaments, or of the Speaker of the House of Commons, or of the Clerk of the same House, "stating that the report, paper, votes, or proceedings, as the case may be, in respect whereof "such civil or criminal proceeding shall have been commenced or prosecuted, was published by such "person or persons, or by his, her, or their servant or servants, by order or under the authority of the "House of Lords or of the House of Commons, as the case may be, together with an affidavit verifying

" such certificate; and such court or judge shall thereupon immediately stay such civil or criminal " proceeding; and the same, and every writ or process issued therein, shall be, and shall be deemed " and taken to be, finally put an end to, determined, and superseded by virtue of this Act."—(Sec. 1.)

" That in case of any civil or criminal proceeding hereafter to be commenced or prosecuted for, or " on account, or in respect of the publication of any copy of such report, paper, votes, or proceedings, " it shall be lawful for the defendant or defendants, at any stage of the proceedings, to lay before the " court or judge such report, paper, votes, or proceedings, and such copy, with an affidavit verifying " such report, paper, votes, or proceedings, and the correctness of such copy, and the court or judge " shall immediately stay such civil or criminal proceeding; and the same, and every writ or process " issued therein, shall be, and shall be deemed and taken to be, finally put an end to, determined, and " superseded by virtue of this Act."—(Sec. 2.)

" Provided always, and it is hereby expressly declared and enacted, that nothing herein contained " shall be deemed, or taken, or held, or construed, directly or indirectly, by implication or otherwise, " to affect the privileges of Parliament in any manner whatsoever."—(Sec. 4.)

Art. 10.

What occasions of publishing wholly exempt from penalties.

No person shall be liable to be prosecuted as the publisher of a libel in respect of anything published by him in either House of Parliament, as a member thereof, in the course of his parliamentary duty (*g*); nor in respect of anything published by him as a judge (*h*), or as a grand or petty juror (*i*), in the course of his duty, or as a witness (*j*) or deponent, in any proceeding by due authority, or as a petitioner to Parliament (*k*), or as a party, suitor, or prosecutor, or the agent of a party, suitor, or prosecutor, in any court of justice (*l*), or in respect of any matter otherwise published in the usual course in any court of justice (*m*), or before any magistrate, constable, or other peace officer, in his official capacity (*n*); nor, except as hereinafter mentioned, in respect of any fair report of any judicial proceeding or inquiry; nor, in respect of any statement of the result or fact found to be true by means of any such proceeding or inquiry (*o*); nor, in general, in respect of any communication duly made and required by law to be made by any public officer or other person, for the advancement of justice.

(*g*) No Member of either House is in any shape responsible in a court of justice for anything said in that House, however offensive the matter may be to the feelings or detrimental to the interest of any individual. By the stat. 4 Hen. VIII., c. 8, Members of Parliament are protected from all charges against them, for anything said in either House. This is further declared by the Bill of Rights, 1 Will. and Mary, stat. 2, c. 2. See Lord Kenyon's observations in R. *v.* Lord Abingdon, 1 Esp. Rep., 226; and see R. *v.* Creevy. 1 Mau. and Sel. 273.

(*h*) 2 N. R., 341.

(*i*) Bac. Ab. tit. Libel; Mo. 627; Hawk. P. C., 73, s. 8; Johnson *v.* Sutton, 1 Term Rep. 493. No presentment by a grand jury can be a libel; not only because persons who are supposed to be returned without their own seeking, and are sworn to act impartially, shall be presumed to have proper evidence for what they do, but also because it would be of the utmost ill consequence in any way to discourage them from making their inquiries with that freedom and readiness which the public good requires.

(*j*) Brownlow 2; Harding *v.* Bulman, Hutton, 11.

(*k*) See the resolution of the House of Commons, in the case of Kemp *v.* Gee, Feb. 9, 8 Will. III.

(*l*) With respect to petitioners in Parliament, and suitors or prosecutors in courts of law, it has been held that no proceeding, according to the regular course of justice, will make the complaint amount to a libel, so as to render the party criminally liable, on the ground that it would be a great discouragement to suitors to subject them to public prosecutions in respect of their applications to a court of justice; and that the chief intention of the law, in prohibiting persons to revenge themselves by libels, or any other private manner, is to restrain them from endeavouring to make themselves their own judges, and to oblige them to refer the decision of their grievances to those whom the law has appointed to determine them. Dyer, 285; 2 Ins. 228; 2 Buls. 269; Godb. 340.

(*m*) The reason for which is, 4 Coke, 14, that if actions should be permitted in such cases, those who have just cause of complaint would not dare to complain, for fear of infinite vexation; and, as was observed by Lord Mansfield, C. J., 2 Burr., 817, there can be no scandal if the allegation be material; and if it be not, the curt before whom the indignity is committed, by immaterial scandal, may order satisfaction, and expunge it out of the record if it be on the record. And see Astley *v.* Young, 2 Burr. 817.

Where, in an action on the case by A. against B., the plaintiff declared that he took his oath in B. R. against B., of certain matters, to bind him to his good behaviour; and thereupon B. said, falsely and maliciously, and intending to scandalize the plaintiff, " There is not a word true in that " affidavit, and I will prove it by forty witnesses." On motion in arrest of judgment, the jury having by their verdict found the words to be false and malicious, it was holden by the court that the action was not maintainable, because " the answer which B. made to the affidavit was a justification in law, " and spoken in defence of himself, and in a legal and judicial way." Roll. Ab. 87, Pl. 4; Sir W. Jones, 431, Mar. 20, Pl. 45. Cited by Mr. Just. Holroyd, in Hodgson *v.* Scarlett, 1 Barn. and Ald., 244.

See also Cro. Jac., 432; 3 Bl. Comm., 126; 10 Mod., 210, 219, 300; Str. 691; 4 Co. 14; Dyer, 285; 2 Buls., 269; 2 Burr., 808; 3 Bac. Ab., 492.

(*n*) By Lord Eldon, in Johnson *v.* Evans, 3 Esp. C. 22, and see the case of Ram *v.* Lamley, Hutt. 113. In that case the defendant went to a justice of the peace for a warrant against the plaintiff, for stealing his ropes. The justice said, " Be advised, and look what you do:" and the defendant replied, " I will charge him with flat felony, for stealing my ropes from my shop."

The court agreed that these words, being spoken to a justice of the peace, when he came for his

warrant, which was lawful, would not maintain an action; for if they could, no other would come to a justice of the peace, to inform him of a felony.

(*o*) See the Prefatory Remarks, p. 62. We conceive that when a criminal has been convicted of an offence by due course of law, a party should be equally exempted from penal prosecution, whether he stated the fact that such a conviction had taken place, or simply stated that the person so convicted had been guilty of the crime, *e. g.*, that supposing A to have been found guilty of obtaining money by false pretences, B should be exempted from a prosecution for libel, not only in case he published that A had been so convicted, but also in case he published merely that A had obtained money by false pretences.

Art. 11.

Exceptions to the last preceding Article.

Provided that nothing contained in the last preceding Article shall extend to exempt any party from any penalty in respect of any publication in a proceeding which is wholly extra-judicial, (*p*) both as regards the mode of proceeding and the jurisdiction of the court; (*q*) or to exempt any party from any penalties in respect of the publication of any judicial proceeding or inquiry, which publication contains any seditious, blasphemous, profane, impious, or indecent or immoral matter, (*r*) or in respect of any *ex-parte* or preliminary proceeding before a coroner or magistrate, on any criminal charge. (*s*)

(*p*) See Maloney *v.* Bartley, 3 Camp., 210.

(*q*) Mere want of jurisdiction in the court will not render scandalous matter actionable, Buckley *v.* Wood, 4 Co. 14; per Powell, J., 2 Lutw., 1571. As where a writ of appeal of murder was brought in the Common Pleas, for although the court wanted jurisdiction in the particular instance, the proceeding was in the nature of a lawful suit, Buckley *v.* Wood, 4 Co. 14. But it was held in the latter case that scandalous matter would be actionable if exhibited by means of an improper process, and in a court which had no jurisdiction over the subject matter. In Maloney *v.* Bartley, 3 Camp., 210, Wood, B. held that an indictment would lie in respect of libellous matter contained in a voluntary extra-judicial affidavit.

(*r*) See the Prefatory Remarks on this subject, and also as to excepting matters defamatory of an individual, and the observations of the Court in the King *v.* Carlile.

(*s*) It is not easy to frame any definite rule for deciding in what cases the occasion of publishing shall furnish an absolute and peremptory justification. Such a test is however frequently necessary, on the ground that it would be impolitic and highly inconvenient, in many instances, to allow a party to be made responsible for what he had published, not voluntarily, but on an occasion sanctioned at least by legal authority. The general principle seems to be this, that no man's conduct in publishing ought to be questioned in this form of proceeding, where he has acted in obedience to or according to the exigency of the law—a principle applicable not only to the case of judge, juror, or witness, but also to parties who, for the assertion of right or defence against wrong, are required by the law to proceed according to a certain prescribed course. It is consistent with legal policy that parties thus placed under the necessity, or *quasi* necessity, of making statements which must so often affect the characters of others, ought not to be fettered in the discharge of a duty by the apprehension of placing themselves in the ordinary situation of voluntary libellers. To allow this would oppose a great obstacle to the administration of justice. A party, however, who thus misconducts himself, is usually amenable in some other way. A corrupt witness is liable to an indictment for perjury, and a malicious prosecutor to an action for damages, a judge who misconducts himself to an impeachment.

PERSONAL LIBEL.

Art. 12.

Personal Libel.

A personal libel is that (*t*) which expresses or signifies any defamatory or opprobrious matter or meaning concerning any person, tending to provoke him to wrath or to expose him to hatred, contempt, or ridicule, or otherwise to injure him in his rank, state, situation, or condition in society, or which expresses or signifies any defamatory or opprobrious matter or meaning tending to attach dishonour or disgrace to the memory of one deceased, and thereby to provoke to wrath those of his blood or family. (*u*)

(*t*) See the definitions given by Sir W. Blackstone, and by Mr. Serjeant Hawkins, in his Pleas of the Crown, cited *ante*, pp. 53 and 54. In the draft of a Bill entitled "A Bill to Secure the Liberty of the Press," (and stated to have been prepared and brought into the House of Commons by Mr. O'Connell and Mr. Lynch,) the following definition is proposed:—"The terms *personal libel* shall be construed to include any matter, written or printed, reflecting on or injurious to any individual whatsoever, whether in a public or private station or rank, or office, or employment, or trade, or profession, or business, or occupation." We have, in our own definition, in conformity with the descriptions usually given of the essentials to a libel, specifically stated the *tendency to provoke*, and have used the term *opprobrious* as comprehending scurrilous and abusive terms or representations, which, although they do not impute either any illegal or criminal act, or vicious sentiment or propensity, directly tend to irritation, or to render a man's situation in society uncomfortable; as, if cowardice or some loathsome disease be imputed, or he be represented with a pair of horns, or be made the subject of the vulgar but ancient practice of "riding Skimmington." The reasons for making such offences indictable are well expressed in Bacon's Abridgement, tit. Libel A. s. 2.—"As every person desires to appear agreeable in life, and must be highly provoked by such ridiculous representations of him as tend to lessen him

in the esteem of the world, and take away his reputation, which, to some men, is more dear than life itself: hence it hath been held that not only charges of a flagrant nature, and which reflect a moral turpitude on the party, are libellous, but also such as set him in a scurrilous, ignominious light; for these equally create ill-blood and provoke the parties to acts of revenge and breaches of the peace."

(*u*) An indictment lies for a libel reflecting upon the memory of a person who is dead, if it be published with the malevolent purpose to injure his family and posterity, and to expose them to contempt and disgrace, 5 Co. 125; Hawkins's P. C. c. 73, s. 1; the King *v.* Topham, 4 T. R. 126; for the chief cause of punishing offences of this nature, is their tendency to a breach of the peace; Hawkins's P. C. c. 73, s. 3; 5 Co. 125; R. *v.* Walter, 2 Esp. C. 51; and although the party be dead at the time of publishing the libel, yet (according to Lord Coke) it stirs up others of the same family, blood, or society to revenge, and to break the peace. In the case of the King *v.* Crichley, 4 Term Rep. 129, in the notes, an information was granted against the defendant for publishing the following libel, reflecting upon Sir C. Gaunter Nicoll, Lady Dartmouth's father, and on the Government:—"On Saturday evening, died, of the small-pox, Sir C. G. Nicoll, Knight of the Most Honourable Order of the Bath, and representative in Parliament of the borough of Peterborough. He could not be called a friend to his country, for he changed his principles for a red ribbon, and voted for that pernicious project, the excise." But, as was observed by Lord Kenyon, C. J., in the case of the King *v.* Topham, 4 Term Rep. 129, "To say that the conduct of a dead person can at no time be canvassed; to hold that, even after ages are past, the conduct of bad men cannot be contrasted with that of the good, would be to exclude the most useful part of history." The malicious intention of the defendant, therefore, to injure the family and posterity of the deceased, must be expressly averred and clearly proved.

Art. 13.

Whosoever shall maliciously publish any personal libel, as defined in the last preceding Article, shall incur the penalties of the class. (*v*)

(*v*) See the Prefatory Remarks, p. 70.

Art. 14.

Whosoever shall maliciously publish any personal libel, as defined in Article 12, which shall be false shall incur the penalties of the class (*w*)

(*w*) See the Prefatory Remarks, p. 70. It is proposed under the head of Procedure, to introduce provisions for securing a party against a second prosecution in respect of the same libel, and also for excluding a prosecution for a libel alleged to be false except by the party defamed, or with his consent.

Art. 15.

Privileged Communications.

As regards personal libels, a communication shall be deemed to be privileged in respect of the occasion, whensoever it is made *bonâ fide* concerning any other person for the benefit of any party or of the public, such party or the public having an interest in the making or receiving of such communication (*x*); or for the purpose of admonition or advice, or otherwise for the benefit of the party to whom it is made (*y*); or by petition or otherwise, with a view to the remedy or prevention of any real or supposed grievance (*z*); or with intent to ascertain any fact in the existence of which any party or the public has an interest, for the purpose of legal evidence or otherwise, and for the benefit of such party or of the public (*a*); or for the advancement of justice, or the prevention of any public or private wrong; or with a view to the discussion of any acts, measures, or proceedings affecting the public; or with a view to criticise works of literature, science, or art. (*b*)

(*x*) Rogers *v.* Clifton, 3 Bos. and Pul., 587; Weatherstone *v.* Hawkins, 1 Term Rep., 110; Macdougall *v.* Claridge, 1 Camp. C., 267; Cleaver *v.* Sarraude, ib.; Dunman *v.* Bigg, 3 Camp., 160. In the case of master and servant, the convenience of mankind requires that what is said in fair communication between man and man should be privileged if made *bonâ fide* and without malice. If, however, the party giving the character knows what he says to be untrue, that may deprive him of the protection which the law throws around him; per Lord Ellenborough in Hodgson *v.* Scarlett, 1 Barn. and Ald., 240.

(*y*) 2 Brownlow, 151, 2; 3 Bac. Ab., 412.

(*z*) R. *v.* Bayley, 3 Bac. Ab. tit. Libel, A. 2, cited by Bayley, J., 5 B. and A., 647; Fairman *v.* Ives, 5 Barn. and Ald., 642.

(*a*) See Lord Ellenborough's observations in Delaney *v.* Jones, 4 Esp., C. 191. It is proper to remark, however, that in the later case of Lay *v.* Lawson, 4 Adol. and Ellis, 795, the extent of the rule as laid down by Lord Ellenborough in Delaney *v.* Jones has been doubted.

(*b*) Carr *v.* Hood, 1 Camp. 354; Tibart *v.* Tipper, ib., 350; Stuart *v.* Lovell, 2 Starkie's C. 73; Heriot *v.* Stewart, 1 Esp. C. 437; Dibdin *v.* Bostock, 1 Esp. C. 29; Dunne *v.* Anderson, 3 Bing., 88.

Art. 16.

Definition of "interest."

A party shall be deemed to have an interest within the meaning of the last preceding Article in the making or receiving of any communication not only where the communication is made in discharge of a legal or other duty, but also in all other cases where it may be necessary in reference to the common convenience of society. (*c*)

(*c*) The necessity for this distinction has already been considered. A class of cases necessarily exists in which the criminality of the act of publication must depend on the actual disposition of mind and intention of the offender. This happens when the law cannot, under the circumstances, absolve one who acted of express malice, or condemn one who acted honestly. In such cases, a good or bad

intention must constitute the test of legal distinction. What shall then determine the privileged class, and constitute a qualified justification, is a question of law; until this be defined, it is left uncertain whether malice in law, be sufficient to constitute the offence, so far as regards intention. After much consideration, we are satisfied that no rule less general than that which we have proposed ought to be laid down. To limit the privilege to mere legal exigencies—that is, to occasions where the party publishing acts under some legal warrant or authority would constitute much too narrow a rule. That consideration, indeed, as has been seen, furnishes a test for excluding the proceeding for this offence altogether. It is absolutely necessary to privilege communications in which either the maker or receiver has an interest, using that term as comprehending not only such as are made in reference to a legal interest, or in discharge of a strictly moral duty, but all such as are usually made with a view to the ordinary convenience and exigencies of society. It will be observed, that even where the occasion is privileged within the meaning of Articles 15 and 16, the communication would not be protected by the occasion in cases of express malice.

ART. 17.

The truth of a libel alleged to be false to be a bar.

Upon the trial of any information or indictment for the publication of any personal libel, which in such information or indictment shall be charged to be false, it shall be competent to the defendant, by such means, and under such conditions as are hereinafter specified, (*d*) to establish the truth of such alleged libel, in bar of such information or indictment.

(*d*) The party ought to be apprized of the particulars of the charges proposed to be proved against him, either by a special plea or notice. The consideration of this point belongs to the head of Procedure.

ART. 18.

Where the communication is privileged, the falsity of the alleged libel may be proved by the prosecutor and the truth by the defendant.

Whensoever upon the trial of any defendant, charged with having published any personal libel, it shall appear to the Court that the communication was privileged in respect of the occasion, it shall be competent to the prosecutor to prove the falsity, or to the defendant to prove the truth of the alleged libel. (*e*)

(*e*) See the Prefatory Remarks, p. 70.

ART. 19.

In the case of a false personal libel, a publication to the party libelled is not sufficient.

Upon the trial of any information or indictment for publishing a personal libel alleged to be false, it shall not be sufficient to prove a publication merely to the party libelled. (*f*)

(*f*) For here the gist of the offence does not consist in the tendency of the published libel to provoke another to commit a breach of the peace, but depends on the probability of injury to the reputation of the party libelled. In the former case, a mere publication to the prosecutor falls within the scope of a law for the preservation of the peace. See R. *v.* Wegener, 2 Starkie's C. 245.

ART. 20.

Truth or falsity cannot be given in evidence where the libel is not alleged to be false, except as mentioned in Art. 18.

When the information or indictment shall not allege the libel to be false, it shall not be competent to the prosecutor to prove the falsity or to the defendant to prove the truth of the libellous matter of such libel, except in cases within the meaning of Article 18.

SEDITIOUS LIBEL.

(For this Offence, see the head of "Offences against the State inferior to Treason.")

BLASPHEMOUS LIBEL.

(For this Offence, see the head of "Offences against Religion.")

OBSCENE LIBEL.

(This offence will be inserted under a subsequent head of the Digest.)

OFFENCES AGAINST RELIGION.

Prefatory Remarks.

Offences against religion may be divided into three classes:

I. Offences against religion generally, including both natural and revealed religion.

II. Offences against the church established by the law, including of course acts of disobedience to its positive ordinances and observances; and

III. Offences against religious peace, or disturbance of the peaceable performance of the public offices of religion.

The arrangement of the just line of distinction between proper liberty of speech and action on religious subjects and a licentiousness sufficiently injurious to constitute a fit object for prevention by punishment is a matter of great nicety and difficulty, and has often formed the topic for controversy. On the one hand it has been urged that an undue pressure placed upon the freedom of writing, speaking, and acting on such subjects would not only impede discussion, and consequently the acquisition of knowledge respecting them, but would violate the principles of religious toleration; while on the other hand it is argued, that there is danger that the practical influence of religion upon human action, and consequently its efficacy as an auxiliary to municipal laws, would be diminished, and also that the feelings of mankind upon a subject of great moment would be frequently outraged, if an unrestricted licence were permitted to all men to speak and write and act as they pleased respecting it. The best method of ascertaining the true line of distinction will be by a reference to the principles upon which municipal laws on this subject ought to be founded.

I. Laws for the punishment of offences against religion generally are justifiable on mere temporal grounds upon two principles. In the first place, religion, by enforcing moral conduct, and applying to that object some of the strongest motives that operate on human nature, is so effectual an assistant in securing a general obedience to social laws, that actions tending directly to expose it to ridicule and contempt, and thus to weaken its authority with the ignorant and unthinking, are mischievous to the community, and on that account may properly be repressed by penal enactments. Secondly, as the great mass of the inhabitants of civilized countries regard religious faith, in one form or other, as of vital interest and importance, the criminal law may properly be employed to protect the feelings and opinions of the community on this subject from wanton insult. Upon these two principles, as it appears to us, the interference of the penal law in matters of religion is to be justified; and we think that rules framed strictly with reference to these principles neither invade the rights of opinion and legitimate discussion, nor endanger any general or particular interests which can properly be protected by the criminal law.

Upon these principles there can be no doubt that open blasphemies against God and the wanton utterance of reviling and contumelious language respecting Christianity, ought to be prevented by the criminal law of every Christian country. In times of gross superstition such offences were punished as dangerous to society by reason of the temporal disasters and calamities which were supposed likely to result from the provocation and insult offered to the Deity. Even the later Roman law gives as the reason for its severe denunciation of blasphemy that "*propter talia delicta, et fames, et terræ motus, et pestilentiæ fiunt.*"* As more

* Novell. lxxvii. ss. 1 and 2.

rational opinions upon the subject of religion began to prevail in Europe, and the absurdity of this doctrine became acknowledged, a disposition arose among criminal jurists to conclude from the falsehood and folly of the principle on which laws of this kind had been anciently rested, that the laws themselves were altogether unnecessary and that such offences were exclusively of ecclesiastical cognizance. In accordance with this notion most of the penal systems of modern Europe contain no provisions against the crime of blasphemy. It appears to us that these omissions are founded upon mistaken views. It is true that the Supreme Being cannot be considered as the object of an injury in the same sense in which mankind are injured by insults and calumnies; but a man who openly and contemptuously reviles the Deity or religion, commits an offence which contains the two great incidents of municipal crime, namely, a mischievous intention or malice in the offender, and the infliction of serious injury to society, from the recurrence of which the criminal law is the only efficient protection. Blasphemy, according to the primitive meaning of the term, which implies insulting and opprobrious language, not only displays a mischievous intention in those who utter it, and a wanton disregard of the religious feelings of others, but is injurious to the community in the way of example, and as affecting the efficacy of religion as a foundation for moral conduct. It is therefore in these respects a proper subject for penal restraint.

II. Offences against the Established Church depend in a great measure upon the same principles. The Church being established by law for the benefit of the community, attempts to bring it into disrepute or impair its authority by improper means, such as contemptuous and insulting language, ought to be restrained by the threat of punishment.

In another point of view, also, the established religion is entitled to protection by the criminal law. As the established religion it is part of the state; and as the peculiar dangers of the political establishment warrant peculiar laws for its safety so there may be occasions of peril to the church, which may justly sanction particular laws for its defence.

Laws for the punishment of open disobedience to the positive ordinances of the established religion are founded upon the same principles. Certain religious observances, such for instance as that of the Sabbath, may properly be considered as exercising so important and beneficial an influence on moral conduct, that the wanton violation of them ought to be prevented by penal laws. The other general principle which we have above referred to as furnishing a legitimate foundation for all laws of the class we are now considering may also, to a certain extent, be applicable, namely, that with respect to institutions and observances which carry strongly with them the opinions and feelings of the community, an open defiance of them, may justly be the subject of punishment.

III. The other class of offences under this head to which we have above referred, viz., the preservation of religious peace, and the protection of all men in the free exercise of the rites of that particular form of religion which they profess, depend upon principles of general policy and toleration too obvious to require especial notice.

Although the principles upon which laws should be framed for the prevention of offences against religion are sufficiently plain, and many of them are of universal application, the penal systems of different countries have exhibited a great variety of provisions upon this subject. The later Roman laws not only punished the offence of blasphemy against God, and the profane use of God's name with death, but threatened the magistrate with the indignation of the Emperor, if he did not enforce the law against such offenders.* Among modern laws, the French Code Pénal contains no provisions for the punishment of persons reviling God or Christianity, except

* Novell. lxxvii. s. 1. Et quoniam quidam ad hæc quæ diximus, et blasphema verba, et sacramenta de Deo jurant, Deum ad iracundiam provocantes, istis injungimus abstinere ab hujusmodi et aliis blasphemis verbis, et non jurare per capillos, et caput, et his proxima verba. Si contra homines factæ blasphemiæ impunitæ non relinquuntur, multo magis qui ipsum Deum blasphemant digni sunt supplicia sustinere. . . . . s. 2. Precipimus enim gloriosissimo præfecto regiæ civitatis, permanentes in prædictis illicitis et impiis actibus post hanc admonitionem nostram comprehendere, et ultimis subdere suppliciis, ut non ex contemtu talium inveniatur et civitas et respublica per hos impios actus lædi. Si enim post hanc suasionem quidam tales invenientes hoc subtercelaverint, similiter a domino Deo condemnabuntur. Ipse enim gloriosissimus præfectus, si invenerit quosdam tale aliquid delinquentes, et vindictam in eos non intulerit secundum nostras leges, primum quidem obligatus erit Dei judicio, post hæc autem et nostram indignationem sustinebit.

where such conduct amounts to a violation of the right of religious freedom, or an interruption of the exercise of public worship. The additions made to the Code Pénal in 1825, under the head of "Sacrilege," have but imperfectly supplied this deficiency. The Prussian law punishes "gross blasphemies of God publicly uttered, and "giving general offence," with imprisonment from two to six months; and revilings of any religious communities allowed by the state, and disturbances of Divine service are visited with a somewhat higher degree of punishment. The Austrian Code declares, that "whosoever shall blaspheme God in speeches, writings, "or actions, or shall interrupt any religious exercise allowed by the state, or shall "by the indecent abuse of vessels used for Divine service, or otherwise by actions, "speeches, or writings, publicly manifest contempt for religion," shall be punished according to the "degree of scandal occasioned, and the degree of malice in the "offender, with heavy imprisonment, for any period between one year and ten years." The Bavarian Code makes no direct mention of blasphemy as an offence, but contains provisions for punishing a disturbance of public worship attended by personal violence with imprisonment for any period between one and six years, and a disturbance by opprobrious words without personal violence, with imprisonment for any period from one month to six months. We may here observe that in none of these laws, nor in the laws of any country with which we are acquainted, excepting the law of England and those States of America which have adopted the English Common Law, is it declared to be a crime simply to deny the truth of the doctrines of natural or revealed religion; offences of this class being invariably made to consist in the use of indecent, railing, or scurrilous language on such subjects.

Having stated the principles upon which it appears to us that penal laws upon the subject of religion ought to depend, and noticed the course adopted by the legislatures of some foreign countries respecting it, we now proceed to state the doctrines and leading provisions of the English law.

I. Following the order above prescribed in tracing the principles upon which laws on this subject are founded, we shall notice, in the first place, the provisions of the English law respecting offences against religion in a general sense, without reference to the Established Church or its ordinances.

The common law of England respecting blasphemy, as stated by Mr. Serjeant Hawkins, declares that "all blasphemies against God, as denying his being or "providence, and all contumelious reproaches of Jesus Christ, as well as all profane "scoffing at the Holy Scriptures, or exposing any part thereof to contempt or "ridicule," are misdemeanors punishable with fine and imprisonment, and formerly with the pillory.* This definition is intended to include oral, as well as written blasphemy. It is worthy of remark that, although numerous authorities are cited by Mr. Serjeant Hawkins, and other text books, in support of the rule as above stated, all the cases referred to, with a single exception, are cases of written libels. The only adjudged case respecting oral blasphemy, to be found in the books of English law as far as we have been able to discover, is that of the King v. Taylor, which occurred in 1676, and is reported in Keble's Reports, vol. iii., p. 607, and Ventris's Reports, p. 293, and as this case has formed the groundwork of all the recent decisions on the subject both of oral and written blasphemy, it may be useful briefly to state its effect. The defendant in that case was prosecuted by the Attorney-General, *ex officio*, for having publicly uttered words reviling God and Christ and the Christian religion, in terms so outrageous and insulting, and at the same time so unmeaning and absurd, that they could hardly have been used by a person who had the use of his reason. And as it appears from the record † that he was brought by Habeas Corpus from Bedlam, to plead to the information in the Court of King's Bench, the first impression upon his apprehension seems to have been that he was a madman. Nevertheless, he was found guilty by the jury, and sentenced by the Court to stand in the pillory at three several places, to pay a fine of 1000 marks, and to find sureties for his good behaviour during life. Lord Hale in the course of the proceedings observed, "that such kind of "wicked blasphemous words were not only an offence to God and religion, but a "crime against the laws, state, and government; and therefore punishable in that "Court. For to say, 'religion is a cheat' is to dissolve all those obligations "whereby civil societies are preserved." He also said that "Christianity was

* Hawkins's P. C., book i. c. 5, ss. 1 and 2. 1 East's P. C., p. 3. † Tremaine's Entries, p. 226.

"parcel of the laws of England; and therefore to reproach the Christian religion is "to speak in subversion of the law. In the Report of the case by Keble, Lord Hale is stated to have said, that "contumelious reproaches of God or the religion esta- "blished, are punishable; and that an indictment lay for saying that the Protestant "religion was a fiction; for, taking away religion, all obligation to Government by "oaths, &c., ceaseth: and Christian religion is a part of the law itself. Therefore, "(he concludes) *injuries to God* are as punishable as to the King, or any common "person." The reports of this case are obviously imperfect; and it is difficult to collect from them the precise grounds upon which the judgment of the Court was founded. At the same time there can be no doubt that the offence committed by the defendant, supposing him to have been of sound mind, was, upon the clearest principles, deserving of exemplary punishment. The meaning of the expression used by Lord Hale that "Christianity was parcel of the laws of England," though often cited in subsequent cases, has, we think, been much misunderstood. It appears to us that the expression can only mean either that as a great part of the securities of our legal system consist of judicial and official oaths sworn upon the Gospels, Christianity is closely interwoven with our municipal law; or that the laws of England, like all municipal laws of a Christian country, must upon principles of general jurisprudence, be subservient to the positive rules of Christianity. In this sense Christianity may justly be said to be incorporated with the law of England, so as to form parcel of it; and it was probably in this sense that Lord Hale intended the expression should be understood. At all events, in whatsoever sense the expression is to be understood, it does not appear to us to supply any reason in favour of the rule; for it is not criminal to speak or write either against the common law of England generally, or against particular portions of it, provided it be not done in such a manner as to endanger the public peace by exciting forcible resistance; so that the statement that Christianity is parcel of the law of England, which has been so often urged in justification of laws against blasphemy, however true it may be as a general proposition, certainly furnishes no additional argument for the propriety of such laws.

The case of the King v. Taylor was a clear case of blasphemy, according to the literal meaning of the term. The offence was punished not only on the ground that the defendant denied the truth of religion, but because he insulted the reasonable feelings of mankind by treating sacred subjects with indecent ribaldry and abuse. In the subsequent case of the King v. Woolston * the rule was carried much further. In that case the defendant was indicted for publishing discourses on the miracles of our Saviour, in which he maintained that they were not to be taken in a literal sense, but allegorically. The jury found him guilty, and an objection being made in arrest of judgment, that though it should be admitted the discourses did amount to a libel on Christianity, yet the common law has not cognizance of such an offence; the Court declared they would not suffer it to be debated whether to write against Christianity in general was not an offence; but desired it to be understood that they laid stress upon the word *general*, because they did not intend to include disputes upon controverted points between learned men. And Lord Raymond said, "Christianity in general is parcel of the common "law of England, and therefore to be protected by it. Now whatever strikes at "the very root of Christianity tends manifestly to a dissolution of the civil Govern- "ment, and so was the opinion of my Lord Hale in Taylor's case; so that to say an "attempt to subvert the established religion is not punishable by those laws upon "which it is established, is an absurdity. I would have it taken notice of that we "do not meddle about any differences in opinion; and that we interpose only where "the very root of Christianity itself is struck at, as it plainly is by this allegorical "scheme; the New Testament, and the whole relation of the life and miracles of "Christ being denied."

It is impossible to contend that this case does not carry the rule to the full extent to which it is stated by Hawkins, Blackstone, East, and other writers, namely, that the common law of England punishes as an offence any general denial of the truth of Christianity, without reference to the language or temper in which such denial is conveyed; and if this is the rule of law with reference to revealed religion, these writers are fully justified in assuming as a consequence, though without any express decision upon the point, that a denial of the truths of natural religion, such as the being and attributes of God, which form the basis of

* Fitzgibbon, p. 64, and 1 Strange's Reports, p. 834.

Christianity, must likewise be a crime. We have, therefore, in conformity with these authorities, stated the law in the Digest precisely as it is laid down by them. It is, however, worthy of remark, that Woolston's Discourses on the Miracles, which work was the subject of prosecution in the only case in which this doctrine has been maintained, was a book of ribaldry and sarcasm, the temper and manner of which were strongly censured and condemned by some of the celebrated writers of the time, who, though they refuted his arguments, lamented that the author should be prosecuted.* It was, therefore, unnecessary for the decision of this particular case, that the judges should lay down the rule so broadly as they have done, and consequently the opinion stated by Lord Raymond, that "to write generally against Christianity was an offence at common law," was extra-judicial. It was certainly unsupported by any previous decision or judicial opinion which we have been able to discover. We may remark, also, that all the recorded instances of prosecution for blasphemy, subsequent to Woolston's case, have been publications of indecent and opprobrious language against natural or revealed religion; and that in all such cases, the judges, in the remarks they have made upon the offence, have founded their reasons for punishment entirely upon the offensive *manner* of writing in the particular instances, and have cautiously avoided laying down any general prohibitory rule.

Besides the provisions of the common law against blasphemy, a statute was passed in the year 1698, containing enactments of great rigour upon the same subject. The statute of the 9th and 10th of King William III., c. 32, is entitled "An Act for the more effectual suppressing of Blasphemy and Profaneness," and the preamble recites that "many persons had of late years openly avowed and "published many blasphemous and infamous opinions contrary to the doctrines and "principles of the Christian religion, greatly tending to the dishonour of Almighty "God, and which might prove destructive to the peace and welfare of the king-"dom." It then goes on to enact "for the more effectual suppressing of the said "detestable crimes, that if any person, having been educated in, or at any time "having made profession of the Christian religion within this realm, shall, by "writing, printing, teaching, or advised speaking, deny any one of the persons of "the Holy Trinity to be God, or shall assert or maintain that there are more Gods "than one, or shall deny the Christian religion to be true, or the Holy Scriptures "of the Old and New Testament to be of Divine authority," every such person shall, upon conviction, for the first offence be adjudged incapable and disabled in law to have or enjoy any office or employment, ecclesiastical, civil, or military; and if, at the time of such conviction, such person shall possess any office, place, or employment, the same shall be void. The statute then goes on to enact that if any person shall be a second time convicted of such offences, he shall be thenceforth disabled to sue, prosecute, plead, or use any action or information in any court of law or equity, to be a guardian, executor, or administrator, and shall be incapable of any legacy or deed of gift, or to bear any office, civil or military, or benefice ecclesiastical, for ever within this realm; and shall also suffer imprisonment for three years.

It may justly be questioned whether the penalties of this statute be not more

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* Dr. Lardner, who had published an able answer to Woolston, wrote a letter to Dr. Waddington, then Bishop of Chichester, respecting Woolston's work, and the probability of his prosecution for it, in which he says,—"I suppose, if he should be punished, it will be for writing *against* Christianity, and not for his *manner* of doing it. I am far from thinking that Mr. Woolston has written in a grave and serious manner; and I have strongly expressed my dislike of his manner. . . . . Your Lordship freely declares, he ought not to be punished for being an infidel, nor for writing at all against the Christian religion, which appears to me a noble declaration. If the governors of the Church and civil magistrates had all along acted up to this principle, I think the Christian religion had been before now well nigh universal; but I have supposed it to be a consequence from this sentiment, that if men have an allowance to write against the Christian religion, there must also be considerable indulgence as to the manner likewise. This has appeared to me a part of that meekness and forbearance to which the Christian religion obliges us, who are to reprove, rebuke, and exhort with all long suffering. The proper punishment of a low, mean, indecent, scurrilous way of writing, seems to be neglect, contempt, scorn, and general indignation. Your Lordship has observed extremely well, that this way of writing is such as may justly raise the indignation and resentment of every honest man, whether Christian or not. This punishment he has already had in part, and will probably have more and more, if he should go on in his rude and brutal way of writing. And if we leave all further punishment to Him to whom vengeance belongs, I have thought it might be much for the honour of ourselves and of our religion; but if he should be punished further, the stream of resentment and indignation will turn, especially if the punishment should be severe; and it is likely that a *small* punishment will not suffice to engage to silence, nor to an alteration in the manner of writing."—*Lardner's Works*, Vol. i. Appendix 1.

severe than was necessary, or even politic. In common with many other laws of great severity, it has rarely if ever been carried into execution, although numerous instances have occurred in which the common law has been enforced for offences clearly within its scope. We are not aware of any instance of a prosecution upon it. Nevertheless, all its provisions continued in full force until the year 1813, when they were repealed, "so far as the same relate to persons denying, as "therein mentioned, respecting the Holy Trinity," by the statute 53rd of King George III., c. 160, s. 2. Persons, however, who deny the Christian religion to be true, or the Old and New Testaments to be of Divine authority, are still liable to the incapacities and penalties threatened by the statute of King William III.

The course hitherto adopted in England respecting offences of this kind has been to withhold the application of the penal law, unless in cases where insulting or contumelious language is used, and where it may fairly be presumed that the intention of the offender is not grave discussion, but a mischievous design to wound the feelings of others, or to injure the authority of Christianity with the vulgar and unthinking by improper means. For although the law distinctly forbids *all* denial of the being and providence of God, or the truth of the Christian religion, works in which infidelity is professed and defended have been frequently published, and have undergone no legal question or prosecution; and it is only where irreligion has assumed the form of blasphemy, in its true and primitive meaning, and has constituted an insult both to God and man, that the interference of the criminal law has taken place. There is no instance, we believe, of the prosecution of a writer or speaker who has applied himself seriously to examine into the truth on this most important of all subjects, and who, arriving in his own convictions at scepticism, or even unbelief, has gravely and decorously submitted his opinions to others, without any wanton and malevolent design to do mischief. Such conduct, indeed, could not be properly considered as blasphemy or profaneness; and at the present day, a prosecution in such a case would probably not meet with general approbation. On the other hand, the good sense and right feeling of mankind have always declared strongly against the employment of abuse and ribaldry upon subjects of this nature; and although many judicious and pious persons have thought, with Dr. Lardner, that it was prudent and proper to allow great latitude to manner, the application of the penal law to cases of this kind has usually met with the cordial acquiescence of public opinion.

II. Under the second head of Offences against Religion above mentioned, viz., Offences against the Established Church and its Ordinances, the English law contains a large mass of positive provisions. In this class must be comprehended crimes which have only an indirect relation to the Established Church, and have much more of a political than a religious character; we refer to the refusal to take the oaths of allegiance, supremacy, and abjuration, by which refusal parties are by express enactments constituted popish recusants convict. This class also includes Offences by Popish Recusants.

The observations made in a former part of this Report as to the offences against religion declared to be treasons apply to a large majority of the inferior offences belonging to the same general class. Such offences appear to us to have been created by laws, which however proper and necessary with reference to the protection of the Reformed Church in its infancy against the powerful body from which it had separated, are unsuitable to the present altered state of things, when the Protestant Church has become firmly established by the usage of nearly three centuries, and when the danger of interference by a foreign power is hardly a subject of apprehension. At the same time, though it may be admitted that such laws would not now be passed if it were proposed to legislate upon these subjects at the present day, the question of their abolition is not dependent upon the ordinary principles of the Criminal Law, but involves a point of political expediency of great importance which has been on several modern occasions considered by the Legislature. In preparing this Digest, we have in ordinary cases suggested such alterations and additions as we have considered to be likely to render the system more complete and effective. But in cases which involve political considerations, and especially in points which have recently undergone discussion in Parliament, we have thought it proper to confine ourselves to a mere statement of the existing law. We have followed this course with respect to the large body of law which has from time to time been devised for the support of the Church of England since its effectual

establishment at the commencement of the reign of Queen Elizabeth; contenting ourselves with stating as precisely as possible the actual law as it is found in statutes and judicial decisions, and adding in the notes such remarks only as are necessary for the purpose of explanation, or to direct attention to obvious defects or inconsistencies. It will, however, be seen from our Digest of the enactments on this subject, and more especially from that part of them which relates to recusancy by Roman Catholics and other Dissenters from the Established Church, that the present law consists of a vast variety of positive provisions, passed at different periods, and so complicated in their details, that it is extremely difficult to ascertain its actual state and meaning; and this difficulty is much increased by the circumstance that many of the offences created by the statutes to which we are now alluding are not in the first instance of their commission punishable by indictment, but by summary conviction before justices of the peace, and consequently cannot be comprised in that part of the Digest which at present occupies our attention.

Although for the reasons above stated, we think it would be inexpedient that we should suggest particular alterations of the law, it may be useful in this place to state in a connected form the effect of the penal enactments which are still in force upon this subject, and also to point out the extent to which relief is afforded by the various toleration acts, in order that the present condition of the law may be distinctly understood.

The statutable offences belonging to this class are as follows: 1stly, Reviling the Sacrament; 2ndly, Being present at any other form of common prayer than that contained in the Book of Common Prayer; 3rdly, Clergymen of the Established Church using any other form of common prayer instead of that contained in the Book of Common Prayer; 4thly, Speaking in derogation of the Book of Common Prayer; 5thly, Forbearing to come to church on Sunday, which constitutes the offender on conviction a *Recusant Convict*; 6thly, Forbearing to come to church on a Sunday, being a Roman Catholic, which constitutes the offender on conviction a *Popish Recusant Convict*; 7thly, Refusal or Omission to take certain oaths, which refusal or omission constitutes the offender on conviction *ipso facto* a Popish Recusant Convict, viz., refusing to take the oaths of allegiance and abjuration when tendered by order of the Privy Council, &c., or, being a member of either House of Parliament, sitting or voting therein, or coming into the Queen's presence before taking the oaths of allegiance and supremacy; 8thly, Offences by Popish Recusants Convict, consisting of not repairing to their usual place of dwelling within forty days after their conviction, or afterwards removing above five miles from thence,—of not receiving the Sacrament, in case of conforming themselves, every year after conformity,—of omitting, if married women and their husbands not standing convicted of Popish Recusancy, to conform themselves within a year after their husbands' deaths; 9thly, Inciting others to abstain from going to church, or to frequent unlawful places of worship, or frequenting any such places under colour of religion; 10thly, Relieving or harbouring recusants in the house; 11thly, Keeping recusant schoolmasters; 12thly, Schoolmasters teaching in private families without licence from their Archbishop, &c., and before subscribing a declaration of their conformity to the Liturgy; 13thly, Saying or hearing mass; 14thly, Promoting the Popish Religion; 15thly, Mayors or other magistrates being present at public meetings for the religious worship of Dissenters, with the ensigns of their office; 16thly, Offences by Jesuits, and other members of any religious order of the Church of Rome, bound by monastic or religious vows.

Of the statutable offences we have just enumerated, those comprised under the fifth and sixth heads, viz., forbearing to come to church, are repealed by the Protestant Dissenters * and Roman Catholic † Toleration Acts, in favour of Dissenters and Roman Catholics, who come to some congregation of religious worship allowed by law. Protestant Dissenters, however, being Quakers, must also make the declaration of fidelity and subscribe a profession of their Christian belief; and Roman Catholics, must also take the oath prescribed by the Roman Catholic Relief Act, in order to relieve themselves from the penalties of not resorting to church.

The Offences by Popish Recusants Convict, comprised under the eighth head, are indirectly repealed in favour of persons who qualify themselves as before mentioned under the Roman Catholic Toleration Acts; because, when they have so qualified themselves, they cannot be convicted of Popish Recusancy, and conse-

* 1 Will. and Mary, sess. 1, c. 18, ss. 13 and 16; 52 Geo. III. c. 155, ss. 4 and 14.
† 31 Geo. III. c. 32, s. 3; 10 Geo. IV. c. 7, ss. 2 and 23.

quently, not being Popish Recusants Convict, they do not come within the denomination of persons by whom those offences can be committed. There is, however, nothing in the Toleration Acts, which directly relieves from the penalties of offences committed by Popish Recusants Convict.

The several offences of inciting others to absent themselves from church, &c., of relieving and harbouring recusants, of keeping recusant schoolmasters, of saying or hearing mass, and promoting the Popish religion, appear to be generally, either directly or incidentally, repealed by the Protestant Dissenters and Roman Catholic Toleration Acts,* in favour of Quakers who make the declaration of fidelity and profession of their Christian belief, of all other Protestant Dissenters who resort to some congregation for religious worship of Protestants allowed by law, or take the oaths of allegiance and supremacy, or (in case such Protestant Dissenters be Moravians, make a solemn affirmation to the effect of such oaths,) and of Roman Catholics who take the oath appointed by the Roman Catholic Relief Act.

The penalties imposed upon schoolmasters teaching without licence from the Archbishop, &c., are repealed by the statute 19th of King George III., c. 44, s. 2, in favour of Protestant Dissenters, who take the oaths of allegiance and supremacy, (or if Moravians, make a declaration to the effect thereof, or if Quakers, make the declaration of fidelity and a profession of their Christian belief,) and make a declaration that they are Protestants; or they may relieve themselves by complying with the requisitions of the Protestant Dissenters Toleration Acts.

We may here also observe that in most of the cases where offenders can relieve themselves under the Toleration Acts, they can by virtue of the statutes creating the offences, prevent the consequences of the commission of such offences by conforming themselves to the Church. The relieving statutes, however, apply only to Roman Catholics and Protestant Dissenters; with respect to members of the Church of England forbearing to come to church, there seems to be no mode of escaping from the penalties but by conforming to the law.† It would also appear that in several other cases, such, for instance, as willingly hearing mass or retaining or keeping a servant who omits to go to church for a month, members of the Church of England, are still liable to the penalties of the law. With the above exceptions, and subject to such conditions, we believe that all the laws abstracted in the Digest upon this subject are still in full force.

By the above statement it will be seen that the practical operation of the numerous laws aimed against Recusants is much restrained by the several Toleration Acts; the principal effect of such laws at the present day being to compel the taking of the oaths prescribed by the latter Acts. It appears to us that this object might be as effectually obtained by a much simpler machinery. As, however, any alteration in this respect could not be effected without in some degree interfering with political relations, we have considered it to be beyond our province to make any specific recommendations on the subject, and have confined ourselves to the systematic arrangement of the law in the Digest, accompanied by such comments in the notes as we have deemed to be necessary for its explanation.

With respect to the propriety of a thorough revision of our laws respecting this class of offences, we prefer citing the forcible language of Sir William Blackstone, uttered nearly a century ago, to the expression of any opinion of our own. In concluding his short summary of the laws against Roman Catholics, that learned judge makes the following remarks:‡ "Of these laws, the President Montesquieu observes, "that 'they are so rigorous, though not professedly of the sanguinary kind, that "they do all the hurt that can possibly be done in cold blood.' But in answer to "this it may be observed (what foreigners, who only judge from our Statute-book, "are not fully apprized of), that these laws are seldom exerted to their utmost "rigour; and indeed if they were it would be very difficult to excuse them. For "they are rather to be accounted for from their history and the urgency of the "times which produced them, than to be approved (upon a cool review) as a standing system of law. The restless machinations of the Jesuits during the reign of "Elizabeth, the turbulence and uneasiness of the Papists under the new religious "establishment, and the boldness of their hopes and wishes for the succession of "the Queen of Scots, obliged the Parliament to counteract so dangerous a spirit "by laws of a great, and then, perhaps, necessary severity. The Powder-treason "in the succeeding reign struck a panic into James I. which operated in different "ways; it occasioned the enacting of new laws against the Papists, but deterred "him from putting them in execution. The intrigues of Queen Henrietta in the

* As to this, however, see the Notes to Articles 60, 62, 65. 68, and 73.
† See Note (*q*) to Article 68.
‡ Blackstone's Commentaries, vol. iv. p. 57.

" reign of Charles I., the prospect of a Popish successor in that of Charles II., the " Assassination-plot in the reign of King William, and the avowed claim of a Papist " Pretender to the Crown in that and subsequent reigns, will account for the exten- " sion of these penalties at those several periods of our history. But if a time " should ever arrive, and perhaps it is not very distant, when all fears of a Pretender " shall have vanished, and the power and influence of the Pope shall become " feeble, ridiculous, and despicable, not only in England, but in every kingdom of " Europe, it probably would not then be amiss to review and soften these rigorous " edicts; at least, till the *civil* principles of the Roman Catholics called again upon " the Legislature to renew them. For it ought not to be left in the breast of every " merciless bigot to drag down the vengeance of those occasional laws upon inof- " fensive, though mistaken subjects, in opposition to the lenient inclination of the " civil magistrate, and to the destruction of every principle of toleration and reli- " gious liberty."

OFFENCES AGAINST RELIGION.

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Offences against God and the Christian Religion.

Art. 1.

Blasphemy.

Whosoever shall deny the Being or Providence of God, or shall utter contumelious reproaches of Jesus Christ, or shall profanely scoff at the Holy Scripture or expose any part thereof to contempt or ridicule, shall be guilty of Blasphemy, and incur the penalties of the class. (*a*)

(*a*) This offence is punishable as a misdemeanor at common law by fine and imprisonment. In its definition we have adopted the words of Mr. Sergeant Hawkins, (1 Hawk. P. C. c. 5, ss. 1, 2, and 6); which have been followed by Sir W. Blackstone. (4 Black. Com. p. 59.)

Art. 2.

Blasphemous libel.

Whosoever shall maliciously compose, print, or publish (*b*) any blasphemous libel, shall incur in respect of a first offence the penalties of the class; and having been convicted of any of these offences shall incur in respect of any subsequent offence the penalties of the class. (*c*)

(*b*) As to what constitutes a *publication*, and when it shall be said to be made *maliciously*, see the Digest of Libel.

(*c*) 60 Geo. III. and 1 Geo. IV. c. 8, ss. 1 and 4; 11 Geo. IV. and 1 Will. IV. c. 73. The 60 Geo. III. and 1 Geo. IV. c. 8, contains no provision for the punishment of persons guilty of a first offence in publishing, &c., blasphemous libels, but only declares the punishment of such as offend therein a second time. The first offence, therefore, continues punishable at common law. For a second offence the punishment by the 60 Geo. III. and 1 Geo. IV. c. 8, is the same as in cases of high misdemeanors, or banishment from the United Kingdom for such term of years as the Court shall award. So much of the 60 Geo. III. and 1 Geo. IV. c. 8. however, as relates to the sentence of banishment, has been repealed by the 11 Geo. IV. and 1 Will. IV. c. 73.

Art. 3.

Whosoever, having been educated in, or at any time having made profession of, the Christian religion within this realm, shall assert or maintain by writing, printing, teaching, or advised speaking, that there are more Gods than one, or shall deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of Divine authority, shall, in respect of a first offence incur the penalties of the class, and in respect of a second or any subsequent offence, the penalties of the class. (*d*)

(*d*) 9 and 10 Will. III. c. 32, s. 1; 53 Geo. III. c. 160, s. 2. By the 9 and 10 Will. III. c. 32, the punishment for a first offence is that the person convicted shall be incapable and disabled in law to have or enjoy any office or employment, ecclesiastical, civil, or military, or any part in them, or any profit or advantage appertaining to them; and if he shall at the time of his conviction enjoy or possess any office, place, or employment, that such office, place, or employment shall be void. And for a second offence, that he shall be disabled to sue, prosecute, plead, or use any action or information in any Court of Law or Equity, or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed of gift, or to bear any office, civil or military, or benefice ecclesiastical for ever within this realm, and shall also suffer imprisonment for the space of three years

without bail or mainprize. It was also, previously to the passing of the 52 Geo. III. c. 160, an offence under the 9 and 10 Will. III. c. 32, s. 1, which subjected the person guilty of it to the like penalties, to deny any one of the Persons in the Holy Trinity to be God. The second section of the former Act, however, repealed the provisions of the 9 and 10 Will. III. c. 32, so far as the same related to persons denying as therein mentioned respecting the Holy Trinity.

So much of the offence described in the above Article as relates to the asserting that there are more gods than one, is a species of the common law offence of heresy, and the remainder is included within the common law offence of apostacy. The former crime is described by Mr. Serjeant Hawkins "to "be among Protestants, a false opinion, repugnant to some point of doctrine clearly revealed in Scrip- "ture, and either absolutely essential to the Christian faith, or at least of most high importance;" and the latter is defined by Mr. Justice Blackstone to be "a total renunciation of Christianity by "such as have once professed the true religion, by embracing either a false religion or no religion at "all." Heresy and apostacy, at the time of passing the 9 and 10 Will. III. c. 32, were subject to correction in the Ecclesiastical Courts only, which was the cause of that Act being passed. (4 Black. Comm. p. 49.)

ART. 4.

Provided that any person convicted of any of the crimes specified in the last preceding Article shall, for the first offence (upon his acknowledgment and renunciation of such offence or erroneous opinions in the same Court where such person was convicted, within the space of four months after his conviction), be discharged from all penalties and disabilities incurred by such conviction. (*e*)

(*e*) 9 and 10 Will. III. c. 32, s. 3.

ART. 5.

False denunciations of Divine judgments.

Whosoever shall falsely pretend to an extraordinary commission from God, or shall terrify or abuse the Queen's subjects with false denunciations of Divine judgments shall incur the penalties of the class. (*f*)

(*f*) These offences are punishable at common law by fine, imprisonment, and also (as is said) by such corporal infamous punishment as to the Court in its discretion shall seem meet. 1 Hawk. P. C. c. 5, ss. 3 and 6; 4 Black. Comm. p. 62.

ART. 6.

Fond, fantastical, or false prophecies.

Whosoever shall advisedly and directly advance, publish, and set forth by writing, printing, signing, or any other open speech or deed, to any person any fond, fantastical, or false prophecy, upon or by the occasion of any arms, fields, beasts, badges, or such other like things accustomed in arms, cognizances, or signets, or upon or by reason of any time, year or day, name, bloodshed or war, to the intent thereby to make any rebellion, insurrection, dissension, loss of life or other disturbance within this realm and other the Queen's dominions, shall in respect of a first offence incur the penalties of the class, and in respect of any subsequent offence the penalties of the class. (*g*)

(*g*) 5 Eliz. c. 15, ss. 2 and 3. The punishment for a first offence is imprisonment for one year and forfeiture of £10; and for any subsequent offence imprisonment for life and forfeiture of all the offender's goods and chattels, real and personal. The crime contained in the above Article partakes of the nature both of an offence against religion and of an offence against the State, and in its latter character we have remarked upon it in the Note to Article 49 of Treason and other Offences against the State, where we have suggested that it would be altogether superseded by the insertion in the Digest of a clause of the general nature of that Article. As an offence against religion, we think that it might properly be repealed altogether.

ART. 7.

Witchcraft, fortune-telling, &c.

Whosoever shall pretend to exercise or use any kind of witchcraft, sorcery, enchantment, or conjuration, or undertake to tell fortunes, or pretend from skill or knowledge in any occult or crafty science, to discover where or in what manner any goods or chattels supposed to have been stolen or lost may be found, shall incur the penalties of the class. (*h*)

(*h*) 9 Geo. II. c. 5, s. 4. The pillory formed part of the punishment for this offence before its abolition; the present punishment is imprisonment for the space of one whole year, and such further punishment by fine or imprisonment, or both, as to the Court shall seem most proper; and the offender shall be obliged to give securities for good behaviour in such sum and for such time as the Court shall judge proper according to the circumstances of the offence, and in such case shall be further imprisoned until such securities be given. This offence has been usually classed under the head of Offences against God, but it may be doubted whether it does not more properly belong to the head of Offences against Property. In modern times it has been very unusual to indict under this statute; the more familiar practice being to proceed under the summary powers of the Vagrant Act.

OFFENCES AGAINST THE ESTABLISHED CHURCH.

ART. 8.

Reviling the Sacrament.

Whosoever shall deprave, despise, or contemn the Sacrament of the Lord's Supper in contempt thereof, by any contemptuous words or by any words of depraving, despising, or reviling, or shall advisedly in any otherwise contemn, despise,

or revile the said most blessed Sacrament contrary to the effects and declaration set forth in an Act passed in the 1st year of the reign of King Edw. VI., intituled "An Act against such as shall unreverently speak against the Sacrament of the Altar, and of the receiving thereof under both kinds," shall incur the penalties of the class. (*i*)

(*i*) 1 Edw. VI. c. 1. s. 1, repealed by 1 Mary, sess. 2. c. 2, and revived by 1 Eliz. c. 1. s. 14. The punishment for these offences is, by the 1 Edw. VI. c. 1, s. 1, imprisonment, and fine and ransom at the Queen's will and pleasure.

Art. 9.

Being present at any other form of Common Prayer than that contained in the Book of Common Prayer.

Whosoever, inhabiting and being within this realm or any other the Queen's dominions, shall willingly and wittingly hear and be present at any other manner or form of Common Prayer, of administration of the Sacrament, of making of ministers in the churches, or of any other rites contained in a book intituled *The Book of Common Prayer and administration of the Sacrament and other Rites and Ceremonies of the Church, according to the use of the Church of England; together with the Psalter or Psalms of David, printed as they are to be sung or said in Churches, and the form or manner of Making, Ordaining, and Consecrating of Bishops, Priests, and Deacons,* annexed to an Act passed in the 13th and 14th years of the reign of King Car. II., intituled "An Act for the Uniformity of Public Prayers and Administration of Sacraments, and other Rites and Ceremonies; and for establishing the form of making, ordaining, and consecrating Bishops, Priests, and Deacons in the Church of England," than is mentioned and set forth in the said book, or that is contrary to the form of sundry provisions and exceptions contained in an Act passed in the 2d and 3rd years of the reign of King Edw. VI., intituled "An Act for Uniformity of Service and Administration of Sacraments throughout the Realm," shall incur, in respect of a first offence, the penalties of the class; in respect of a second offence, the penalties of the class; and in respect of a third or any subsequent offence, the penalties of the class. (*j*)

(*j*) 5 and 6 Edw. VI. c. 1. s. 6, repealed by 1 Mary, sess. 2. c. 2, revived by 1 Eliz. c. 2. s. 2, and by the 13 and 14 Car. II. c. 4, made applicable to the Book of Common Prayer, annexed to that Act. The punishment, by the 5 and 6 Edw. VI. c. 1. s. 6, for a first offence is imprisonment for six months; for a second offence, imprisonment for one year; and for a third offence, imprisonment for life. The enactments of which the above Article is compounded were passed at a time when the law presumed the whole nation to be of the established religion, and before any toleration of Dissenters was permitted. The object of the enactment was to secure an uniformity of common prayer amongst members of the established religion. The obliging Roman Catholic and other Dissenters to resort to the churches of the Establishment, appears to have been no part of their intention, that duty being enforced by other statutes passed expressly for the purpose. The language, however, in which those enactments are expressed is very general, and may be thought to clash with the provisions of the Toleration Acts, which allow Dissenters duly qualifying themselves to resort to their own places of worship. To remove any doubt on this head, it might be as well to expressly limit the operation of the above Article to the object for which those enactments were originally passed, viz. the securing uniformity of service in the Established Church.

Art. 10.

Clergymen of the Established Church using any other form of Common Prayer instead of that contained in the Book of Common Prayer.

Whosoever, being any manner of parson, vicar, or other whatsoever minister that ought or should sing or say common prayer mentioned in the book of Common Prayer referred to in the last preceding Article, or minister the Sacrament, shall refuse to use the said Common Prayer or to minister the Sacraments in such cathedral or parish church, or other places as he should use to minister the same, in such order and form as they be mentioned and set forth in the said book, or shall wilfully or obstinately, standing in the same, use any rite, ceremony, order, form or manner of celebrating of the Lord's Supper, openly or privily, or matins, evensong, administration of the sacraments or other open prayers other than *and instead of*(*k*) such as are mentioned and set forth in the said book, or shall preach, declare, or speak anything in the derogation or depraving of the said book, or anything therein contained, or of any part thereof, shall, in respect of a first offence, forfeit to the Queen, her heirs or successors, the profit of all his spiritual benefices or promotions coming or arising in one whole year next after his conviction, and incur the penalties of the class; in respect of a second offence, shall be deprived, *ipso facto*, of all his spiritual promotions (and the patrons or donors thereof may present or collate to the same as though he were dead), and incur the penalties of the class; and in respect of a third or any subsequent offence, shall be deprived, *ipso facto*, of all his spiritual promotions, and incur the penalties of the class. Provided that in case he have no spiritual promotion, that then in respect of a first

offence he shall incur the penalties of the class; and in respect of any subsequent offence, the penalties of the class. (*l*)

(*k*) These words have been inserted to remove a doubt which appears to have been entertained before the decision in the case of R. *v.* Sparks, 3 Mod. 78, as to whether the mere using of another form of prayer was sufficient to constitute the offence, or whether it must have been used *instead of* the form prescribed by the book of Common Prayer. That case decided that it must have been used *instead of* the form so prescribed.

(*l*) 2 and 3 Edw. VI. c. 1, made applicable by the 5 and 6 Edw. VI. c. 1, to the book of Common Prayer annexed to that Act, and which Act was repealed by the 1 Mary, sess. 2, c. 2, and revived and the provisions of the 2 and 3 Edw. VI. c. 1 re-enacted by the 1 Eliz. c. 2, and both the last-mentioned Acts made applicable by the 13 and 14 Car. II. c. 4 to the book of Common Prayer annexed to the 13 and 14 Car. II. c. 4. The punishment for the offences specified in the above Article, where the offender has any spiritual promotion, is, in addition to the forfeiture of such promotion, as there mentioned, in respect of a first offence, imprisonment for six months; of a second offence, imprisonment for one year; and of any subsequent offence, imprisonment for life: where the offender has no spiritual promotion is, for a first offence, imprisonment for one year, and for any subsequent offence, imprisonment for life.

Art. 11.

Definition of "open prayer."

The term "open prayer," as used in the last preceding or any other Article under the present head, shall be deemed to signify that prayer which is for others to come unto or hear, either in common churches, or private chapels or oratories, commonly called the service of the church. (*m*)

(*m*) The language of this Article is taken from the 1 Eliz. c. 2. s. 4.

Art. 12.

Speaking in derogation of the Book of Common Prayer, &c.

Whosoever shall in any interludes, plays, songs, rhymes, or by other open words, declare or speak anything in derogation, depraving or despising of the Book of Common Prayer, mentioned in Art. 9, or of anything therein contained, or any part thereof; or shall by open fact, deed, or open threatenings, compel or cause or otherwise procure or maintain any parson, vicar, or other minister in any cathedral or parish church, or in chapel or in any other place to sing or say any common or open prayer, or to minister any sacrament otherwise or in any other manner and form than *and instead of such as* (*n*) is mentioned in the said book; or shall by any of the said means unlawfully interrupt or let any parson, vicar, or other minister in any cathedral, parish church, chapel, or any other place, to sing or say common and open prayer, or to minister the sacraments, or any of them, in such manner and form as is mentioned in the said book, shall incur, in respect of the first offence, the penalties of the class, in respect of a second offence, the penalties of the class, and in respect of any subsequent offence, the penalties of the class. (*o*)

(*n*) See note (*k*) to Article 10.

(*o*) 1 Eliz., c. 2, ss. 9, 10, 11, 12, and 13, made applicable by the 13 and 14 Car. II., c. 4, to the Book of Common Prayer annexed to that Act.

The punishment for the above crimes is by the 1 Eliz., c. 2, for a first offence, forfeiture to the Queen of 100 marks, and in default of payment within six weeks after conviction, imprisonment for six months; for a second offence, forfeiture of 400 marks, and in default of payment within six weeks after conviction, imprisonment for twelve months; and for any subsequent offence, forfeiture of all the offender's goods and chattels and imprisonment for life.

Art. 13.

Definition of "other minister."

The words "other minister," as used in Articles 10 and 12, shall be deemed to extend to clergymen having no cure of souls. (*p*)

(*p*) 1 Hawk., P. C., c. 7, s. 3, p. 22; Dyer, 203; 1 Lev., 205.

Art. 14.

Recusancy.

Whosoever, having no lawful or reasonable excuse to be absent, shall *forbear* (*q*) to resort to his parish church or chapel accustomed, or, upon reasonable let thereof, to some usual place where common prayer and such service of God as is mentioned in Article 9 shall be used in such time of let, upon every Sunday and other days ordained and used to be kept as holy days, and then and thereby to abide, orderly and soberly, during the time of the common prayer, preaching, or other service of God there to be used and ministered, and shall be thereof convicted, shall be deemed to be a *recusant convict*, and shall, for every such offence, incur the penalties of the class, (*r*) and, *in addition to such penalties*, (*s*) shall, for every month which he shall so forbear, in case he be above the age of sixteen years, incur the penalties of the class, (*t*) and in either case, having been once convicted of any of the above offences, shall, without further indictment or con-

viction, for every month which he shall so forbear after such conviction, incur the penalties of the class. (*u*)

(*q*) The words of the 1 Eliz. c. 2, s. 14, are "not endeavour himself" to resort, &c.; but as the Acts passed subsequently, for enforcing an attendance at church on Sunday, refer to the 1 Eliz., s. 2, as forbidding persons *to forbear* to resort to church, we have adopted the term "forbear," for the sake of uniformity, and as being a more familiar expression.

(*r*) 1 Eliz. c. 2, s. 14; 3 Jac. I. c. 5, s. 8.

(*s*) 1 Hawk. P. C. b. 1, c. 10, s. 7, p. 32.

(*t*) 23 Eliz., c. 1, s. 5.

(*u*) 29 Eliz., c. 6, s. 4; 3 Jac. I., c. 4, s. 8.

The penalty for the first offence is forfeiture of 12*d.*, leviable by the churchwardens of the parish where the offence was committed, by way of distress (1 Eliz., c. 2, s. 14); and by the 3 Jac. I., c. 4, s. 27, may be so levied on the warrant of one justice of the peace, and in default of such distress the same justice may commit the offender to prison till payment of the forfeiture. On conviction of recusancy, the offender also becomes liable to the following disabilities; viz., he is disabled to practise the common law of this realm as a counsellor, clerk, attorney, or solicitor, in the same; to practise the civil law as advocate or proctor; to practise physic; to use or exercise the trade or art of an apothecary; to be judge, minister, clerk, or steward, of or in any court, or to keep any court, or be register or town-clerk or other minister or officer in any court; to bear any office or charge as captain, lieutenant, corporal, serjeant, ancient-bearer, or other officer in camp, troop, band, or company of soldiers; to be captain, master, governor, or bear any office or charge of or in any ship, castle, or fortress of the queen, her heirs, or successors, 3 Jac. I., c. 5, s. 8; and, in case he be convicted at the time of the death of any testator, or at the time of the granting of any administration, he is disabled to be executor or administrator by force of any testament or letters of administration, and to have the custody of any child as guardian in chivalry, guardian in socage, or guardian in nurture, of any lands, tenements, or hereditaments, being freehold or copyhold, 3 Jac. I., c. 5, s. 22.

It should be observed, with respect to such of the disabilities above described as are enacted by the 3 Jac. I., c. 5, s. 8, that any person incurring such disabilities renders himself liable to a penalty of £100, recoverable by action of debt, &c., if he practises any of the professions or fills any of the offices there mentioned. It is not, however, an indictable offence. See below, the note to Article 16, relating to popish recusancy.

The additional punishment of a person who, being sixteen years of age, abstains from church, is forfeiture of £20 for every month which he so abstains; and the penalty incurred by every person convicted of recusancy, for each month after conviction, is also £20.

It appears also that the Crown has the election either to seize all the goods and two parts of the hereditaments and leases of the offender, upon his making default in payment of either of the £20 penalties, or else to refuse the penalties, and thereupon seize two parts of the hereditaments and leases of the offender. 29 Eliz. c. 6, s. 4; 3 Jac. I. c. 4, ss. 8, 9, 11; 1 Hawk. P. C. b. 1, c. 10, s. 43, p. 42.

Art. 15.

It is not essential to the offences contained in the last preceding Article that a person should wholly or actually absent himself from the places of worship therein mentioned: it is sufficient if he misbehave himself in any such place, or miss either morning or evening prayer, or go away before the whole service is over. (*v*)

(*v*) 1 Roll. 93; 1 Keb. 491; Dalt. c. 45, f.; 1 Sid. 301; 230 Gib. 292; 2 Keb. 124; 1 Hawk. P. C. b. 1, c. 10, s. 4, p. 32.

Art. 16.

Popish recusancy.

Whosoever, being a Roman Catholic, shall be convicted of any of the offences specified in Article 14, shall be deemed to be a *Popish recusant convict*, and, in addition to the penalties therein mentioned, shall incur the penalties of the class. (*w*).

(*w*) 1 Hawk. P. C. b. 1, c. 12, p. 49. The additional penalties to which Popish recusants convict are liable beyond recusants convict consist of a variety of disabilities, restraints, and other inconveniencies, imposed chiefly by the 3 Jac. I. c. 5. "First," (to use the summary of Mr. Serjeant Hawkins, see Hawk. P. C. b. 1, c. 12, p. 50,) "they are put under the following disabilities:—"1. That of bringing an action. 2. That of presenting to a church. 3. That of bearing any public "office or charge. 4. That of claiming any part of a husband's personal estate. 5. That of claiming "an estate by courtesy, or by way of dower, after a marriage against law.

"Secondly, they are put under the following restraints:—1. From going above five miles "from home. 2. From coming to court. 3. From keeping arms. 4. From coming within ten "miles of London.

"Thirdly, they are liable to the following forfeitures:—1. That of two parts of a jointure or dower. "2. That of twenty pounds for not receiving the sacrament yearly after conformity. 3. That of one "hundred pounds for an unlawful marriage. 4. That of one hundred pounds for an omission of "lawful baptism. 5. That of twenty pounds for an unlawful burial.

"Lastly, they are subject to the following inconveniencies:—1. That their houses may be searched "for reliques, whether they be men or women. 2. That if they be women, and married, they may "be committed," &c.

But it appears to us that some of such disabilities, &c., cannot, strictly speaking, be regarded in the light of penalties, but are in the nature of specific offences to be committed by Popish recusants convict. It should be remarked that the statute throughout treats a Popish recusant convict as a description of person, and only makes him punishable when he takes upon himself to do certain acts which he is thereby disabled or restrained from doing. In this view such acts of a Popish recusant convict as are *indictable* are inserted below as a class of offences. See Articles 29 to 43 inclusive. It should be observed, however, that the greater number only subject the offender to a pecuniary penalty, recoverable by action of debt, &c., and are consequently omitted from this part of the Digest. These remarks apply equally to the disabilities incurred by a recusant convict.

ART. 17.

Exceptions.

The provisions of Articles 14 (*x*) and 16, shall not be deemed to affect any person who shall usually, on the Sunday, have in his house the Divine service which is established by the law of this realm, and shall be himself usually or most commonly present thereat, and shall not obstinately refuse to come to church and there to do according to the provisions of Article 14; and shall also, four times in the year at the least, be present at the Divine service in the church of the parish where he shall be resident, or in some other open common church or chapel of ease. (*y*)

(*x*) The provisions of the above Article are taken from the 12th section of the 23 Eliz., c. 1. It may be doubtful how far we are justified in making them relieve from the penalties of Article 14 generally. That Article, it will be observed, comprises two offences; viz., the forbearing to resort to church on any Sunday, and the forbearing (if above 16 years of age) to do so for a month together. In the former case, the offender is liable, under the 1 Eliz., c. 2, s. 14, to be fined 12*d. for every Sunday;* and in the latter is liable, under the before-mentioned statute, 23 Eliz., c. 1, s. 5, to be fined 20*l.*, in addition, for every month that he so abstains from church. The 12th section of the 23 Eliz., c. 1, however, only provides that persons having Divine service in their houses, as mentioned in the above Article, "shall not incur any pain or penalty limited by that Act for not repairing to "church;" and the only penalties so limited are those above referred to in respect of a person's not doing so for a month together. From this, therefore, it would appear that the benefit of the 23 Eliz. c. 1, s. 12, only extends to persons above 16 years of age, who forbear to resort to church for a month together. But we think that this cannot have been the intention of the framers of that enactment, but that it should apply as well where a person forbears for a single Sunday, as where he forbears to resort to church for a month together.

(*y*) 23 Eliz. c. 1, s. 12.

ART. 18.

Provided that nothing in the last preceding Article contained shall allow of there being assembled, on the occasion of any person's having Divine Service in his house, as in that Article mentioned, more than 20 persons besides his immediate family and servants. (*z*)

(*z*) 52 Geo. III., c. 155, s. 2. The penalty imposed by the 52 Geo. III., c. 155, s. 2, on any person knowingly permitting or suffering any congregation or assembly for religious worship of Protestants to meet in any place occupied by him, until the same shall have been certified as therein mentioned, is forfeiture of any sum not exceeding 20*l.*, nor less than 20*s.*, for every time any such congregation or assembly shall meet contrary to the provisions of that Act. The offence, however, is not indictable, and is therefore omitted from this part of the Digest.

ART. 19.

Neither shall the provisions of Articles 14 or 16 be deemed to affect any person who being accused of any of the offences therein contained shall, before he shall be thereof indicted, or at his arraignment, or his trial before judgment, submit or conform himself before the bishop of the diocese where he shall be resident, or before the justices where he shall be indicted, arraigned or tried, (not having before made like submission at his trial for a like offence,) and shall become obedient to the laws and ordinances of the Church of England, and repair to some place of worship mentioned in Article 14, and continue there, according to law, during the time of the Divine service and sermons; but such person shall, upon his recognition of such submission in open assizes or sessions of the county where he shall be resident, be thenceforth, for and during such time as he shall so continue in such conformity and obedience, freed and discharged from the penalties which he might otherwise incur in respect of any such offence. (*a*)

(*a*) 23 Eliz. c. 1, s. 10; 29 Eliz. c. 6, s. 6: 1 Jac. I. c. 4, s. 2. The above Article is compounded of the 10th sec. of the 23 Eliz. c. 1, and the 2d sec. of the 1 Jac. I. c. 4. The 1 Jac. I. c. 4, s. 2, does not specify the authorities before whom the recusant is to conform himself; but it must be intended that they are the same as are named in the 23 Eliz. c. 1, s. 10; indeed the 1 Jac. I. c. 4, s. 2, in all probability was thought to express this; it is, however, very obscurely framed. It should also be observed that this is the construction put upon the 1 Jac. I. c. 4, s. 2, by Mr. Serjeant Hawkins, (Pl. of the Crown, vol. i. b. 1, c. 10, s. 52, p. 44). He describes that enactment as providing "That a recusant conforming himself *according to the meaning of the abovementioned statutes*," (*i. e.* the 23 Eliz. c. 1, s. 10, and 29 Eliz. c. 6, s. 6,) "shall during such conformity be discharged "of all penalties which he might otherwise sustain by reason of his recusancy." See, however, the note to Article 41, *infra.*

See also the 3 Jac. I. c. 4, ss. 16 and 17, which would seem to render it necessary, where a person is *indicted* for absenting himself from church *for a month*, that he should, before he can avoid the penalties of recusancy, take the sacrament in addition to conforming himself. By sec. 16 it is enacted, "That no *indictment or indictments* had or found, or hereafter to be had or found against *any person* "*or persons for not repairing to some church or chapel, or usual place of common prayer, but* "*absenting him or herself by the space of one month, contrary to the laws and statutes in that behalf* "*provided*, or for not receiving the said sacrament contrary to this present law, nor any proclamation, "outlawry or other proceeding thereupon, shall at any time hereafter be *avoided*, discharged or reversed, "by reason of any default in form or lack of form, *or other defect whatsoever* (*other than by direct*

" *traverse to the point of not coming to church,* or not receiving the said sacrament, *whereof such* " *person or persons hath been or shall be indicted*), but the same indictment shall stand in force and " be proceeded upon. Sec. 17 provides, " That if *any person or persons so indicted or to be* " *indicted,* shall at any time hereafter submit and conform him or herself and become obedient to " the laws of the church of England and repair to the parish church of his or her most abiding, and if " there be no such, then to the church next adjoining to his or her such dwelling, and there hear " divine service according to the true meaning of the statute in that behalf made and provided, AND " *there publicly receive the said sacrament according to the laws of this realm of England now esta-* " *blished ;* That then every such person and persons so indicted shall and may from thenceforth be " admitted and allowed to *avoid*, discharge, reverse and undo the said indictment and indictments, and " all proceedings thereupon, *in such manner and form as if this present Act had not been had or made.*" It should be observed, however, that the object of the 3 Jac. I. c. 4, as stated in the preamble, was the better discovery of such persons as " being *popishly* affected do nevertheless the better to cover " and hide their false hearts, and with the more safety to attend the opportunity to execute their mis- " chievous designs, repair sometimes to church to escape the penalties of the laws in that behalf pro- " vided." And the Act then goes on to enact, That Popish recusants *who should be convicted* and should conform themselves and repair to church according to law, should within the first year after such conformity and repairing to church, and afterwards once in every year following, at the least, receive the Sacrament as therein mentioned under certain penalties in case of omission. These penalties, it will be perceived, are only to attach where the offender is a Popish recusant *convict*, and has previously conformed himself : and the conformity intended is not the conformity spoken of in the above Article, which must generally be *before conviction*, (*i. e.*, either before indictment, or upon arraignment or trial before judgment,) but that of a Popish recusant AFTER *conviction*. There is nothing, therefore, if we except the before mentioned sections [16 and 17],) to render conformity *before conviction* less efficacious to discharge the penalties of recusancy than it had previously been. The question then is, looking to the context of the Act, can sections 16 and 17, notwithstanding the generality of the language in which they are expressed, be considered as applying to any other than Popish recusants *convict*. We have thought not, and in that view have omitted from the enumeration of the means by which an offender, after indictment, may discharge himself from the penalties for not resorting to church specified in the above Article, the additional act of receiving the sacrament according to the provisions of the 3 Jac. I. c. 4.

ART. 20.

Neither shall the penalties of Articles 14 or 16 attach upon the heir of any person in respect of such person's having, at the time of his death, been liable to be indicted for any of the offences contained in those Articles, such heir himself not being liable to be so indicted ; nor upon any such heir, although he shall be liable to be so indicted, provided he shall afterwards, *in the manner mentioned in Art.* 19, (*b*) become conformable and obedient to the laws and ordinances of the Church of England, and repair to some place of worship mentioned in Art. 14, and continue there according to law during the time of the Divine service and sermons, and also take the oath of supremacy before the archbishop or bishop of the diocese. (*c*)

(*b*) The authorities before whom and the mode in which the party is to conform are not stated in the Act ; but see note to Art. 19.

(*c*) This Article contains he effect of 1 Jac. I. c. 4, s. 3.

ART. 21.

Provided that, if the heir of any person who, at the time of his death, shall be liable to be indicted for any of the offences in the last preceding Article referred to, shall happen, at the time of such person's decease, to be within the age of sixteen years, and shall, after attaining that age, become or be liable to be indicted for any of the like offences, then the penalties of Articles 14 or 16 shall attach upon such heir in respect of his ancestor's offence until such heir shall, in manner in the said last preceding Article mentioned, conform himself, repair to some place of worship therein referred to, and continue there during the time of the Divine service and sermons, and take the oath of supremacy. (*d*)

(*d*) This Article contains the effect of 1 Jac. I. c. 4, s. 4.

ART. 22.

Toleration Clauses.

Neither shall the provisions of Articles 14 and 16 respectively be deemed to affect any Quaker who shall make and subscribe the Declaration of Fidelity according to law, shall subscribe a profession of his Christian belief in the words appointed by an Act passed in the first year of the reign of King William and Queen Mary, intituled " An Act for exempting their Majesties' Protestant subjects, dissenting from the Church of England, from the penalties of certain laws," and shall come to some congregation or assembly of religious worship allowed or permitted by that Act ; (*e*) nor any other Protestant dissenter who shall resort to some congregation or assembly for religious worship of Protestants whose place of meeting shall be duly certified or registered according to law ; (*f*) nor any Roman Catholic who shall take and subscribe according to law the oath appointed and set forth in an Act passed in the tenth year of the reign of King George the Fourth, intituled " An Act

for the relief of His Majesty's Roman Catholic subjects," and shall come to some congregation or assembly of religious worship permitted by an Act passed in the 31st year of the reign of King George the Third, intituled " An Act to relieve, upon conditions and under restrictions, the persons therein described from certain penalties and disabilities to which Papists, or persons professing the Popish religion, are by law subject." (*g*)

(*e*) 1 Will. and Mary, sess. 1, c. 18, ss. 13 and 16; 52 Geo. III. c. 155, s. 14.

(*f*) 52 Geo. III. c. 155, s. 4. The 1 Will. and Mary, sess. 1, c. 18, (The Protestant Dissenters' Toleration Act,) repealed the penalties for not resorting to church in favour of persons (other than Papists and Popish recusants) taking the oaths of allegiance and supremacy, and making the declaration against transubstantiation, (s. 1,) *provided they came to some congregation or assembly of religious worship allowed by that Act*, (s. 16.) And persons scrupling to take the oaths were allowed to make a declaration of fidelity, and subscribe a profession of their Christian belief instead, (s. 13.)

The Roman Catholic Relief Act, (10 Geo. IV. c. 7;) and the 52 Geo. III. c. 155, s. 4, enacts (amongst other things) that a person resorting to any congregation or assembly for religious worship, whose place of meeting shall be duly certified according to the provisions of that *or any other Act* relating to the certifying or registering of places of religious worship, shall be exempt from all such penalties under any Act relating to religious worship as any person who shall have taken the oaths prescribed by the 1 Will. and Mary, sess. 1, c. 18, is by law exempt, and declares that nothing in the 52 Geo. III. c. 155, contained shall extend to Quakers.

From this it will appear that (except in the case of Quakers) all that is now necessary to exempt a Protestant dissenter from the penalties against recusancy is that he should resort to some registered place of worship. The enactment above alluded to is, however, very obscure; it is not clear if more is intended than that the places of worship allowed by the 52 Geo. III. c. 155, should be equally available for the purposes of the other Acts relating to the registering of places of worship as the places mentioned in such Acts.

(*g*) 31 Geo. III. c. 32, s. 3; 10 Geo. IV. c. 7, ss. 2 and 23.

Art. 23.

Neither shall the penalties of Article 14 attach upon any Protestant dissenting from the Church of England, who shall at any time during his prosecution upon or by virtue of any of the provisions of such Article take the oaths of allegiance and supremacy, or, if a Moravian, make a solemn affirmation or declaration to the effect of such oaths, (*h*) or, if a Quaker, make and subscribe the declaration of fidelity in the last preceding Article mentioned, and subscribe the profession of his Christian belief, according to the Act of the first year of the reign of King William and Queen Mary, mentioned in the said last preceding Article, or before any two of Her Majesty's justices of the peace. (*i*)

(*h*) 3 and 4 Will. IV., c. 49, s. 1.

(*i*) 10 Ann, c. 2, s. 8. It will be observed that the provisions of the above Article do not extend to Roman Catholics. At the time of the passing of the 10 Anne, c. 2, (the 8th section of which is embodied in that Article,) none of the Roman Catholic Toleration Acts had been passed; but it seems reasonable that, at the present day, the benefit of the above Article should be extended to Roman Catholics, upon their taking and subscribing the oath appointed by the Roman Catholic Relief Act.

Art. 24.

Refusing to take the Oaths of Allegiance and Abjuration when tendered by order of the Privy Council, &c.

Whosoever, to whom the oaths of allegiance and abjuration, or, being a Quaker or Moravian, a solemn affirmation or declaration to the effect of such oath of allegiance and, in lieu of such oath of abjuration, a solemn affirmation in the form appointed by an Act passed in the third and fourth years of the reign of His late Majesty King William the Fourth, intituled " An Act to allow Quakers and Moravians to make affirmation in all cases where an oath is or shall be required," (*j*) shall be tendered by two or more justices of the peace, or any other person or persons by Her Majesty specially appointed, by order in the Privy Council or by commission under the Great Seal, to administer and tender the said oaths to any person or persons whatsoever, whom they shall or may suspect to be dangerous or disaffected to Her Majesty or her government, shall neglect or refuse respectively to take the same oaths and make the same affirmation, (such refusal to be certified and recorded according to the provisions of an Act passed in the first year of the reign of King George the First, intituled " An Act for the further security of His Majesty's person and government, and the succession of the Crown in the heirs of the late Princess Sophia, being Protestants; and for extinguishing the hopes of the pretended Prince of Wales and of his open and secret abettors,") shall be from the time of his neglect or refusal, taken, esteemed, and adjudged a *Popish recusant convict*, and as such to forfeit and be proceeded against. (*k*)

(*j*) 3 and 4 Will. IV. c. 49, ss. 1 and 2.

(*k*) 1 Geo. I. stat. 2, c. 13, s. 10; 6 Geo. III. c. 53. To refuse to take the oath of supremacy when

tendered under the provisions of the 1 Geo. I., stat. 2, c. 13, s. 10, was also, before the passing of the 31 Geo. III. c. 32, an offence which constituted the person guilty of it a Popish recusant convict, but the 18th section of the former statute enacted that no person should be thenceforth summoned to take that oath, or be prosecuted for not obeying such summons.

It also appears that a Roman Catholic is liable, notwithstanding the Roman Catholic Relief Act, to have the oaths of allegiance and abjuration tendered to him under the provisions of the above Article, and that, in case of refusal to take the same, he would constitute himself a popish recusant convict. The Roman Catholic Relief Act only abolishes the declaration against transubstantiation, and the invocation of saints, and the sacrifice of the mass, as practised in the Church of Rome, and provides a form of oath, to be taken instead of the oaths of allegiance, supremacy, and abjuration, as a qualification for the exercise of the offices and civil rights therein mentioned; and then, by section 23, enacts that such oath being taken and subscribed in any of the courts, and before any of the persons therein mentioned, "shall be of the same force and effect, to all intents and purposes as, and shall stand in the "place of, all oaths and declarations required or prescribed by any law then in force *for the relief of* "His Majesty's Roman Catholic subjects from any disabilities, incapacities, or penalties." The Act does not, by any of its provisions, substitute the oath therein appointed for the oaths of allegiance supremacy, and abjuration, in *all* cases where the latter oaths were previously required to be taken by Roman Catholics. It only substitutes it, it will be observed, in those cases where such oaths had been allowed to relieve from the penalties of some distinct offence, and not, as in a case like the present, where the not taking the oaths was itself the offence. There seems to be no reason why the oath appointed by the Roman Catholic Relief Act should not be substituted for the oaths of allegiance and abjuration, when required to be taken under the provisions of the above Article, as well as in the cases specified in the Roman Catholic Relief Act, since that oath contains the effect of the oaths of allegiance and abjuration. It may, therefore, be proper that the oath contained in the 10 Geo. IV., c. 7, should, in the case of Roman Catholics, be substituted for the oaths of allegiance and abjuration, when required to be taken under the circumstances mentioned in the above Article, and that its provisions should be altered to that extent.

By the 1 Will. and Mary, sess. 1, c. 18, s. 12, it is enacted, "That every justice of the peace may "at any time hereafter require any person that goes to any (Protestant) meeting for exercise of reli- "gion, *to make and subscribe the declaration aforesaid* (*i. e.*, against transubstantiation), and also to "take the said oaths (of allegiance and supremacy) or declaration of fidelity hereinafter mentioned, "in case such person scruples the taking of an oath; and upon refusal thereof, such justice of the "peace is hereby required to commit such person to prison without bail or mainprize, and to certify "the name of such person to the next general or quarter sessions of the peace to be held for that "county, city, town, part, or division where such person then resides; and if such person so com- "mitted shall, upon a second tender at the general or quarter sessions, refuse *to make and subscribe* "*the declaration aforesaid*, such person refusing shall then and there be recorded, and he shall be "taken thenceforth to all intents and purposes for a Popish recusant convict, and suffer accordingly," &c. This enactment is very obscurely worded: we conceive, however, that the declaration, the refusal of which on a second tender is to make the person refusing a Popish recusant convict, is the declaration against transubstantiation. The words of the clause are, "refuse *to make and subscribe* "*the declaration aforesaid.*" The only declaration which is therein directed *to be made and subscribed*, is the declaration against transubstantiation; the declaration of fidelity is only to be *taken*. Under these circumstances, the Roman Catholic Relief Act having repealed the declaration against transubstantiation, the offence contained in the above section of the 1 Will. and Mary, sess. 1, c. 18, appears also to have been incidentally repealed by it.

Art. 25.

Whosoever being summoned under the provisions of the Act of the first year of the reign of King George the First, in the last preceding Article mentioned, by two or more justices of the peace or any other such person or persons as therein mentioned, by writing under their hands and seals, to appear before them at a certain day and time therein appointed to take the oaths, or being a Quaker or Moravian to make the solemn affirmations (*l*) respectively mentioned in such last preceding Article, shall neglect or refuse to appear according to such summons, and such his neglect or refusal so to appear having been certified under the provisions of the before-mentioned Act to the next general quarter sessions of the peace to be holden for the county, riding, liberty, city, borough, town-corporate, or place in which such refusal shall be made, shall neglect or refuse to appear and respectively take the said oaths and make the said solemn affirmations at the said general quarter sessions, shall be taken, esteemed, and adjudged a *Popish recusant convict*, and as such to forfeit and be proceeded against as if he had actually refused respectively to take the said oaths and make the said affirmations. (*m*)

(*l*) 3 and 4 Will. IV., c. 49, ss. 1 and 2.
(*m*) 1 Geo. I. stat. 2, c. 13, s. 11; 6 Geo. III. c. 53.

Art. 26.

Provided that any person who shall become a Popish recusant convict by virtue of any thing in the last two preceding Articles contained, and shall at any time thereafter respectively take the oaths and make the affirmations therein respectively mentioned, in such manner and in such place as is appointed by the Act of the first year of the reign of King George the First, in Article 24 mentioned, shall be from such time discharged from such conviction. (*n*)

(*n*) 1 Geo. I. stat. 2, c. 13, s. 26; 6 Geo. III. c. 53; 3 and 4 Will. IV. c. 49, ss. 1 and 2.

ART. 27.

Members of either House of Parliament sitting or voting therein or coming into the Queen's presence before they have taken the Oaths of Allegiance and Supremacy.

Whosoever, being a Peer of this realm, or Member of the House of Peers, shall vote, or make his proxy in the House of Peers, or sit there during any debate in the said House of Peers; or being a Member of the House of Commons, shall vote in the House of Commons, or sit there during any debate in the said House of Commons after their Speaker is chosen; or being a Peer, or Member of the House of Peers, and of the age of twenty-one years or upwards; or being a Member of the House of Commons, shall come advisedly into or remain in the presence of the Queen or any of her successors, or shall come into the court or house where she or any of them shall reside, until, in any of the cases aforesaid, being a Protestant, he shall have first taken, according to law, the oaths of allegiance and supremacy, or if a Quaker or Moravian have first made a solemn affirmation or declaration to the effect of such oaths, or, being a Roman Catholic, he shall have first taken and subscribed, in like manner, the oath appointed and set forth in an Act passed in the tenth year of the reign of King George the Fourth, intituled "An Act for the relief of His Majesty's Roman Catholic subjects," and shall be thereof respectively convicted, shall be deemed to be a *Popish recusant convict*, and shall, in addition to the penalties in the last preceding Article mentioned and referred to, incur the penalties of the class. (*o*)

(*o*) 30 Car. II. st. 2, ss. 2, 5, 6; 10 Geo. IV. c. 7, ss. 2, 4, 23; 3 and 4 Will. IV. c. 49, s. 1. The additional disabilities to which a Popish recusant convict is liable under this Article beyond a Popish recusant convict under Art. 16 are contained in the sixth section of the 30 Car. II. st. 2, which enacts, "That if any person that now is, or hereafter shall be, a Peer of this realm, or Member of the House "of Peers, or Member of the House of Commons, shall presume to do anything contrary to this Act, or "shall offend in any of the cases aforesaid, that then every such Peer and Member so offending shall "from thenceforth be deemed and adjudged a *Popish recusant convict* to all intents and purposes what-"soever, and shall forfeit and suffer as a Popish recusant convict, and shall be disabled to hold or "execute any office or place of profit or trust, civil or military, in any of His Majesty's realms of "England or Ireland, dominion of Wales, or town of Berwick-upon-Tweed, or in any of His Majesty's "islands or foreign plantations to the said realms belonging, and shall be disabled from thenceforth to "sit or vote in either House of Parliament, or make a proxy in the House of Peers, or to sue or use "any action, bill, plaint, or information in course of law, or to prosecute any suit in any Court of "Equity, or to be guardian of any child, or executor or administrator of any person, or capable of any "legacy or deed of gift; and shall forfeit, for every wilful offence against this Act, the sum of £500, to "be recovered and received by him or them that shall sue for the same, and to be prosecuted by any "action of debt, suit, bill, plaint, or information in any of His Majesty's Courts at Westminster, wherein "no essoin, protection, or wager of law shall lie."

ART. 28.

Exception.

Provided that, if any Peer or Member of the House of Peers, or of the House of Commons, shall in the next term after his coming or remaining, as in the last preceding Article is mentioned, being a Protestant, take the oaths of allegiance and supremacy, or if a Quaker or Moravian make a solemn affirmation or declaration to the effect thereof, or, being a Roman Catholic, take and subscribe the oath, in the same Article mentioned to be appointed, and set forth in the Act of the tenth year of King George the Fourth, in Her Majesty's High Court of Chancery, between the hours of nine and twelve in the forenoon, he shall not be deemed to be within, or to be affected by, so much of the said last preceding Article as makes it an offence for any such Peer or Member to come or remain, as in that Article is mentioned. (*p*)

(*p*) 30 Car. II. st. 2, s. 5; 10 Geo. IV. c. 7, ss. 2, 4, and 23; 3 and 4 Will. IV. c. 49, s. 1.

ART. 29.

Offences by Popish recusants convict.

Whosoever, being a Popish recusant convict, shall come advisedly into or remain in the presence of the Queen, or any of her successors, or shall come into the court or house where she or any of them shall reside, shall incur all and singular the penalties in Article 27, respectively mentioned and referred to. (*q*)

(*q*) 30 Car. II. st. 2, ss. 5 and 6.

There is nothing in the 31 Geo. III. c. 32 (the Roman Catholic Toleration Act) which expressly relieves Popish recusants convict committing any of the offences specified in the above Article and Articles 33, 34, 41, and 44, from the penalties imposed in respect of those offences. Although the fourth section of that Act recites that, by several Acts, "Papists, reputed Papists, persons professing "or educated in the Popish religion, Popish recusants, Popish recusants convict, &c., &c., are made "subject to the punishments, penalties, and disabilities therein mentioned;" yet, in the enacting part, it only declares that no person qualifying himself as therein mentioned shall be indicted, &c., for being a Papist or reputed Papist, &c. It says nothing about Popish recusants and Popish recusants convict; and it should be observed that the penalties of the above-mentioned Articles could not be incurred upon a conviction for being a Papist or reputed Papist merely, but only where a person, being a Papist, had been convicted of not resorting to church, and afterwards committed any of the offences described in those Articles. The only manner in which offences by Popish recusants convict

are affected by the 31 Geo. III. c. 32, is under the third section of that Act, which enacts that no person professing the Roman Catholic religion, qualifying himself as therein mentioned, shall be prosecuted for not resorting or repairing to his parish church or chapel, or some other usual place of common prayer, to hear Divine service and join in public worship, according to the forms and rites of the Church of England as by law established; since which, no Roman Catholic so qualifying himself can become a Popish recusant convict; and consequently, the penalties for offences committed by Popish recusants convict, as such, are incidentally repealed in favour of Roman Catholics who duly qualify themselves. But should a Roman Catholic, who has omitted to qualify himself, be convicted of not going to church (which would constitute him a Popish recusant convict), and afterwards, before conformity, be convicted of any of the offences specified in the above-mentioned Articles, the only mode in which he could avoid the penalties for those crimes would be by conforming himself, where that is allowed, otherwise he would, even at the present day, be liable to incur them.

ART. 30.

Provided that, if such Popish recusant convict as in the last preceding Article is mentioned, shall, in the next term after his coming or remaining as therein mentioned, being a Protestant, take the oaths of allegiance and supremacy, or, if a Quaker or Moravian, make a solemn affirmation or declaration to the effect of such oaths, in Her Majesty's High Court of Chancery, between the hours of nine and twelve in the forenoon, (*r*) or, being a Roman Catholic, take and subscribe the oath in Article 27 mentioned to be appointed and set forth in the Act of the tenth year of King Geo. IV., therein referred to, according to the directions of that Act, he shall not be deemed to be within or to be affected by the said last preceding Article. (*s*) Exceptions.

(*r*) 30 Car. II. st. 2, s. 5; 3 and 4 Will. IV. c. 49, s. 1. It is not necessary in order to constitute a person a Popish recusant convict that he should be a Roman Catholic.

(*s*) 30 Car. II. st. 2, s. 5; 10 Geo. IV. c. 7, ss. 20 and 23. It seems that although the statute 30 Car. II. st. 2, s. 5, directs the oaths of allegiance and supremacy to be taken in the High Court of Chancery, between the hours of 9 and 12 in the forenoon; yet as the statute 10 Geo. IV. c. 7, s. 23, directs that the oath therein appointed "shall be of the same force and effect to all intents and purposes as and shall stand in the place of all oaths and declarations required or prescribed by any law "now in force for the relief of His Majesty's Roman Catholic subjects from any disabilities, incapacities, or penalties," that a Popish recusant convict, (being a Roman Catholic,) circumstanced as in the above Article is mentioned, might relieve himself from the penalties of Article 29, by taking and subscribing the oath specified in the 10 Geo. IV. c. 7, in any of the Courts, and beween the hours appointed by that statute.

ART. 31.

Provided also, that nothing in Articles 27 and 29 contained shall extend to the prejudice of any person for coming into or remaining in the presence of Her Majesty, who shall first have licence so to do by any warrant under the hands and seals of six or more privy counsellors, by order of Her Majesty's Privy Council, upon some urgent occasion therein to be expressed, so as such licence exceed not the space of ten days; and that the said licence be first filed and put upon record in the office of the petty bag in Chancery, for any body to view without fee or reward, and no person be licensed for above the number of thirty days in any one year. (*t*)

(*t*) 30 Car. II. st. 2, s. 12.

ART. 32.

Provided also, that if any offender, contrary to the provisions of Articles 27 and 29, shall at any time after such offence, being a Protestant, take the oaths of allegiance and supremacy, or if a Quaker or Moravian, make a solemn affirmation or declaration to the effect of such oaths, in Her Majesty's High Court of Chancery, in the manner mentioned in Article 30; (*u*) or being a Roman Catholic, take and subscribe the oath in Article 27 mentioned to be appointed and set forth in the Act of the tenth year of the reign of King George the Fourth, therein referred to, according to the directions of that Act, (*v*) every such person shall be from thenceforth free and discharged from all seizures, penalties, and losses which he might otherwise sustain or bear for or by reason of being a popish recusant convict by virtue of Articles 27 and 29, and shall be freed and discharged from all disabilities and incapacities incurred thereby, so as such freedom and discharge extend not to restore any such person to any office or place filled and supplied upon voidance by those Articles, nor to any other office till after the expiration of one year from the taking and subscribing the said oath. (*w*)

(*u*) 30 Car. II. st. 2, s. 13; 3 and 4 Will. IV. c. 49.

(*v*) 30 Car. II. st. 2, s. 13. See 10 Geo. IV. c. 7, ss. 20 and 23, and note (*s*) to Art. 30, which equally applies to this Article.

(*w*) 30 Car. II. st. 2, s. 13; 10 Geo. IV. c. 7, s. 1. The 30 Car. II. st. 2, s. 13, also provides that nothing therein contained shall extend to make void, or at any time discharge, the forfeiture of £500, incurred as mentioned in note (*o*) to Art. 27.

ART. 33.

Whosoever, being a Popish recusant convict, above the age of sixteen years, and

Popish recusants convict not repairing to their usual place of dwelling within forty days after conviction, or afterwards removing above five miles from thence.

born within any Her Majesty's realms or dominions, or made denizen, shall not, within forty days next after his conviction (if he be within this realm at the time of such conviction, and not restrained or stayed by imprisonment, or by Her Majesty's commandment, or by the order and direction of some six or more of the Privy Council, or by such sickness and infirmity of body as he shall not be able to travel without imminent danger of life, and in such cases of absence out of the realm, restraint, or stay, then within twenty days next after he shall *return into the realm*, and be enlarged of such imprisonment or restraint, and shall be able to travel), repair to his place of usual dwelling and abode, if he have any certain place of dwelling and abode within this realm, [or if he have none such, then to the place where he was born, or where his father or mother shall be then dwelling,] or shall at any time after pass or remove above five miles from thence respectively, shall incur the penalties of the class. (*x*)

(*x*) 35 Eliz. c. 2, ss. 2, 3, and 4; 3 Jac. I. c. 5, s. 6.

The above Article is compounded of the 35 Eliz., c. 2, ss. 2, 3, and 4; and the penalties for the offences there detailed are forfeiture of the offender's goods and chattels, lands, tenements, and hereditaments (whether freehold or copyhold), rents, and annuities, during his life.

It seems doubtful if so much of the above Article as relates to Popish recusants who have no certain place of abode within the realm, viz., the part inserted between brackets, can be considered to be still in force.

The fourth section of the 35 Eliz. c. 2, would appear to apply only to persons then in existence. It enacts "That every person above the age of 16 years, born within any of Her Majesty's realms or "dominions, not having any certain place of dwelling and abode within this realm, and being a "Popish recusant, not usually repairing to some church, chapel, or usual place of common prayer, but "forbearing the same contrary to the same laws and statutes in that behalf made, shall *within forty "days next after the end of this session of Parliament*, (if they be then within this realm, and not "imprisoned, restrained, and stayed as aforesaid, and in such case of absence out of the realm, impri-"sonment, restraint, or stay, then within 20 days next after they shall return into the realm and be "enlarged of such imprisonment or restraint, and shall be able to travel) repair to the place where "such person was born, or where the father or mother of such person shall then be dwelling, and "shall not at any time after remove or pass above five miles from thence, upon pain that every person "and persons which shall offend against the tenor and intent of this Act in anything before mentioned, "shall lose and forfeit all his and their goods and chattels, and shall also forfeit to the Queen's "Majesty all the lands, tenements, and hereditaments, and all the rents and annuities of every such "person so doing or offending, during the life of the same person." It will be observed that this enactment makes no mention of Popish recusants not repairing as therein mentioned *after the forty days*. However, looking to ss. 2 and 3 of the same statute, which, in the case of Popish recusants having some certain place of abode, apply as well to persons who should be convicted of recusancy at any time thereafter, as to Popish recusants then in existence, and seeing that the 3 Jac. I. c. 5, s. 6, which confirms that statute, treats the enactment in question as being then in force, we have considered ourselves justified in embodying it in the above Article as an existing provision.

With respect also to the first branch of the above Article (that relating to Popish recusants having some certain place of abode within the realm), the 35 Eliz., c. 2, specifies no time within which, in the instance there mentioned, such recusants, if absent from the kingdom, must repair to their places of abode after their return; although, in the other cases of absence specified in the Act, it limits the time to twenty days.

As, however, the language of the Act clearly shows that such absence was contemplated, and as in all probability the omission has resulted from the negligent mode in which the Act was prepared, we have adopted the period of twenty days in this as well as the other instances.

Art. 34.

Provided that, if any such Popish recusant convict, as in the last preceding Article is mentioned, shall not be a *feme covert*, and shall not have lands, tenements rents, or annuities of an absolute estate of inheritance or freehold, of the clear yearly value of twenty marks above all charges, to his own use and behoof, and not upon any secret trust or confidence for any other, or goods and chattels in his own right and to his own proper use and behoof, and not upon any such secret trust or confidence for any other, above the value of £40; then, in case he shall not, within the time in the before-mentioned Article limited and appointed, repair to his place of usual dwelling and abode, if he have any, or else to the place where he was born, or where his father or mother shall be dwelling, according to the tenor and intent of such Article, and thereupon notifying his coming, and present himself and deliver his true name in writing to the minister or curate of the parish, and to the constable, headborough, or tithingman of the town, within twenty days after his so coming, or shall at any time after such his repairing to any such place, pass or remove above five miles from the same, and shall not within three months next after he shall be apprehended or taken for offending as is aforesaid, conform himself to the obedience of the laws and statutes of the realm, in coming usually to the church to hear Divine service, and in making such public confession and submission as is hereafter, in Article 39, appointed and expressed, being thereunto required by the bishop of the diocese, or any justice of the peace of the county where he shall happen to be, or by

the minister or curate of the parish, he shall, being thereunto warned or required by any two justices of the peace, or the coroner of the county where such offender shall then be, upon his corporal oath before any two justices of the peace, or the coroner of the same county, abjure this realm of England and all other the Queen's Majesty's dominions for ever, and thereupon shall depart out of this realm, at such haven and port, and within such time as shall in that behalf be assigned and appointed by the said justices of peace or coroner before whom such abjuration shall be made, unless he shall be letted or stayed by such lawful and reasonable means or causes as by the common law of this realm were, before the passing of an Act of the 21st year of King James I., intituled "An Act for continuing and reviving of divers Statutes and repeal of divers others," permitted and allowed in cases of abjuration of felony, (*y*) and in such cases of let or stay, then within such reasonable and convenient time after as the common law required in case of abjuration of felony; (*z*) and in case he shall refuse to make such abjuration, or after such abjuration made shall not go to such haven, and within such time as aforesaid, and from thence depart out of this realm, or after such his departure shall return or come again into any of Her Majesty's realms or dominions, without Her Majesty's special licence in that behalf first had and obtained, then he shall incur the penalties of the class. (*a*)

21 Jac. I. c. 28, ss. 6 and 7.

(*y*) The 21 Jac. I. c. 28, s. 6, which abolished privilege of sanctuary, also took away abjuration, which was consequent thereupon.

(*z*) 35 Eliz., c. 2, s. 8.

(*a*) 35 Eliz., c. 2, s. 10. The punishment of any such Popish recusant convict as above mentioned, refusing to abjure the realm, appears to be death. By the 35 Eliz. c. 2, s. 10, he was to be adjudged a felon, and to suffer and lose as in case of felony, without benefit of clergy; and the 7 and 8 Geo. IV. c. 28, which abolished benefit of clergy, enacted (sec. 7) "that no person convicted of felony shall "suffer death, *unless it be for some felony which was excluded from the benefit of clergy before or on "the first day of the present session of Parliament*," &c., which was the case with respect to the above offence.

Art. 35.

In respect of the offences contained in the last two preceding Articles the miles there intended shall be deemed to consist of 5280 feet, or 1760 yards each, and shall be reckoned not by straight lines, as a bird or an arrow may fly, but according to the nearest and most usual way. (*b*)

(*b*) Cro. Eliz. 212; 1 Hawk. P. C. b. 1, c. 12, s. 15, p. 54.

Art. 36.

Exceptions.

The provisions of Articles 33 and 34 shall not be deemed to affect any Popish recusant convict who, having obtained the licence in writing of Her Majesty, her heirs or successors, or three or more of the Privy Council, under the hands of such Privy Councillors, for that purpose, without expressing any other cause, shall go and travel out of the compass of the five miles in the said Articles mentioned, for such time as in the said licence shall be contained for his travelling, attending, and returning; or, who having necessary occasion or business to go and travel out of the compass of the said five miles, and having gotten licence in writing in that behalf, (in which licence shall be specified and contained both the particular cause of such licence and how long the party licensed shall be absent in travelling, attending, and returning,) under the hands and seals of four of the justices of the peace of the county, limit, division, or place next adjoining to the place of abode of such recusant, with the privity and assent in writing of the bishop of the diocese, or of the lieutenant or any deputy-lieutenant of the same county, residing within the said county or liberty, (*such bishop, lieutenant, or deputy-lieutenant not being one of the four justices of the peace before mentioned* (*c*),) under their hands and seals, and also having first taken his corporal oath before the said four justices of the peace, or any of them, that he hath truly informed them of the cause of his journey, and that he will not make any causeless stays, shall go and travel about such his necessary business, for such time only for his travelling, attending, and returning, as in such licence shall be comprised. (*d*)

(*c*) Mansfield's Case, Moor 836. It was determined in this Case, that the person giving his assent must be a different person from any of the justices required to sign the licence.

(*d*) 3 Jac. I. c. 5, s. 7.

Art. 37.

Neither shall the penalties of Articles 33 and 34 be incurred by any Popish recusant convict who shall be urged by process, without fraud or covin, or be

bounden, without fraud or covin, to make appearance in any of Her Majesty's Courts, or be sent for, commanded or required by any three or more of the Privy Council, or by any four or more of any Commissioners to be in that behalf nominated and assigned by Her Majesty, to make appearance before the said Council or Commissioners, for travelling to make appearance accordingly, nor for his abode concerning the same, nor for convenient time for his return back again upon the same. (*e*)

(*e*) 35 Eliz. c. 2, s. 13.

ART. 38.

Neither shall such penalties be incurred by any Popish recusant convict who shall be bound, or ought to yield and render his body to the sheriff of the county where he shall happen to be, upon proclamation in that behalf without fraud or covin to be made, for travelling for that intent and purpose only, without any fraud or covin, nor for convenient time taken for the return back again upon the same. (*f*)

(*f*) 35 Eliz. c. 2, s. 14.

ART. 39.

Moreover the provisions of Articles 33 and 34 shall not be deemed to affect any Popish recusant convict who shall, before he shall be convicted of any offence in those Articles contained, come to some parish church on some Sunday, or other festival day, and then and there hear Divine service; and at service time, before the sermon or reading of the gospel, make public and open submission and declaration of his conformity to the laws and statutes of the realm, in manner following, (that is to say),

"I, A. B., do humbly confess and acknowledge that I have grievously offended "God, in contemning Her Majesty's godly and lawful government and authority, "by absenting myself from church and from hearing Divine service, contrary to "the godly laws and statutes of this realm, and I am heartily sorry for the same; "and do acknowledge and testify in my conscience that the Bishop or See of Rome "hath not, nor ought to have any power or authority over Her Majesty, or within "any of Her Majesty's realms or dominions; and I do promise and protest, without any dissimulation, or any colour or means of any dispensation, that from "henceforth I will from time to time obey and perform Her Majesty's laws and "statutes in repairing to the church and hearing divine service, and do my "uttermost endeavour to maintain and defend the same." (*g*)

(*g*) 35 Eliz. c. 2, ss. 15 and 16.

ART. 40.

Relapse.

Provided that if any Popish recusant convict shall, after such submission made, as in the last preceding Article is mentioned, fall into relapse or eftsoons become a recusant in not repairing to church to hear Divine service, but shall forbear the same, contrary to the laws and statutes in that behalf made and provided, then he shall lose all such benefit as he might otherwise by virtue of the said last preceding Article have or enjoy by reason of his said submission, and shall thereupon stand and remain in such plight, condition, and degree, to all intents, as though such submission had never been made. (*h*)

(*h*) 35 Eliz. c. 2, s. 18.

ART. 41.

Popish recusants convict, after conformity, not receiving the sacrament every year.

Whosoever being a Popish recusant convict and having conformed himself (*i*) and repaired to some place of worship mentioned in Article 14, and continued there during the time of Divine service, according to law, shall not within the first year after he shall so conform himself and repair to some place of worship as aforesaid, and after the said first year once in every year following, at the least, receive the blessed Sacrament of the Lord's Supper in the church of the parish where he shall most usually abide or be within the said year, and if there be no such parish church then in the church next adjoining to the place of such his most usual abode, shall for such not receiving incur, for the first year, the penalties of the class, and for the second year the penalties of the class, and for every year after the penalties of the class until he shall have received the said Sacrament as aforesaid; and if after he shall have received the said Sacrament as aforesaid he shall after eftsoons at any time offend in not receiving the said Sacrament as

aforesaid by the space of one whole year, in every such case he shall for every such offence incur the penalties of the class. (*j*)

(*i*) In Syvedale *v.* Lenthal, Cro. Jac. 365, it was held not to be necessary that this conformity should be before the ordinary of otherwise according to the mode described in Article 19; but that going to church and continuing there during Divine service is a sufficient conformity within the meaning of the Act. It should be observed, however, that by the 3 Jac. I, c. 4, the provisions of which are embodied in the above Article, the offender must have conformed as well as repaired to church and continued there during Divine service. That Act treats conformity and repairing to church as separate and distinct things, and the term "conformity" has acquired a technical signification by the sense in which it is used in the 23 Eliz. c. 1, and the frequent references to that Act by subsequent statutes requiring conformity. See also the note to the next Article; and it should be observed that Mr. Serj. Hawkins, (Pleas of the Crown, vol. i. b. 1, c. 10, s. 52, p. 44,) in abridging the second section of the 1 Jac. I. c. 4, which speaks of conformity in the like general words as the enactment embodied in the above Article, describes it as providing "that a recusant conforming *according to the* "*meaning of the above-mentioned statutes*," &c. (*i. e.*, the 23 Eliz. c. 1, s. 10; and 29 Eliz. c. 6, s. 6,) "shall, during such conformity, be discharged of all penalties."

(*j*) 3 Jac. I. c. 4, ss. 2 and 3. The penalty for not receiving the Sacrament as above mentioned is, for the first year, £20; for the second, £40; and for every year after, or where the offender having received the Sacrament afterwards omits to do so for the space of a year, £60.

Art. 42.

The penalties of Article 41 shall not be incurred by any person in respect of his wife's offence in not receiving the Sacrament during her marriage, nor by any woman for any such offence which shall happen during her marriage. (*k*)

(*k*) 3 Jac. I. c. 4, s. 40.

Art. 43.

Married women being Popish recusants convict (their husbands not being so) omitting to conform themselves for a year after their husbands' deaths.

Every married woman, being a Popish recusant convict (her husband not standing convicted of Popish recusancy), who shall not conform herself and remain conformed, but shall forbear to repair to some place of worship mentioned in Article 14, and there to hear Divine service and sermon, if any then be, and within the same year receive the Sacrament of the Lord's Supper according to law, by the space of one whole year next after the death of her said husband, shall incur the penalties of the class. (*l*)

(*l*) 3 Jac. I. c. 5. s. 10. The penalties for the above offence are forfeiture to the Crown of the issues and profits of two parts of the offender's jointure, and two parts of her dower during her life out of any lands, tenements, or hereditaments which were her husband's, and to be disabled to be executrix or administratrix of her husband and to have any part of his goods and chattels. Also by the 7 Jac. I. c. 6, s. 18, it is enacted "That if any married woman (being lawfully convicted as a Popish "recusant for not coming to church) shall not within three months next after such conviction conform "herself and repair to the church and receive the Sacrament of the Lord's Supper, according to the "former laws and statutes made and provided in that behalf touching recusants, that then she thall be "committed to prison by one of the Privy Council of your Highness, your heirs or successors, "or by the bishop of the diocese, if she be a baroness, or if she be under that degree, by two justices "of the peace of the same county, whereof one to be of the *quorum*, there to remain without bail or "mainprize until she shall conform herself and come to church and receive the Sacrament of the Lord's "Supper, unless the husband of such wife shall pay to the King's Majesty, his heirs or successors, for "the offence of his said wife, for every month £10 of lawful money of England, or else the third "part (in three parts to be divided) of all his lands and tenements, at the choice of the husband "whose wife is so convicted as aforesaid, for and during so long time as she remaining a recusant "convicted shall continue out of prison, during which time (and no longer) she may be at liberty."

Art. 44.

Inciting others to abstain from going to church, and frequenting, and inciting others to frequent unlawful places of worship.

If any person above the age of sixteen years, who shall obstinately refuse to repair to some place of worship, in Article 14 mentioned, to hear Divine service as by law established, and shall forbear to do the same by the space of a month next after, without any lawful cause, shall by printing, writing, or express words or speeches advisedly, or purposely practise or go about to move or persuade any of Her Majesty's subjects, or any other within Her Majesty's realms or dominions, to deny, withstand, and impugn Her Majesty's power and authority in cases ecclesiastical united and annexed to the imperial Crown of this realm, or to that end or purpose shall advisedly and maliciously move or persuade any other person whatsoever to forbear or abstain from coming to some place of worship as aforesaid to hear Divine service or to receive the communion according to law, or to come to or be present at any *unlawful* assemblies, conventicles, or meetings, under colour or pretence of any exercise of religion contrary to law;

Or if any such person shall either of himself, or by the motion, persuasion, enticement, or allurement of any other, willingly join in or be present at any such assemblies, conventicles, or meetings under colour or pretence of any exercise of religion contrary to law, he shall, being thereof convicted, be committed to prison

there to remain without bail or mainprize until he shall conform and yield himself to come to some place of worship as aforesaid, and hear Divine service according to law, and to make such open submission and declaration of his said conformity as is hereafter in Article 46 declared and appointed. (*m*)

(*m*) 35 Eliz. c. 1, s. 1, continued by 3 Car. I. c. 4, until the end of the first session of the next Parliament, and further continued by the 16 Car. I. c. 4, which enacted (amongst other things) that all statutes and Acts of Parliament which had their continuance, or were by the 3 Car. I. c. 4 continued until the end of the first session of the then next Parliament, should be adjudged ever since the session of Parliament in the 3 Car. I. to have been of such force and effect as the same were the last day of that session, and from thenceforth until some other Act of Parliament should be made touching the continuance or discontinuance of the Statutes and Acts in the 3 Car. I. c. 4, continued.

We presume that by *unlawful* assembles, as used in the above Article, must be understood all assemblies other than those for the religious worship of Protestants according to the rites of the Established Church, as at the time of passing the 35 Eliz. c. 1, no toleration of Dissenters was allowed. If, however, the enactment embodied in the above Article is to be continued as part of the law, we would suggest that words expressive of this meaning should be substituted for the term "unlawful."

Art. 45.

Provided that if any such person, as in the last preceding Article is mentioned (not being a Roman Catholic or a feme covert) (*n*) shall not within three months next after he shall be convicted of any of the offences therein described conform himself to the obedience of the laws and statutes of this realm in coming to the church to hear Divine service, and in making such public confession and submission as is hereinafter in Article 46 appointed and expressed, being thereunto required by the bishop of the diocese or any justice of the peace of the county where such person shall happen to be, or by the minister or curate of the parish, then in every such case being thereunto warned or required by any justice of the peace of the same county where he shall then be, he shall upon his corporal oath before the justices of the peace in the open quarter sessions of the same county, or at the assizes and gaol delivery of the same county before the justices of the same assizes and gaol delivery, abjure this realm of England and all other the Queen's dominions for ever, unless Her Majesty shall license the party to return, and thereupon shall depart out of this realm at such haven or port, and within such time as shall in that behalf be assigned and appointed by the said justice before whom such abjuration shall be made, unless he shall be letted or stayed by such lawful and reasonable means or causes as by the common law of this realm were before the passing of an Act of the 21st year of King James I., intituled "An Act for continuing and reviving of divers statutes and repeal of divers others," permitted and allowed in cases of abjuration of felony, (*o*) and in such cases of let or stay then within such reasonable and convenient time after as the common law required in case of abjuration of felony; and if any such person shall refuse to make such abjuration, or after such abjuration made, shall not go to such haven, and within such time as aforesaid, and from thence depart out of this realm, or after such his departure shall return or come again into any of Her Majesty's realms or dominions, without Her Majesty's special licence in that behalf first had and obtained, then he shall incur the penalties of the class. (*p*)

21 Jac. I. c. 28, ss. 6 and 7.

(*n*) 35 Eliz. c. 1, s. 12, declares that no Popish recusant or feme covert shall be compelled or bound to abjure by virtue of that Act.

(*o*) See note (*y*) to Article 34.

(*p*) 35 Eliz. c. 1, ss. 2 and 3, continued as mentioned in note to Article 44.

Lord Hale, speaking of the above offence (Pleas of the Crown, vol. i. p. 688, 690), remarks, that "to make up the offence to be felony, there are so many circumstances required, that it is difficult to "have any legal conviction according to this statute.

"1. The party must be sixteen years of age. 2. He must obstinately refuse to come to church, "which obstinate refusal cannot be without a previous request or monition. 3. He must forbear to "come to church for a month after such refusal without a reasonable cause of absence. 4. He must "do some of those acts limited by the statute, as to dissuade from coming to church, &c., or after the "month's absence, to be at an unlawful conventicle; all these things must be precisely charged in the "indictment, and proved upon evidence, or otherwise no such commitment or abjuration of felony can "follow; and, therefore, although many have been hastily convicted upon this statute on general "indictments, of not coming to church, and being at an unlawful conventicle, yet never was any con-"vict before me upon this offence, because these circumstances were either not laid in the indictment, "or not effectually proved."

Any such person as above mentioned, refusing to abjure the realm, appears to be liable to suffer death. By the 35 Eliz. c. 1, ss. 2 and 3, he was to be adjudged a felon, and to suffer as in case of felony without benefit of clergy; and such felonies as were excluded from clergy on the first day of the session of Parliament (7 and 8 Geo. IV.), which the above felony was, continue since the abolition of benefit of clergy to be still punishable capitally.—See note (*a*) to Art. 34.

ART. 46.

The provisions of the last two preceding Articles shall not be deemed to affect any person who shall before he shall be warned or required to make abjuration according to the tenor of the last preceding Article, repair to some parish church on some Sunday or other festival day, and then and there hear Divine service, and at service time before the sermon or reading of the gospel make public and open submission and declaration of his conformity to the laws and statutes of the realm, in manner following, (that is to say,) Exception.

"I, A. B., do humbly confess and acknowledge that I have grievously offended "God in contemning Her Majesty's godly and lawful government and authority, by "absenting myself from church and from hearing Divine service, contrary to the "godly laws and statutes of this realm, and in using and frequenting disordered "and unlawful conventicles and assemblies, under pretence and colour of exercise "of religion, and I am heartily sorry for the same, and do acknowledge and testify "in my conscience that no other person hath or ought to have any power or au- "thority over Her Majesty; and I do promise and protest, without any dissimula- "tion or any colour or means of any dispensation, that from henceforth I will, from "time to time, obey and perform Her Majesty's laws and statutes in repairing to "the church and hearing Divine service, and do my uttermost endeavour to main- "tain and defend the same." (*q*)

(*q*) 35 Eliz. c. 1, ss. 4 and 5, continued as in the note to Article 44 mentioned.

ART. 47.

Provided that if any person shall after such submission made as in the last preceding Article is mentioned, fall into relapse or eftsoons obstinately refuse to repair to some place of worship specified in Article 14, to hear Divine service, and shall forbear the same as in Article 44 is mentioned, or shall come or be present at any unlawful assemblies, conventicles, or meetings, under colour or pretence of any exercise of religion, contrary to the laws and statutes of the realm, then he shall lose all such benefit as he might otherwise by virtue of the said last preceding Article have or enjoy by reason of his said submission, and shall thereupon stand in such plight, condition, and degree, to all intents, as though such submission had never been made. (*r*) Relapse.

(*r*) 35 Eliz. c. 1, s. 7.

ART. 48.

Whosoever shall willingly maintain, retain, relieve, keep or harbour in his house any servant, sojourner or stranger who shall not go or repair to some place of worship in Article 14 mentioned, to hear Divine service, but shall, not having a reasonable excuse, forbear the same contrary to law, by the space of one month together, shall for every month that he shall so relieve, maintain, retain, keep or harbour any such servant, sojourner or stranger in his house, incur the penalties of the class. (*s*) Relieving or keeping recusants in the house.

(*s*) 3 Jac. I. c. 4, s. 32. The punishment for every month of keeping a recusant in the house is forfeiture of £10.

ART. 49.

Whosoever shall retain or keep in his service, fee or livery, any person who shall not go or repair to some place of worship in Article 14 mentioned, to hear Divine service, but shall forbear the same by the space of one month together, shall for every month that he shall, knowing the same, so retain, keep or continue in his service, fee or livery any such person, incur the penalties of the class. (*t*)

(*t*) 3 Jac. I. c. 4. s. 33. The punishment is the same as for the last preceding offence. It will be seen that the Toleration clauses inserted subsequently do not exempt members of the Established Church from these penalties.

ART. 50.

The penalties of the last two preceding Articles shall not be incurred by any person for maintaining, retaining, relieving, keeping or harbouring his father or mother wanting, without fraud or covin, other habitation or sufficient maintenance, or for maintaining, retaining, relieving, keeping or harbouring his ward, or any person who shall be committed by authority to his custody. (*u*)

(*u*) 3 Jac. I. c. 4, s. 34.

ART. 51.

If any person or body politic or corporate shall keep or maintain any schoolmaster who shall not repair to some place of worship as in Article 14 is mentioned, or be Keeping recusant schoolmasters.

allowed by the bishop or ordinary of the diocese where such schoolmaster shall be so kept, such person or body politic or corporate shall for every month of so keeping him, incur the penalties of the class. (*v*)

(*v*) 23 Eliz. c. 1, s. 6. The penalty for every month of keeping a recusant schoolmaster is £10.

ART. 52.

Whosoever being such schoolmaster, as in the last preceding Article is mentioned, shall presume to teach contrary to that Article, shall be disabled to be a teacher, and shall incur the penalties of the class. (*w*)

(*w*) 23 Eliz. c. 1, s. 7. Besides the disability above mentioned, the offender is liable to be imprisoned for one year.

It is also enacted by the 1 Jac. I. c. 4, s. 9, "That no person shall keep any school or be a schoolmaster out of the Universities or Colleges of this realm, except it be in some public or free grammar-school, or in some nobleman's or noblewoman's, or gentleman's or gentlewoman's house, as are not recusants, or where the same schoolmaster shall be specially licensed thereunto by the archbishop, bishop or guardian of the spiritualities of that diocese, upon pain that as well the schoolmaster as also the party that shall retain or maintain any such schoolmaster contrary to the true intent and meaning of that Act, shall forfeit each of them for every day so wittingly offending forty shillings." This penalty however, is only recoverable by action of debt, &c.; the offence, consequently, is not indictable, and is therefore omitted from this part of the Digest.

ART. 53.

The term "schoolmaster," as used in the last two preceding Articles, shall be deemed to include ushers and other assistants to schoolmasters. (*x*)

(*x*) Com. Dig. tit. University (D).

ART. 54.

Schoolmasters teaching in private families without licence from their archbishop, &c., and before subscribing a declaration of their conformity to the Liturgy.

Whosoever, being a schoolmaster or other person instructing or teaching youth in any private house or family as a tutor or schoolmaster, shall instruct or teach any youth as a tutor or schoolmaster before licence obtained from his respective archbishop, bishop, or ordinary of the diocese, according to law, (for which he shall pay twelve pence only,) and before he shall have subscribed according to law the declaration or acknowledgment following, viz.:—

"I, A. B., do declare that I will conform to the Liturgy of the Church of England, as it is now by law established,"

shall incur in respect of a first offence the penalties of the class, and in respect of a second and any subsequent offence the penalties of the class. (*y*)

(*y*) 13 and 14 Car. II. c. 4, ss. 11 and 12; 1 Will. and Mary, sess. 1, c. 8, s. 11. The punishment for a first offence is three months' imprisonment without bail or mainprize, and for any subsequent offence the like imprisonment and forfeiture of £5 to the Queen.

Also by the 13 and 14 Car. II. c. 4, s. 10, deans, canons, and prebendaries of cathedral or collegiate churches; and masters and other heads, fellows, chaplains, and tutors, of or in colleges, halls, houses of learning, or hospitals; and public professors and readers in either of the universities and in colleges elsewhere; and parsons, vicars, curates, lecturers, and other persons in holy orders; and schoolmasters keeping public or private schools; who fail to subscribe the admission or acknowledgment mentioned in the above Article, at or before their respective admission to be incumbents or have possession of any deanery, canonry, prebend, mastership, headship, fellowship, professor's place or reader's place, parsonage, vicarage, or any other ecclesiastical dignity or promotion, or of any curate's place, lecture, or school, are liable to lose and forfeit such respective deanery, canonry, &c., and shall be utterly disabled and (*ipso facto*) deprived of the same; and every such respective deanery, canonry, &c., shall be void, as if such person so failing were naturally dead. We have not, however, inserted the provisions of that enactment, as the offence contained in it does not appear to be indictable.

Shower, in his report of the case of the King against Sparkes (2 Shower, 447), says that no indictment will lie upon the 6th section of the same statute, where the like form of enacting the consequences of neglecting to comply with its requisitions is adopted as in the case of the 10th section above described; for the design of it was only to work a deprivation, and not to create a temporal offence.

ART. 55.

Saying or hearing mass.

Whosoever shall say or sing mass shall incur the penalties of the class. (*z*)

(*z*) 23 Eliz. c. 1. s. 4. The punishment for this offence is forfeiture of 200 marks and imprisonment for one year, and thenceforth till payment of the 200 marks.

ART. 56.

Whosoever shall willingly hear mass shall incur the penalties of the class. (*a*)

(*a*) 23 Eliz. c. 1, s. 4. The punishment for this offence is forfeiture of 100 marks and imprisonment for a year.

ART. 57.

The provisions of Articles 51, 52, 55, and 56, shall not be deemed to affect any person who, being accused of any of the offences therein contained, shall, before

he shall be thereof indicted, or at his arraignment or trial before judgment, submit and conform himself before the bishop of the diocese where he shall be resident, or before the justices where he shall be indicted, arraigned, or tried, (not having before made like submission at his trial for a like offence;) but such person shall, upon his recognition of such submission in open assizes or sessions of the county where such person shall be resident, be discharged from all penalties for the same. (*b*)

(*b*) 23 Eliz. c. 1, s. 10. So much of Article 51 as relates to bodies politic or corporate keeping recusant schoolmasters does not appear to be affected by the above enactment. The section of the 23 Eliz. c. 1, which makes conformity relieve from the penalties of keeping or being a schoolmaster under the circumstances in that Act specified, makes no mention of such bodies.

Art. 58.

Whosoever, being a Popish bishop, priest, or Jesuit, shall say mass, or exercise any other part of the office or function of a Popish bishop or priest within these realms, or the dominions thereunto belonging, or being a Papist, or person making profession of the Popish religion, shall keep school, or take upon himself the education or government or boarding of youth in any place within this realm, or the dominions thereunto belonging, shall incur the penalties of the class. (*c*)

(*c*) 11 and 12 Will. III. c. 4, s. 3. The punishment for these offences is perpetual imprisonment in such place within the kingdom as the King, by advice of the Privy Council, shall appoint. The above enactment was repealed by the 18 Geo. III. c. 60, in favour of persons taking the oath therein prescribed, before apprehension or prosecution commenced against them. The oath prescribed by the 31 Geo. III. c. 32, was subsequently substituted for the oath appointed by the 18 Geo. III. c. 60, by the 43 Geo. III. c. 30, which was passed for that purpose; and that oath has been since superseded by the one required by the 10 Geo. IV. c. 7 (the Roman Catholic Relief Act).

Art. 59.

The provisions of the last preceding Article shall not be deemed to affect any Popish priest who shall say mass or officiate as a priest within the dwelling-house of any foreign minister residing here, so as such priest be not one of His Majesty's natural born subjects, nor naturalized within any of his kingdoms or dominions, and so as the name of such priest, and the place of his birth, and the foreign minister to whom he shall belong, be entered and registered in the office of the principal Secretary of State. (*d*)

(*d*) 11 and 12 Will. III. c. 4, s. 5.

Art. 60.

Promoting the Popish religion.

Whosoever, being under the Queen's obedience, shall pass, or go, or be sent into any the parts beyond the seas, out of the Queen's obedience, to the intent to enter into or to be resident in any college, seminary, or house of Jesuits, priests, or any other Popish order, profession, or calling whatsoever, or shall repair in or to any the same to be instructed, persuaded, or strengthened in the Popish religion, or in any sort to profess the same, shall incur the penalties of the class. (*e*)

(*e*) 1 Jac. I. c. 4, s. 6. Persons committing any of the above offences shall, as in respect of themselves only, and not to, or in respect of, any of their heirs or posterity, be disabled and made incapable to inherit, purchase, take, have, or enjoy any manors, lands, tenements, annuities, profits, commodities, hereditaments, goods, chattels, debts, duties, legacies, or sums of money within this realm of England, or any other Her Majesty's dominions; and all and singular estates, terms, and other interests whatever, to be made, suffered, or done to, or for the use or behoof of, any such persons, or upon any trust or confidence, mediately or immediately, to or for the benefit or relief of any such persons, shall be utterly void and of none effect to all intents, constructions, and purposes.

It is also enacted by the 1 Jac. I. c. 4, s. 6, that any person who shall send, or cause to be sent, any child, or other person under his government, beyond the seas for the purposes mentioned in the above Article, shall for every such offence forfeit to the Crown the sum of £100; whereof one-half to be to the Crown, and the other to him or them that will sue for the same. This offence, however, not being indictable, has been omitted from this part of the Digest. See further as to this offence the note to Article 65, *infra*.

The offence contained in the above Article does not appear to be *directly* affected by the 31 Geo. III. c. 32 (the Roman Catholic Toleration Act). But as that Act repeals the penalties to which a person was liable for being educated in the Popish religion, or entering or belonging to any ecclesiastical order or community of the Church of Rome, provided he comply with the requisitions of that Act, it must, we conceive, be held to have repealed, under the same conditions, the offence contained in the above Article of crossing the seas *with intent* to enter any such order, or of repairing to the same to be instructed in the Popish religion.

Art. 61.

Provided that if any person so passing, going, or being sent beyond the seas, as in the last preceding Article is mentioned, shall after, *in the manner mentioned in*

Article 19, (*f*) become conformable and obedient unto the laws and ordinances of the Church of England, repair to some place of worship therein referred to, and there remain and be during the time of the Divine service and sermons, and continue in such conformity, according to the true intent and meaning of the said laws and ordinances, he shall, for and during such time as he shall so continue in such conformity and obedience, be freed and discharged from the penalties of the said last preceding Article. (*g*)

(*f*) The authorities before whom, and the mode in which, the party is to conform, are not stated in the Act; but see note to Article 19.

(*g*) 1 Jac. I. c. 4, s. 7.

ART. 62.

Whosoever, being an officer of the port, shall willingly or negligently suffer any woman, or any child under the age of twenty-one years, not being a sailor or ship-boy, or the apprentice or factor of some merchant in trade of merchandize, to pass over the seas (except the same be by licence of the Queen, her heirs or successors, or of some six or more of the Queen's Privy Council, thereunto first had under their hands), or shall not enter the names of such passengers licensed, shall incur the penalties of the class. (*h*)

(*h*) 1 Jac. I. c. 4, s. 8. Any officer committing the above offence forfeits his office and all his goods and chattels. The above offences, and those contained in the two following Articles, do not appear to be *directly* affected by any of the Toleration Acts; but the object of the 1 Jac. I. c. 4, s. 8, being to oppose obstacles to the promotion of the Popish religion, by making it illegal for the persons there specified to suffer women or children to pass beyond the seas without the licence of the Crown, when the Legislature declared that it should no longer be criminal for persons to promote, or profess or be educated in, that religion, provided they complied with certain requisitions, it must be considered to have incidentally repealed the enactment, the provisions of which are contained in the above and the two following Articles, so far as relates to the suffering persons who have complied with those requisitions to pass beyond sea.

ART. 63.

Whosoever, being the owner of any ship or vessel in which, with the knowledge and consent of such owner, any such woman or child as in the last preceding Article is mentioned shall be carried over the seas, without licence as therein is mentioned, shall incur the penalties of the class. (*i*)

(*i*) 1 Jac. I. c. 4, s. 8 The person committing the above offence forfeits his ship or vessel and all the tackle. The meaning of the enactment embodied in the above Article is very obscure. After enacting that no woman, &c., shall pass over the seas, &c., it proceeds, "upon pain that the owner "of any ship or vessel *that* shall wittingly or willingly carry any such over the seas, &c., shall forfeit "his ship, &c." The object of the Act seems to have been to punish all the parties in any way connected with a ship in which the prohibited persons should be carried, whether owner, master, or mariner. We have altered the language of the Act to suit this construction.

See also the note to the last preceding Article.

ART. 64.

Whosoever shall be a master or mariner of or in any such ship or vessel as in the last preceding Article is mentioned, shall incur the penalties of the class. (*j*)

(*j*) 1 Jac. I. c. 4, s. 8. The person committing the above offence forfeits all his goods, and is liable to be imprisoned for twelve months.

See the notes to the last two preceding Articles.

ART. 65.

Whosoever, being the child of any subject within this realm (such child not being a soldier, mariner, merchant, or their apprentice or factor), shall, to prevent his good education in England or for any other cause, be sent or go beyond seas without licence of the Queen's Majesty or six of her Honourable Privy Council (whereof the Principal Secretary to be one), under their hands and seals, shall incur the penalties of the class. (*k*)

(*k*) 3 Jac. I. c. 5, s. 16. By the 3 Jac. I. c. 5, s. 16, any such child so going beyond seas is disabled from taking any benefit by any gift, conveyance, descent, devise, or otherwise, of or to any lands, tenements, hereditaments, leases, goods, or chattels, until, being of the age of eighteen years or above, he take the oath therein mentioned before some justice of peace of the county, liberty, or limit where the parents of such children as shall be so sent, inhabit or dwell; and in the mean time his next of kin, which shall be no Popish recusant, shall have and enjoy the lands, tenements, hereditaments, leases, goods, and chattels, so given, conveyed, descended, or devised, until such time as the person so sent or gone beyond the seas, shall conform himself and take the aforesaid oath and receive the Sacrament of the Lord's Supper, And after such oath taken, and conforming of himself and receiving the Sacrament of the Supper of the Lord, he or they which have so received the profits of the said lands, &c., or any of them, shall make account of the profits so received, and in reasonable time make payment thereof, and restore the value of such goods to such person who shall so conform himself as aforesaid. It does not appear how these penalties are to arise; whether they can be incurred except after conviction

upon indictment, or how otherwise. The like remark applies to the penalties of Article 60. The 3 Car. I. c. 2, however, which directs that the 1 Jac. I. c. 4, (the sixth section of which is embodied in the last-mentioned Article,) shall be put in due execution, and otherwise enforces that enactment and the 3 Jac. I. c. 5, s. 16, provides that the disabilities which itself imposes (see the next Article) on persons passing or being sent beyond the seas, to be trained up in popery, shall accrue upon conviction "in or upon any "information, presentment, or indictment, as is aforesaid." Explaining the 1 Jac. I. c. 4, s. 6, and the 3 Jac. I. c. 5, s. 16, by the 3 Car. I. c. 2, the offences described in the two former enactments would appear to be indictable, and as such we have inserted them above, although we are by no means satisfied that such explanation is justifiable.

The 3 Jac. I. c. 5, s. 16, also enacts that such persons as send such children, as are mentioned in the above Article, over seas, without licence, shall forfeit £100, to be divided, had, and recovered in three equal parts, whereof the one-third shall be to the Crown, the other third part to such as shall sue for the same, and the other third part to the poor of the parish where such offender inhabits or remains. This offence, however, not being indictable, has been omitted for the present. We have, nevertheless, set out thus fully in the notes to this and Article 60 the offences of so sending children beyond seas, for the purpose of exhibiting an instance of the careless mode in which Acts of Parliament were prepared in former times. By the 11 and 12 Will. III. c. 5, s. 6, after reciting that "Whereas by an Act "made in the *third* year of King James the First, intituled '*An Act to prevent and avoid dangers which* "*may grow by Popish recusants*,' whosoever shall be convicted of sending or causing to be sent any child "or any other person under their government into parts beyond the seas out of the King's obedience, to "the intent that such child or person so sent should be educated in the Romish religion, contrary to the "said Act, is to forfeit £100, one half to the King's majesty, and the other half to him that shall sue "for the same," enacts, that for the greater *encouragement and reward* of those who shall discover such offenders the said sum of £100 shall be to the sole use and benefit of him or her who shall discover and convict any person so offending. Now the offence so recited to be contained in the 3 Jac. I. c. 5, is not to be found in that Act, but exists in the 1 *Jac.* I. c. 4. the title of which is "*An Act for the due execution of the statutes against Jesuits, Seminary Priests, Recusants*," &c. So that not only is the date but also the title of the Act mis-quoted. And moreover the title of the 3 Jac. I. c. 5, is not even correctly recited. In the title itself there is no "may" before the words "grow by Popish recusants." 3 Jac. I. c. 5.

See note (*e*) to Article 60, upon the extent to which the penalties of that Article may be considered to be repealed by the 31 Geo. III. c. 32, in favour of persons complying with the requisitions of that Act, which equally applies to the offence contained in the above Article.

Art. 66.

Whosoever, being under the obedience of the Queen, her heirs or successors, shall pass or go, or shall convey or send, or cause to be sent or conveyed any child or other person out of any of the Queen's dominions unto any parts beyond the seas out of the Queen's obedience, to the intent and purpose to enter into, or be resident or trained up in, any abbey, priory, nunnery, Popish university, college or school, or house of Jesuits, priests, or in any private Popish family, and shall be there by any Jesuits, seminary priests, friar, monk, or other Popish person, instructed, persuaded, or strengthened in the Popish religion, in any sort to profess the same, or shall convey or send, or cause to be conveyed or sent by the hands or means of any person whatsoever any sum or sums of money or other thing for or towards the maintenance of any child or other person already gone or sent, or to go or be sent, and trained and instructed as is aforesaid, shall incur the penalties of the class. (*l*)

(*l*) 3 Car. I. c. 2, s. 1. The person committing any of the above offences, being lawfully convicted thereof, upon any presentment, information, or indictment, becomes disabled from thenceforth to sue or use any action, bill, plaint or information in course of law, or to prosecute any suit in any court of equity, or to be committee of any ward, or executor or administrator to any person, or capable of any legacy or deed of gift, or to bear any office within the realm, and loses and forfeits all his goods and chattels, and forfeits all his lands, tenements and hereditaments, rents, annuities, offices and estates of freehold, during his natural life. But if he return into the realm and afterwards conform himself to the established religion and receive the Sacrament, he shall have his lands restored to him during such time as he shall continue in such conformity and obedience. Sec. 4.

Art. 67.

The provisions of the last preceding Article shall not be deemed to affect any person so sent or conveyed as in that Article is mentioned, who shall within six months after his return into this realm conform himself unto the religion established in the Church of England, and receive the Sacrament of the Lord's Supper according to the laws made concerning conformity in other cases required from Popish recusants. (*m*)

(*m*) 3 Car. I. c. 2. s. 2.

Art. 68.

Protestant Dissenters' Toleration clauses.

The provisions of Articles 44, (*n*) 48, 49, 51, (*o*) 52, and 65, shall not be deemed to affect any Quaker who shall make and subscribe the Declaration of fidelity according to law, and subscribe the profession of his Christian belief, mentioned in Article 22, (*p*); nor any other Protestant dissenter who shall resort to some congregation or assembly for religious worship of Protestants whose place of

meeting shall be duly certified according to law, or take the oaths of allegiance and supremacy, (*q*) or, if a Moravian, make a solemn affirmation or declaration to the effect thereof. (*r*)

(*n*) With respect to Article 44 none of the Roman Catholic Toleration Acts make any mention of the 35 Eliz. c. 1, s. 1, the provisions of which are embodied in that Article, or describe the offences therein contained. These offences, it will be seen by reference to Article 44, consist in the inciting of others, *by a person who obstinately refuses to repair to church*, to abstain from going there, or to frequent unlawful places of worship, &c. Unless, therefore, it should be held that a Roman Catholic who takes the oath appointed by the Roman Catholic Relief Act and resorts to a registered place of worship is not a person obstinately refusing to repair to church, it would seem that there is no mode under the existing law by which a Roman Catholic who commits any of those offences can avoid the penalties of Article 44.

It will be observed that many assemblies for the religious worship of Roman Catholics, which were illegal at the time of the passing of the 35 Eliz., c. 1, were, by the 31 Geo. III. c. 32, made lawful; to which extent, of course, the provisions of the former Act are incidentally repealed.

(*o*) So much of Article 51, as relates to bodies politic or corporate keeping or maintaining recusant schoolmasters, does not appear to be affected by the 1 Will. and Mary, sess. 1, c. 18.—That Act only relieves "any person or persons dissenting from the Church of England;" it makes no mention of bodies politic or corporate.

(*p*) 1 Will. and Mary, sess. 1, c. 18, ss. 4 and 13.

(*q*) 52 Geo. III. c. 155, s. 4. The only mode in which, before the passing of the 52 Geo. III. c. 155, Protestant dissenters were able to relieve themselves from the penalties of the several Articles referred to in the above Article, was by taking the oaths and making the declaration prescribed by the 1 Will. and Mary, sess. 1, c. 18; but, by the fourth section of the former Act, it was enacted, amongst other things, that *every* person who shall resort to any congregation or assembly for religious worship of Protestants, whose place of meeting shall be duly registered according to the provisions of that or any other Act or Acts of Parliament relating to the certifying or registering of places of religious worship, shall be exempt from all such pains or penalties, under any Act or Acts of Parliament relating to religious worship, as any person who shall have taken the oaths and made the declaration prescribed by the 1 Will. and Mary, sess. 1, c. 18, is by law exempt, as fully and effectually as if all such pains and penalties of the several Acts enforcing the same were recited in that Act, and such exemptions as aforesaid were severally and separately enacted in relation thereto. It is provided, however, by the fourteenth section, that nothing therein contained shall extend or be construed to extend to the people usually called Quakers.

It may be a question, since the passing of this Act, whether a professed member of the Church of England, if he resort to a registered Protestant place of worship on a Sunday, would be liable to the penalties of recusancy in respect of his absence from church on that day. It is quite clear that the Toleration Act (1 Will. and Mary, sess. 1, c. 18) did not excuse such a person, that Act being expressly limited to the relief of Protestant dissenters. Besides which, Lord Holt, in Bretton *v.* Standish, 6 Mod. 190, said—"If a man be a professed churchman, and his conscience will permit him some-"times to go to *meeting* instead of coming to *church*, the Act of Toleration shall not excuse him, "for it was not made for such sort of people." It will be observed, however, that the language of the 52 Geo. III. c. 155, is very general,—"*Every* person who shall resort, &c." But it has appeared to us that these words should be construed as meaning "Every person whom the taking the oaths prescribed by law would "have relieved, &c."

(*r*) 3 and 4 Will. IV. c. 49, s. 1.

ART. 69.

Provided, as regards Article 44, that if any assembly, conventicle, or meeting, in that Article mentioned, shall be had in any place for religious worship, with the doors locked, barred, or bolted during the time of such meeting together, no person who shall come to and be at such meeting shall receive any benefit from the last preceding Article. (*s*)

(*s*) 1 Will. and Mary, sess. 1, c. 18, s. 5.

ART. 70.

Neither shall the penalties of Articles 44, 48, 49, 51, 52, and 65, attach upon any Protestant dissenting from the Church of England who shall at any time during his prosecution upon or by virtue of any of the provisions of such Articles, take the oaths of allegiance and supremacy, or, if a Moravian, make a solemn affirmation or declaration to the effect thereof (*t*), or, if a Quaker, make and subscribe the Declaration of fidelity according to law, and subscribe the profession of his Christian belief, mentioned in Article 22, according to the Act of the first year of the reign of King William and Queen Mary therein referred to, or before any two of Her Majesty's justices of the peace. (*u*)

(*t*) 3 and 4 Will. IV. c. 49, s. 1.

(*u*) 10 Anne, c. 2, s. 8. See note to Article 23 as to the 10 Anne, c. 2, not applying to Roman Catholics.

ART. 71.

Neither shall the provisions of Articles 52 and 54 (*v*) be deemed to affect any Dissenting Minister, or any other Protestant dissenting from the Church of England, who shall take, according to law, the oaths of allegiance and supremacy; or, being a Moravian, shall make a solemn affirmation or declaration to the effect

thereof (*w*); or, being a Quaker, make and subscribe the declaration of fidelity and profession of his Christian belief respectively referred to in Article 68 (*x*); and in each of such cases shall make and subscribe the declaration following, viz.

"I, A. B., do solemnly declare in the presence of Almighty God that I am a "Christian and a Protestant, and as such that I believe that the Scriptures of the "Old and New Testament, as commonly received among Protestant churches, do "contain the revealed will of God; and that I do receive the same as the rule of "my doctrine and practice." (*y*)

(*v*) As regards Article 52, it is not *necessary*, in order to be relieved from its penalties, that a person should subscribe the declaration mentioned in the above Article; it is sufficient if he comply with the requisitions of Article 68.

(*w*) 3 and 4 Will. IV. c. 49, s. 1.

(*x*) 1 Will. and Mary, sess. 1, c. 18, s. 13.

(*y*) 19 Geo. III. c. 44, s. 2; 10 Geo. IV. c. 7, s. 1. It is also provided by the third section of the 19 Geo. III. c. 44, that nothing in that Act contained shall extend or be construed to extend to the enabling of any person dissenting from the Church of England, to obtain or hold the mastership of any college or school of royal foundation, or of any other endowed college or school for the education of youth, unless the same shall have been founded since the first year of the reign of King William and Queen Mary, for the immediate use and benefit of Protestant Dissenters. This provision does not appear to revive the penalties of Articles 52 and 54, but to be prohibitory only.

Art. 72.

Roman Catholic Toleration Clauses.

Neither shall the provisions of Articles 48, 49, 51 (*z*), 52 (*a*), 55, 56 (*b*), 58 (*c*), 60, 65, and 66 (*d*), be deemed to affect any person professing the Roman Catholic religion, who shall take and subscribe, according to law, the oath mentioned in Article 22. (*e*)

(*z*) See note (*o*) to Article 68, on so much of Article 51 as relates to bodies politic and corporate, which equally applies to the 31 Geo. III. c. 32, that Act making no mention of such bodies.

(*a*) It is also provided by sections 14 and 15 of the 31 Geo. III. c. 32, and confirmed by the 10 Geo. IV. c. 7, s. 16, as follows:—By section 14, "That no person professing the Roman Catholic "religion shall obtain or hold the mastership of any college or school of royal foundation, or of any "other endowed college or school for the education of youth, or shall keep a school in either of the "Universities of Oxford and Cambridge." And by section 15, "That no schoolmaster professing the "Roman Catholic religion shall receive into his school for education the child of any Protestant "father." These provisions do not, however, appear to revive the penalties of Articles 52, but to be "prohibitory only.

(*b*) It appears to be doubtful whether a Protestant dissenter, in order to avoid the penalties of Art. 56, must not qualify himself according to the provisions of Article 68. If the 23 Eliz., c. 1, s. 4, intended to make the mere fact of hearing mass criminal, without reference to the person doing so being a Papist or not, then it is clear that he must; and in that case, even a member of the Established Church, who went to a Catholic chapel and heard mass, would have no means of avoiding his liability to the penalties for so doing, unless the 52 Geo. III. c. 155, s. 4, as suggested in note (*q*) to Article 68, be of general application.

(*c*) See note (*z*) which equally applies to Article 58.

(*d*) The offences contained in Article 66 appear to be either expressly or incidentally repealed by the 31 Geo. III. c. 32, s. 4, in favour of persons complying with the requisitions of that Act. That section enacts that no person professing the Roman Catholic religion, who takes the oath there mentioned, shall be prosecuted for being (amongst other things) educated in the Popish religion, or for entering or belonging to any ecclesiastical order or community of the Church of Rome, or for being present at or performing or observing any rite, ceremony, practice, or observance of the Popish religion, *or maintaining or assisting others therein.* It is presumed that the last sentence overrides the whole clause, in which case it conditionally repeals so much of the above-mentioned Article as relates to sending money, &c., for the maintenance of the persons there described: and also so much of it as regards the sending persons abroad for the purpose of their entering Popish colleges, &c., and being there instructed in the Popish religion, if such an act can be considered as assisting in the education of a person in that religion. At all events the latter offence, as well as that of being sent abroad for the purpose of Popish education, would seem to be incidentally repealed by the 31 Geo. III. c. 32, s. 4. See the last paragraph of the note to Article 60. It will be observed, however, that the provisions as to sending persons or money abroad for the purposes before mentioned do not appear, under any circumstances, to be repealed except in favour of Roman Catholics who qualify themselves.

(*e*) 31 Geo. III. c. 32, ss. 3, 4, and 13; 10 Geo. IV. c. 7, ss. 2 and 23.

Art. 73.

Provided, as regards Articles 55 and 58, that no benefit in the last preceding Article contained shall be deemed to extend to any person in holy orders, or pretended holy orders, whether as priest or as a minister of any other higher rank or order, unless his name and his description as a priest or minister shall be recorded at the quarter or other general sessions of the peace for the county or other division or place in which the place of meeting of any congregation or assembly for religious worship in which he shall officiate shall be situate, by the clerk of the peace of the said Court, according to the provisions of the Act mentioned in Article 22 to have been passed in the thirty-first year of the reign of King George III.; nor unless such place of meeting shall be recorded according to the provisions of such

Act (*f*); nor to any such Roman Catholic ecclesiastic who shall officiate in any such congregation or assembly for religious worship, with a steeple and bell, or at any funeral in any church or churchyard, or who shall exercise any of the rites or ceremonies of his religion or wear the habits of his order, save within some place of congregation or assembly for religious worship permitted by the before-mentioned Act, or in a private house where there shall not be more than five persons assembled, besides those of the household, or who shall not, previously to his so officiating or exercising his functions as aforesaid, have taken and subscribed, according to law, the oath mentioned in Article 22. (*g*)

(*f*) 31 Geo. III. c. 32, s. 5.

(*g*) 31 Geo. III. c. 32, s. 11; 10 Geo. IV. c. 7, s. 23. Besides deriving no benefit from the last preceding Article, Roman Catholic ecclesiastics, Jesuits and members of any other religious order, community, or society of the Church of Rome, bound by monastic or religious vows, and now lawfully resident within the United Kingdom, are liable to forfeit £50 if they exercise any of the rites or ceremonies of the Roman Catholic religion, or wear the habits of their order, save within the usual places of worship of the Roman Catholic religion or in private houses. See 10 Geo. IV. c. 7, s. 26. The offence so created by the 10 Geo. IV. c. 7, s. 26, is not indictable.

Art. 74.

Provided also, as regards Articles 52 and 58, that no person professing the Roman Catholic religion who shall keep a school for the education of youth until his name and description as a Roman Catholic schoolmaster shall have been recorded at the Quarter or General Sessions of the Peace for the county, or other division or place where such school shall be situated, by the clerk of the peace of the said Court, shall receive any benefit of Article 72. (*h*)

(*h*) 31 Geo. III. c. 32, s. 16; 10 Geo. IV. c. 7, s. 16.

Art. 75.

Mayors or other magistrates being present at public meetings for the religious worship of Dissenters with the ensigns of their office.

Whosoever, being a mayor, bailiff, or other magistrate in that part of Great Britain called England, the dominion of Wales, or the town of Berwick-upon-Tweed, or the isles of Jersey or Guernsey, shall knowingly or wilfully resort to or be present at any public meeting for religious worship other than of the Church of England as by law established, in the gown or other peculiar habit, or attended with the ensign or ensigns of or belonging to such his office, shall incur the penalties of the class. (*i*)

(*i*) 5 Geo. I. c. 4, s. 2. The punishment for this offence is, that every such mayor, &c., shall be disabled to hold his office or employment, and shall be adjudged incapable to bear any public office or employment whatsoever, within England, Wales, the town of Berwick-upon Tweed, or the isles of Jersey and Guernsey.

Art. 76.

Jesuits.

Whosoever, being a jesuit, or member of any religious order, community, or society of the church of Rome, bound by monastic or religious vows, shall come into this realm, shall incur the penalties of the class. (*j*)

(*j*) 10 Geo. IV. c. 7, s. 29. The punishment for this offence is banishment from the United Kingdom for the natural life of the offender. The crime is only a misdemeanor.

Art. 77.

Provided that it shall be lawful for any one of Her Majesty's principal Secretaries of State, being a Protestant, by a licence in writing, signed by him, to grant permission to any jesuit, or member of any such religious order, community, or society as is mentioned in the last preceding Article, to come into the United Kingdom, and to remain therein for such period as the said Secretary of State shall think proper, not exceeding in any case the space of six calendar months; and it shall also be lawful for any of Her Majesty's principal Secretaries of State to revoke any licence so granted before the expiration of the time mentioned therein, if he shall so think fit; and if any such person to whom such licence shall have been granted shall not depart from the United Kingdom within twenty days after the expiration of the time mentioned in such licence, or if such licence shall have been revoked, then within twenty days after notice of such revocation shall have been given to him, every person so offending shall incur the penalties of the class. (*k*)

(*k*) 10 Geo. IV. c. 7, s. 31. The person offending as above, is guilty of a misdemeanor, and liable to be banished from the United Kingdom for the term of his natural life.

Art. 78.

Whosoever, being a jesuit, or member of any such religious order, community, or society as is mentioned in Article 76, shall, within any part of the United King-

dom admit any person to become a regular ecclesiastic, or brother or member of any such religious order, community, or society, or be aiding or consenting thereto, or shall administer or cause to be administered, or be aiding or assisting in the administering or taking any oath, vow, or engagement purporting or intended to bind the persons taking the same to the rules, ordinances, or ceremonies of such religious order, community, or society, shall incur the penalties of the class. (*l*)

(*l*) 10. Geo. IV. c. 7, s. 33. The person committing the above offence is, by the 33d section or the 10 Geo. IV. c. 7, declared to be guilty of a misdemeanor.

ART. 79.

Whosoever shall, within any part of the United Kingdom, be admitted or become a jesuit, or brother or member of any other such religious order, community, or society, as is mentioned in Article 76, shall incur the penalties of the class. (*m*)

(*m*) 10 Geo. IV. c. 7, s. 34. The above offence is, by the 10 Geo. IV. c. 7, s. 34, made a misdemeanor, and subjects the person committing it to banishment from the United Kingdom for his natural life.

ART. 80.

Whosoever, being sentenced and ordered to incur the penalties of Articles 76, 77, and 79, shall not depart from the United Kingdom within thirty days after the pronouncing of such sentence and order, shall be conveyed to such place out of the United Kingdom as Her Majesty by the advice of Her Privy Council shall direct. (*n*)

(*n*) 10 Geo. IV. c. 7, s 35.

ART. 81.

Provided that nothing in the last five preceding Articles contained, shall extend or be construed to extend in any manner to affect any religious order, community, or establishment consisting of females bound by religious or monastic vows. (*o*)

(*o*) 10 Geo. IV. c. 7, s. 37.

DISTURBING RELIGIOUS ASSEMBLIES.

ART. 82.

Disturbing Religious Assemblies.

Whosoever shall wilfully and maliciously or contemptuously disquiet or disturb any meeting, assembly, or congregation of persons assembled for religious worship permitted or authorized by law, or shall in any way disturb, molest, or misuse any preacher, teacher, or person officiating at such meeting, assembly, or congregation, or any person or persons there assembled, shall incur the penalties of the class. (*p*)

(*p*) 52 Geo. III. c. 155, s. 12. The penalty for the above offence is fine of £40. The 1 Will. and Mary, sess. 1. c. 18 (the Dissenters' Toleration Act), and the 31 Geo. III. c. 32 (the Roman Catholic Toleration Act), contained provisions similar to the above against disturbing the meetings permitted by those Acts, but subjecting the offender to a fine of £20 only. The 52 Geo. III. c. 155, s. 12, however, by inflicting the penalty of £40 upon any person who should disturb any assembly for religious worship "permitted or authorised by that Act, or *any former Act or Acts of Parliament*," appears to have superseded them.

PROFANATION OF SUNDAY AND OTHER HOLY DAYS.

ART. 83.

Holding Fairs on Sundays and Saint Days.

All manner of fairs and markets upon the high and principal feasts of Almighty God and his saints, as in the Feast of the Ascension of our Lord, in the day of Corpus Christi, in the day of Whitsunday, in Trinity Sunday, with other Sundays, and also in the High Feast of the Assumption of our Blessed Lady, the Day of All Saints, and on Good-Friday, shall clearly cease from all showing of any goods or merchandizes (necessary victual only excepted), upon pain of forfeiture of all the goods aforesaid so showed to the Lord of the Franchise or Liberty where such goods be or shall be showed (the four Sundays in harvest except.) (*q*)

(*q*) 27 Hen. VI. c. 5. By the 1 Car. I. c. 1, meetings, assemblies, and concourse of people out of their own parishes on the Lord's day, for any sports and pastimes whatsoever, and bear-baiting, bull-fighting, interludes, common plays, and other unlawful exercises and pastimes, used by persons within their own parishes, are prohibited, under the penalty of 3*s.* 4*d.* upon every person so offending. The offence, however, does not appear to be indictable, and is therefore omitted from this part of the Digest.

ART. 84.

Sunday Trading

Whosoever, being a tradesman, artificer, workman, labourer, or other person whatsoever, and of the age of 14 years or upwards, shall do or exercise any worldly labour, business, or work of his ordinary calling upon the Lord's day, or any part thereof (works of necessity and charity only excepted) shall incur the penalties of the class. (*r*)

(*r*) 29 Car. II. c. 7, s. 1. The punishment for the above offence, which is an indictable one, is forfeiture of 5*s*. Also by the 3 Car. I. c. 1, any butcher who by himself, or any other for him, by his privity or consent, kills or sells any victual upon the Lord's day, is liable to forfeit for every such offence 6*s*. 8*d*.; but the offence does not appear to be indictable, and whether it be so or not seems to be superseded by the provisions of the above Article.

ART. 85.

Whosoever shall publicly cry, show forth, or expose to sale any wares, merchandizes, fruits, herbs, goods, or chattels whatsoever upon the Lord's day, or any part thereof, shall incur the penalties of the class. (*s*)

(*s*) 29 Car. II. c. 7, s. 1. The punishment for this offence, which is an indictable one, is forfeiture of the goods so cried, showed forth, or exposed to sale.

ART. 86.

Nothing in the last two preceding Articles contained shall be deemed to extend to the prohibiting of dressing of meat in families, or dressing or selling of meat in inns, cooks' shops, or victualling houses for such as otherwise cannot be provided, nor to the crying or selling of milk before nine of the clock in the morning, or after four of the clock in the afternoon. (*t*)

(*t*) 29 Car. II. c. 7, s. 3. There have been several Acts passed since the 29 Car. II. c. 7, which regulate the hours during which victualling houses, &c., may be kept open, &c., on Sundays; but as any breach of such regulations is punishable on summary conviction only, the enactments on the subject are omitted from this part of the Digest.

ART. 87.

Neither shall anything in Articles 84 and 85 contained be construed to prohibit the selling of mackarel before or after Divine service on Sundays. (*u*)

(*u*) 10 and 11 Will. III. c. 24, s. 14. The above is the effect of the 14th section of the 10 and 11 Will. III. c. 24. (An Act for making Billingsgate a free market for the sale of fish.) That section provides (amongst other things) "That nothing in that Act contained shall be construed to prohibit the selling of mackarel before or after Divine service on Sundays." There is nothing in the 10 and 11 Will. III. c. 24, or any other Act, which expressly authorizes the sale of mackerel on Sundays; but we conceive that the above words would be held to give such authority by implication. Under no circumstances, however, does any such authority appear to exist except in the case of mackerel sold in Billingsgate Market, or, if elsewhere, which was originally bought in that market. We know of no reason for this restriction, and if this exemption from the penalties of Sunday trading is thought proper in the case of mackerel sold in Billingsgate Market, we submit that it should be extended generally to such fish wherever sold.

ART. 88.

Neither shall anything in Articles 84 and 85 contained be deemed to extend to any master or mistress, journeyman or other person exercising or employed in the trade or calling of a baker, who shall upon the Lord's day, or any part thereof, set and superintend the sponge to prepare bread or dough for the following day's baking, or who shall on any part of the Lord's day, before the hour of one of the clock in the afternoon, sell or expose for sale, or permit or suffer to be sold or exposed for sale any bread, rolls or cakes of any sort or kind, or bake or deliver, or permit or suffer to be baked or delivered any meat, pudding, pie, tart, or victuals, or who shall at any time before half an hour past one of the clock in the afternoon of that day deliver any bakings to his or her customers: (*v*) Provided that every such sale or delivery shall be within the bakehouse or shop. (*x*)

(*v*) The above Article is compounded of the 16th section of the 3 Geo. IV. c. 106, relating to bakers and sellers of bread within the city of London and the liberties thereof, the weekly bills of mortality, and ten miles of the Royal Exchange, and the 14th section of the 6 & 7 Will. IV. c. 37, relating to bakers and sellers of bread out of those limits.

By the 3 Geo. IV. c. 106, it is not lawful to do the acts specified in the above Article on any other part of the Lord's day than between the hours of *nine* in the morning and *one* o'clock in the afternoon, except that bakings may be delivered till half-past one.

By the 6 & 7 Will. IV. c. 37, it is made unlawful to do the like acts on any part of the Lord's day *after half-past one* o'clock in the afternoon, except that bakings may be delivered till half-past one.

We see no reason for making any distinction between the former and the latter case as to the hours during which the above acts may be lawfully done, and as there appears to be no principle upon which they should be prohibited before nine o'clock in the morning, (indeed the crying of milk before that hour is expressly authorized by the 29 Car. II. c. 7, s. 3, see Article 86,) we have adopted and made generally applicable the limitation of the 6 & 7 Will. IV. c. 37.

There is an inconsistency in the 6 & 7 Will. IV. c. 37, which appears to have arisen through

inadvertence. That Act prohibits (amongst other things) the baking and *delivering* of meat, puddings, pies, &c., *after half-past one o'clock* on Sundays, and then provides that *nevertheless* bakings may be delivered *till half-past one*. Half-past one appears to have been inserted in the former case by mistake for one. The intention of the Legislature, no doubt, was the same as that which is expressed in the 3 Geo. IV. c. 106, viz., that though it should be unlawful to bake or otherwise exercise the calling of a baker on Sundays after *one o'clock;* yet that so far as related to the delivering to customers of things which had been baked before that hour, that might be continued till half-past one. We have, therefore, limited the time after which the ordinary business of a baker may not be conducted, in all cases, to one o'clock (the hour specified in the 3 Geo. IV. c. 106.) By these two alterations the regulations in respect of Sunday bakings are rendered uniform throughout England. The offence of exercising the trade of a baker on Sundays, except between the hours specified in the above Article, is summarily punishable under the 3 Geo. IV. c. 106, s. 16, and 6 & 7 Will. IV. c. 37, s. 14, and to that extent, therefore, the provisions of Articles 84 and 85 would appear to be impliedly repealed. We have thought it proper, nevertheless, (although we postpone for the present the express offence of Sunday baking as not being indictable,) to state in the above Article such exercises of the trade of a baker, as under no circumstances amount to a profanation of the Lord's day.

(*x*) The above proviso is contained in the 3 Geo. IV. c. 106, s. 16 only. We have applied it generally, or if it is to be omitted, it appears to us that it should be so uniformly.

ART. 89.

Neither shall anything in Art. 84 contained be deemed to extend to any waterman who, under the provisions of an Act passed in the 7 and 8 years of the reign of King George the Fourth, entitled, "An Act for the better regulation of "the watermen and lightermen on the river Thames, between Yantlet Creek and "Windsor," shall be appointed by the Court of master, wardens, and assistants of the company of "the Master, Wardens, and Commonalty of Watermen and "Lightermen of the River Thames," to ply and work on the said river Thames on Sundays, at and between Chelsea and Bow Creek, or to any freeman of the said company who, under the provisions of the said Act, shall take such plying or working to farm, or to any person who, under the provisions of the said Act, shall be employed by or under either of them, or to any freeman of the said company residing at Gravesend, or any of the apprentices of such freeman, or the widow of such freeman residing at Gravesend who, under the provisions of the said Act, shall be licensed by the justices of the peace acting in and for the corporation, villages, and parishes of Gravesend and Milton, or either of them, to carry goods and passengers for hire at and from Gravesend on Sundays, or to any freeman of the said company, or any apprentice not licensed as aforesaid, who, under the provisions of the said Act, shall be permitted by the said justices, on the request of any person, to work for such person on a Sunday. (*y*)

(*y*) 7 & 8 Geo. IV. c. lxxv. ss. 42—50. This Act expressly repealed so much of the 29 Car. II. c. 7, as prevented any person or persons from using, employing, or travelling on the Lord's day with any boat, wherry, lighter, or barge, or imposed any penalty or punishment for so doing; but for a *waterman* to do so, *in the way of his ordinary calling*, is nevertheless still an offence within the provisions of Article (84), except as regards watermen plying on the River Thames according to the regulations prescribed by the 7 and 8 Geo. IV. c. lxxv., and embodied in the above Article. We are not aware of any principle upon which this exemption is confined to Thames watermen, and submit that it should be extended, under certain regulations, to all other watermen.

ART. 90.

Neither shall anything in Article 84 contained be deemed to extend to any proprietor or driver of any hackney-carriage licensed under the authority of an Act passed in the 1st and 2d years of the reign of his late Majesty King William the Fourth, entitled, "An Act to amend the laws relating to hackney carriages, "and to waggons, carts, and drays used in the metropolis, and to place the collec-"tion of the duties on hackney carriages and on hawkers and pedlars in England "under the Commissioners of Stamps," or of any stage carriage (*z*), who shall stand and ply for hire with such carriages respectively, or drive the same on the Lord's day. (*a*)

(*z*) Sandiman *v.* Breach, 7 Barn. and Cresw. 96; Dowl. and Ry. 796.
(*a*) 1 & 2 Will. IV. c. 22, s. 37.

ART. 91.

Whosoever being a drover, horse-courser, waggoner, butcher, higler, or their or any of their servants, shall travel or come into his or their inn or lodging upon the Lord's day, or any part thereof, shall incur the penalties of the class. (*b*) Travelling on Sunday.

(*b*) 29 Car. II. c. 7, s. 2. The punishment for this offence is forfeiture of 20*s*. By the 3 Car. I. c. 1 also, it is enacted that no carrier with any horse or horses, nor waggonmen with any waggon or waggons, nor carmen with any cart or carts, nor wainmen with any wain or wains, nor drovers with any cattle, shall by themselves or any other travel upon the Lord's day, upon pain that every person and persons so offending shall lose and forfeit 20*s*. for every such offence. This offence, however, appears to be punishable on summary conviction only, and is therefore omitted for the present; some branches of it, indeed, seem to be superseded by the 29 Car. II. c. 7, s. 2, contained in the above Article. We presume that the above enactment applies only to the persons there specified travelling

in the way of their ordinary calling on the Lord's day. At all events, if retained, this should be made certain and more generally applicable.

ART. 92.

Nothing in Article 84 and the last preceding Article contained shall be deemed to prohibit carriages used for the conveyance of fish under the provisions of an Act passed in the second year of the reign of King George the Third, entitled, "An "Act for the better supplying the cities of London and Westminster with fish, "and to reduce the present exorbitant price thereof, and to protect and encourage "fishermen" from travelling, passing or being drawn on Sundays and holy days on *any* road, whether laden or empty, or the horse or horses which shall return from drawing any such fish carriage, although rode on by any driver of any such fish carriage, or drawing back any empty fish carriage, from passing on Sundays and holy days on *any* road, or to render the driver of any such fish carriage, or the rider of any such horse as aforesaid, liable to any penalty for so travelling therewith. (*c*)

(*c*) 2 Geo. III. c. 15, s. 7.

ART. 93.

Provided that no person shall be impeached, prosecuted, or molested for any offence mentioned in Articles 84, 85, and 91, unless he be prosecuted for the same within 10 days after the offence committed. (*d*)

(*d*) 29 Car. II. c. 7, s. 4.

ART. 94.

Opening places of public entertainment, or public debating societies, on Sunday.

Whosoever shall be the keeper of any house, room, or other place which shall be opened or used for public entertainment or amusement, or for publicly debating on any subject whatever, upon any part of the Lord's day, called Sunday, and to which persons shall be admitted by the payment of money, or by tickets sold for money, shall incur the penalties of the class, and such house, room, or other place shall be deemed a disorderly house or place. (*e*)

(*e*) 21 Geo. III. c. 49, s. 1. The keeper of any such place as is specified in the above Article incurs the penalty of £200, recoverable by action of debt, &c., for every day that such place is opened on the Lord's day, *and is otherwise punishable as the law directs in cases of disorderly houses.* To keep a disorderly house is a public nuisance, and the party keeping it may, upon indictment, be fined or imprisoned and the house suppressed, (4 Black. 168; Hawk. P. C. b. 1, c. 78); and by the 3 Geo. IV. c. 114, the Court, before which any such offender shall be convicted, may award and order sentence of imprisonment, with hard labour, for any term not exceeding the term for which such Court might then imprison for such offence, either in addition to or in lieu of any other punishment which might be inflicted on any such offender by any law in force before the passing of that Act.

ART. 95.

Any house, room, or place at which persons shall be supplied with tea, coffee, or any other refreshments of eating or drinking on the Lord's day, at any greater prices than the common and usual prices at which the like refreshments are commonly sold upon other days at such house, room, or place, or at coffee-houses, or at other houses where the same are usually sold, shall be deemed a house, room, or place to which persons are admitted by the payment of money, within the meaning of the last preceding Article, although money be not there taken in the name of or for admittance, or at the time when persons enter into or depart from such house, room, or place; and any house, room, or place which shall be opened or used for any public entertainment or amusement, or for public debate, on the Lord's day, at the expense of any number of subscribers or contributors to the carrying on any such entertainment, or amusement, or debate, on the Lord's day, and to which persons shall be admitted by tickets, to which the subscribers or contributors shall be entitled, shall be deemed a house, room, or place to which persons are admitted by the payment of money, within the meaning of the said last preceding Article. (*f*)

(*f*) 21 Geo. III. c. 49, s. 2.

ART. 96.

Any person who shall appear, act, or behave him or herself as master or mistress, or as the person having the care, government, or management of any such house, room, or place, as in the two last preceding Articles is mentioned, shall be deemed and taken to be the keeper thereof, and shall be liable to be sued or prosecuted and punished as such, notwithstanding that he or she be not in fact the real owner or keeper thereof; and wherever any such house, room, or place shall belong to or be kept by divers persons in partnership, as joint-owners or joint-keepers thereof, each and every such joint-owner or joint-keeper of such house, room, or place, shall be deemed the keeper thereof, and shall be liable to be sued or prosecuted and punished as such. (*g*)

(*g*) 21 Geo. III. c. 49, s. 2.

OFFENCES RELATING TO THE COIN.

SUMMARY OF CONTENTS.

[Counterfeiting gold or silver coin, Art. 1—3. Impairing gold or silver coin, Art. 4. Buying or putting off gold or silver coin at a less value than its denomination imports, Art. 5. Importing counterfeit gold or silver coin, Art. 6. Uttering counterfeit gold or silver coin, Art. 7. Uttering counterfeit gold or silver coin, accompanied by possession of other counterfeit gold or silver coin, or followed by a second uttering, Art. 8. Having counterfeit gold or silver coin in possession with intent to utter it, Art. 9. Making, buying, or having in possession coining implements, Art. 10. Conveying coining tools out of the Royal Mint, Art. 11. Making, buying, or putting off counterfeit copper coin, or making tools for making the same, Art. 12. Uttering counterfeit copper coin, having other pieces in possession, Art. 13. Counterfeiting foreign gold or silver coin, Art. 14. Importing counterfeit foreign gold or siver coin, Art. 15. Uttering counterfeit foreign gold or silver coin, Art. 16. Counterfeiting foreign copper coin, Art. 17. Interpretation Clause, Art. 18.]

Art. 1.

Whosoever shall falsely make or counterfeit any coin resembling, or apparently intended to resemble or pass for, any of the Queen's current gold or silver coin shall incur the penalties of the class. (*a*)

Counterfeiting gold or silver coin.

(*a*) 2 Will. 4, c. 34, s. 3. The punishment for this offence, and also for the several offences defined in Art. 3, is under the present law transportation for life, or any term not less than seven years, or imprisonment for any term not exceeding four years.

Art. 2.

The offence defined in the last preceding Article shall be deemed to be complete, although the coin made or counterfeited as therein mentioned shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected. (*b*)

(*b*) This provision is contained in the stat. 2 Will. 4, c. 34, s. 3.

Art. 3.

Whosoever shall gild or silver, or with any wash or materials capable of producing the colour of gold or of silver shall wash, colour, or case over any coin whatsoever resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin;

Or shall gild or silver, or with any wash or materials capable of producing the colour of gold or of silver shall wash, colour, or case over any piece of silver or copper, or of coarse gold or coarse silver, or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined into false and counterfeit coin resembling, or apparently intended to resemble, or pass for any of the Queen's current gold or silver coin;

Or shall gild, or with any wash or materials capable of producing the colour of gold shall wash, colour, or case over any of the Queen's current silver coin; or shall file or in any manner alter such coin, with intent to make the same resemble or pass for any of the Queen's current gold coin;

Or shall gild or silver, or with any wash or materials capable of producing the colour of gold or of silver shall wash, colour, or case over any of the Queen's current copper coin; or shall file or in any manner alter such coin, with intent to make the same resemble or pass for any of the Queen's gold or silver coin, shall incur the penalties of the class. (*c*)

(*c*) 2 Will. 4, c. 34, s. 4.

Art. 4.

Whosoever shall impair, diminish, or lighten any of the Queen's current gold or silver coin with intent to make the coin so impaired, diminished, or lightened pass for the Queen's current gold or silver coin, shall incur the penalties of the class. (*d*)

Impairing gold or silver coin.

(*d*) 2 Will. 4, c. 34, s. 5. This offence is punishable under the present law with transportation for any term not exceeding fourteen years, or not less than seven years, or imprisonment for any term not exceeding three years.

ART. 5.

Buying or putting off gold or silver coin at a less value than its denomination imports.

Whosoever shall buy, sell, receive, pay or put off, or offer to buy, sell, receive, pay or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, at or for a lower rate or value than the same by its denomination imports, or was coined or counterfeited for, shall incur the penalties of the class.

ART. 6.

Importing counterfeit gold or silver coin.

Whosoever shall import into the United Kingdom from beyond the seas any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall incur the penalties of the class. (*e*)

(*e*) This and the 5th Article are taken from the 6th section of the stat. 2 Will. 4, c. 34; and by the present law the offences described in them are felonies, and the offenders are liable to be transported for any term not exceeding seven years, or to be imprisoned for any term not exceeding four years.

ART. 7.

Uttering counterfeit gold or silver coin.

Whosoever shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall incur, in respect of a first offence, the penalties of the class, and in respect of any subsequent offence, the penalties of the class. (*f*)

(*f*) 2 Will. 4, c. 34, s. 7. To utter counterfeit coin, as in the above Article is mentioned, is, for the first offence, a misdemeanor, punishable by imprisonment for any term not exceeding one year; and for any subsequent offence, a felony punishable, at the discretion of the Court, by transportation for life, or not less than seven years, or imprisonment not exceeding four years.

ART. 8.

Uttering counterfeit gold or silver coin, accompanied by possession of other counterfeit gold or silver coin; or followed by a second uttering.

Whosoever shall tender, utter, or put off any such false or counterfeit coin, as in the last preceding Article is mentioned, and shall, at the time of such tendering, uttering, or putting off, have in his possession, besides the false or counterfeit coin so tendered, uttered, or put off one or more piece or pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the Queen's current gold or silver coin, or shall either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing tender, utter, or put off any more or other false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall incur, in respect of a first offence, the penalties of the class, and in respect of any subsequent offence, the penalties of the class. (*g*)

(*g*) This Article is framed from the 7th section of the stat. 2 Will. 4, c. 34; by which enactment the crimes therein described are made, for the first offence, misdemeanors punishable with imprisonment for any term not exceeding two years; and for any subsequent offence, felonies punishable by transportation for life, or not less than seven years, or imprisonment not exceeding four years.

ART. 9.

Having counterfeit gold or silver coin in possession with intent to utter it.

Whosoever shall have in his custody or possession three or more pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the Queen's current gold or silver coin, knowing the same to be false and counterfeit, and with intent to utter or put off the same, shall incur, in respect of a first offence, the penalties of the class, and in respect of any subsequent offence, the penalties of the class. (*h*)

(*h*) 2 Will. 4, c. 34, s. 8. Having counterfeit coin in possession as mentioned in the above Article, is for the first offence a misdemeanor punishable by imprisonment for any term not exceeding three years, and for any subsequent offence a felony punishable with transportation for life, or for any term not less than seven years, or imprisonment for any term not exceeding four years.

ART. 10.

Making, buying, or having in possession coining implements.

Whosoever shall knowingly and without lawful authority, (the proof of which authority shall lie on the party accused) make or mend, or begin or proceed to make or mend, or buy or sell, or shall knowingly and without lawful excuse (the proof of which excuse shall lie on the party accused) have in his custody or possession any puncheon, counter-puncheon, matrix, stamp, die, pattern, or mould in or upon which there shall be made or impressed, or which will make or impress, or which shall be intended to make or impress the figure, stamp, or apparent resemblance of both or either of the sides of any of the Queen's current gold or silver coin, or any part or parts of both or either of such sides;

Or shall without lawful authority (the proof whereof shall lie on the party accused) make or mend, or begin or proceed to make or mend, or buy or sell, or shall without lawful excuse (the proof whereof shall lie on the party accused) have in his custody or possession any edger, edging-tool, collar, instrument or engine adapted and intended for the marking of coin round the edges with letters, grainings, or other marks or figures apparently resembling those on the edges of any of the Queen's gold or silver coin, knowing the same to be so adapted or intended as aforesaid;

Or shall without lawful authority (the proof whereof shall lie on the party accused) make or mend, or begin or proceed to make or mend, or buy or sell, or shall without lawful excuse (the proof whereof shall lie on the party accused) have in his custody or possession any press for coinage, or any cutting engine for cutting by force of a screw, or of any other contrivance round blanks out of gold, silver, or other metal, knowing such press to be a press for coinage, or knowing such engine to have been used, or to be intended to be used for or in order to the counterfeiting of any of the Queen's current gold or silver coin, shall incur the penalties of the class. (*i*)

(*i*) 2 Will. 4, c, 34, s. 10.

Art. 11.

Whosoever shall without lawful authority (the proof whereof shall lie upon the party accused) knowingly convey out of any of Her Majesty's Mints any puncheon, counter-puncheon, matrix, stamp, die, pattern, mould, edger, edging-tool, collar, instrument, press or engine used or employed in or about the coining of coin, or any useful part of any of the several matters aforesaid, or any coin, bullion, metal, or mixture of metals, shall incur the penalties of the class. (*j*)

Conveying coining tools out of the Royal Mint.

(*j*) 2 Will. 4, c. 34, s. 11. The offences described in this and the last preceding Article are declared by the statute to be felonies, and are punishable with transportation for life or not less than seven years, or with imprisonment for any term not exceeding four years.

Art. 12.

Whosoever shall falsely make or counterfeit any coin resembling, or apparently intended to resemble or pass for any of the Queen's current copper coin;

Making counterfeit copper coin.

Or shall knowingly and without lawful authority (the proof of which authority shall lie on the party accused) make or mend, or begin or proceed to make or mend, or buy or sell, or shall knowingly, and without lawful excuse (the proof of which excuse shall lie on the party accused) have in his custody or possession any instrument, tool or engine adapted and intended for the counterfeiting of any of the Queen's current copper coin;

Making tools for making counterfeit copper coin.

Or shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay or put off, any false or counterfeit coin, resembling, or apparently intended to resemble or pass for any of the Queen's current copper coin, at or for a lower rate or value than the same by its denomination imports, or was coined or counterfeited for, shall incur the penalties of the class. (*k*)

Buying or putting off copper coin at less value than its denomination imports.

(*k*) 2 Will. 4, c. 34, s. 12. This offence is by the present law a felony, and is punishable with transportation for seven years, or imprisonment for any term not exceeding two years.

Art. 13.

Whosoever shall tender, utter, or put off, any false or counterfeit coin, resembling, or apparently intended to resemble or pass for any of the Queen's current copper coin, knowing the same to be false or counterfeit, or shall have in his custody or possession three or more pieces of false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current copper coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same, shall incur the penalties of the class. (*l*)

Uttering counterfeit copper coin having other pieces of counterfeit copper coin in possession.

(*l*) 2 Will. 4, c. 34, s. 12. These offences are declared by the statute to be misdemeanors, and are punishable with imprisonment for any term not exceeding one year.

Art. 14.

Whosoever shall make, coin, or counterfeit any kind of coin, not the proper coin of this realm, nor permitted to be current within the same, but resembling, or made with intent to resemble or look like any gold or silver coin of any foreign prince, state, or country, or to pass for such foreign coin, shall incur the penalties of the class. (*m*)

Making coin to resemble and pass for foreign gold or silver coin.

(*m*) This offence is created, and was made a felony punishable with transportation for seven years,

by the stat. 37 G. 3. c. 126, s. 2, and which was intended, as the preamble declares, to prevent the then increasing practice of "counterfeiting foreign gold and silver coin, and the bringing into this realm, and uttering within the same, false and counterfeit foreign gold and silver coin, and particularly pieces of gold coin commonly called Louis d'or, and pieces of silver coin commonly called dollars. The provisions of this statute, as far as they relate to the *copper* coin, are repealed by the 2 Will. 4, c. 34, s. 1; but its enactments respecting gold and silver coin remain in force, excepting that the punishment of death, which is enacted in one of the clauses, is changed to transportation for life, or not less than seven years, by the general words in the 1st section of the stat. 11 Geo. 4, and 1 Will. 4, c. 66. It is perhaps unnecessary to advert to the inaccuracy of expression in the above clause, which does not limit the general acts declared to be criminal by specifying any fraudulent or mischievous intention, because the provision was obviously made to meet a temporary purpose, and to prevent an evil which at the present day can hardly occur. We submit, therefore, that this enactment, as well as the other provisions of the 37 Geo. 3, c. 126, as digested in the following articles relating to the same subject, might be advantageously repealed.

Art. 15.

Importing counterfeit foreign gold and silver coin into England with intent to utter it.

Whosoever shall bring into this realm any such false or counterfeit coin, as in the last preceding Article is mentioned, resembling, or made with intent to resemble or look like any gold or silver coin of any foreign prince, state, or country, or to pass as such foreign coin, knowing the same to be false or counterfeit, to the intent to utter the same within this realm, or within any dominions of the same, shall incur the penalties of the class. (*n*)

(*n*) The statute 37 Geo. 3, c. 126, s. 3. makes this offence a felony, and subjects the offender to seven years' transportation. See Note to Art. 14.

Art. 16.

Uttering counterfeit foreign gold and silver coin.

Whosoever shall utter or tender in payment, or give in exchange, or pay or put off to any person or persons any such false or counterfeit coin as is mentioned in Article 14, resembling, or made with intent to resemble or look like any gold or silver coin of any foreign prince, state, or country, or to pass as such foreign coin, knowing the same to be false and counterfeit, shall incur in respect of a first offence the penalties of the class, in respect of a second offence the penalties of the class, and in respect of any subsequent offence the penalties of the class (*o*)

(*o*) By the stat. 37 Geo. 3, c. 126, s. 4, uttering counterfeit foreign gold or silver coin was for the first offence made punishable with imprisonment for six months, and the offender was required to find sureties for his good behaviour for six months after the expiration of his term of imprisonment; the second offence subjected the offender to two years' imprisonment, and to find sureties for his good behaviour for two years after the expiration of his term of imprisonment; and the third offence was declared to be felony without benefit of clergy, and it continued to be a capital offence until the law was altered by the general words of repeal in the stat. 11 Geo. 4, and 1 Wm. 4, c. 66. See note to Article 14.

Art. 17.

Counterfeiting foreign coin of copper or mixed metal of less value than silver.

Whosoever shall make, coin, or counterfeit any kind of coin, not the proper coin of this realm, nor ordered by the royal proclamation of Her Majesty, her heirs or successors, to be deemed and taken as current money of this realm, or any part thereof, but resembling, or made with intent to resemble, any copper coin, or any other coin made of any metal or mixed metals of less value than the silver coin of any foreign prince, state, or country respectively, or to pass as such foreign coin, shall incur in respect of a first offence the penalties of the class, and in respect of a second offence the penalties of the class. (*p*)

(*p*) By the st. 43 Geo. 3, c. 139, s. 3, (which is not in any respect repealed by the Consolidation Act of the 2 Wm. 4, c. 34,) the crime described in the above Article is for the first offence declared to be a misdemeanor and *breach of the peace*, punishable with imprisonment for one year; a second offence subjects the offender to transportation for seven years. The observations which we have made in the note to Article 14 respecting the stat. 37 Geo. 3, c. 126, will apply, we apprehend, also to this more recent enactment. The evil which it was meant to prevent existed in a state of the metallic currency of this country, very unlike its present situation, and which is unlikely to recur. We conceive, therefore, that these provisions likewise may be advantageously repealed.

Art. 18.

Interpretation clause.

Where "the Queen's current gold or silver coin," or "the Queen's current copper coin," shall be mentioned in any article under this head, the same shall be deemed to include and denote any gold or silver coin or any copper coin respectively coined in any of Her Majesty's mints, and lawfully current in any part of Her Majesty's dominions, whether within the United Kingdom or otherwise.

And any of the Queen's current coin which shall have been gilt, silvered, washed, coloured, or cased over, or in any manner altered so as to resemble, or be apparently intended to resemble, or pass for any of the Queen's current coin of a higher denomination, shall be deemed and taken to be counterfeit coin, within the intent

and meaning of those articles under this head, wherein mention is made of "false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin."

And where the having any matter in the custody or possession of any person is in any Article under this head expressed to be an offence, if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in any dwelling-house or other building, lodging, apartment, field, or other place, open or enclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit, or for that of another, every such person shall be deemed and taken to have such matter in his custody or possession within the meaning of such Article. (*q*)

(*q*) This interpretation clause is taken from the Will. IV. c. 34, s. 21.

OFFENCES RELATING TO THE PUBLIC REVENUE.*

SUMMARY OF CONTENTS.

[Assaults on Revenue Officers, Art. 1. Assaulting or obstructing officers of the Army or Navy employed for the prevention of smuggling, Art. 2. Violently assaulting or resisting Excise Officers, Art. 3. Rescuing, by means of arms or violence, persons arrested under the Act relating to duties on spirits, or assaulting officers, &c., discovering or giving evidence against offenders, or otherwise forcibly opposing the powers of the Act, Art. 4. Riotously assembling to rescue offenders against the laws relating to spirituous liquors, Art. 5. Assembling to the number of three or more to assist in the illegal running of prohibited goods, or in rescuing such goods after seizure, or any person apprehended for such offence, Art. 6. Maliciously shooting at any boat belonging to the Navy or Revenue service and employed for the prevention of smuggling, Art. 7. Being found with more than four other persons in possession of smuggled goods, or with one other person within five miles of the coast with such goods, Art. 8. Making signals for the purpose of giving notice to smuggling vessels, Art. 9, 10. Embezzlement by public officers, Art. 11. Embezzlement of goods in bonded warehouses by officers of Customs or Excise, Art. 12. Collectors and Receivers of Excise not keeping proper or rendering false accounts, Art. 13. Officers of Excise delivering out false permits, &c., Art. 14. Embezzlements by collectors of public money, Art. 15. Making false declarations relating to liabilities of Assessed Taxes, Art. 16. Making false declarations relating to names, &c., of proprietors, &c., of newspapers, Art. 17. Making false statements on applying for hackney or stage-carriage licences, Art. 18, 19.]

Art. 1.

Assaults on revenue officers.

Whosoever shall forcibly assault, obstruct, or resist any officer or servant lawfully employed in the receipt or protection of any part of the public revenue, when in the due execution of his duty as such officer or servant, shall incur the penalties of the class. (*a*)

(*a*) The forcible obstruction or resistance of a revenue officer is said to be an offence at common law, if done when the officer is in the actual execution of his duty. Brady's Case, 1 Bos. and Pull. 188. The stat. 9 Geo. 4, c. 31, s. 25, contains a specific provision against assaults "upon revenue officers in the due execution of their duty," authorizing a punishment by fine or imprisonment for two years, with or without hard labour. But as the offence described by the statute is comprehended in the above definition, and as it will probably fall within the same class of punishment in any new arrangement of the law, we have thought it unnecessary to make it the subject of a separate Article.

Art. 2.

Assaulting or obstructing officers of the army or navy employed in preventing smuggling.

Whosoever shall, by force or violence, assault, resist, oppose, molest, hinder, or obstruct any officer of the army, navy, or marines, being duly employed for the prevention of smuggling and on full pay, or any officer of Customs or Excise, or any person acting in his or their aid or assistance, or duly employed for the prevention of smuggling, in the due execution of his or their office or duty, shall incur the penalties of the class. (*b*)

(*b*) By the stat. 3 and 4 Wm. 4, c. 53, s. 61, this offence is punishable with transportation for seven years, or imprisonment for any term not exceeding three years.

Art. 3.

Violently assaulting or resisting excise officers.

Whosoever, being armed with any offensive weapon whatsoever, shall, with force or violence, assault or resist any officer of Excise, or any person employed in the revenue of Excise, or any person acting in the aid or assistance of such officer or person so employed, who in the execution of his office or duty shall search for, take, or seize, or shall endeavour or offer to search for, take, or seize any goods or commodities forfeited under or by virtue of an Act of Parliament, passed in the 7th and 8th years of the reign of King George the Fourth, intituled "An Act to consolidate and amend the laws relating to the collection and management of the Revenue of Excise throughout Great Britain and Ireland," or any other Act or Acts of

* It should be observed that there are several offences besides those included under this head, which may be considered as relating to the public revenue, which have been inserted under other heads of the Digest, such, for instance, as the forgery of stamps, Excise marks, permits, &c, under that division which treats of Forgery, but which, if it is thought proper, can on the completion of the Digest be transferred to the head of Offences relating to the Public Revenue.

Parliament relating to the revenue of Excise or Customs; or who shall search for, take, or seize, or shall endeavour or offer to search for, take, or seize any vessel, boat, cart, carriage, or other conveyance, or any horse, cattle, or other thing used in the removal of any such goods or commodities, or who shall arrest or shall endeavour or offer to arrest any person carrying, removing, or concealing the same, or employed or concerned therein, and liable to such arrest, shall incur the penalties of the class (*c*)

(*c*) The offence described in this Article is created by the statute 7 & 8 Geo. IV. c. 53, ss. 40 & 43, and by that Act the Court may, upon conviction of the offender sentence him to imprisonment, with hard labour, for any term not exceeding three years, either in addition to or in lieu of any other punishment or penalty which may by law be inflicted. We have digested this provision, as we find it in a very recent statute; but we apprehend that this Article, as well as Art. 2, will be found wholly unnecessary if the class of punishment applied to Art. 1, be sufficiently comprehensive.

Art. 4.

Rescuing by means of arms or violence persons arrested under the Act relating to duties on spirits.

Whosoever being armed with a gun, pistol, sword, or pike, or in a violent manner with staves or stones, shall rescue any offender arrested, or any goods or chattels seized under an Act of Parliament passed in the sixth year of the reign of King George the Fourth, entitled "An Act to repeal the duties payable in respect of spirits distilled in England, and of licences for distilling, rectifying, or compounding such spirits, and for the sale of spirits, and to impose other duties in lieu thereof, and to provide other regulations for the collection of the said duties, and for the sale of spirits, and for the warehousing of such spirits without payment of duty for exportation;" or shall prevent such arrest or seizure;

Assaulting officers, &c., discovering or giving evidence against offenders.

Or shall assault, beat, or wound any officer, or other person acting in his or their aid or assistance, or any person who shall have given, or be about to give, any information against, or shall have discovered or given evidence against, or be about to discover or give evidence against, or shall seize or bring to justice any person offending against that Act, or who shall have seized, or be about to seize, or examine any goods or chattels forfeited under that Act;

Forcibly opposing any of the powers of the Act.

Or shall forcibly oppose the execution of any of the powers given by that Act, or being so armed, or with such violence as aforesaid, shall offer or threaten so to do, shall incur the penalties of the class. (*d*)

(*d*) The offences described in this Article are created by the statute 6 Geo. 4, c. 80, s. 143, and offenders under that clause are to be "subject and liable to the like pains and penalties as in cases of felony," and the courts by whom they may be tried are authorized to sentence them to transportation for seven years.

Art. 5.

Riotously assembling to rescue offenders against the laws relating to spirituous liquors.

If any persons, to the number of five or more, shall in a tumultuous and riotous manner assemble themselves to rescue any offenders against an Act of Parliament, passed in the twenty-fourth year of the reign of King George the Second, intituled "An Act for granting to His Majesty an additional duty upon spirituous liquors and upon licences for retailing the same; and for repealing the Act of the twentieth year of His present Majesty's reign, intituled 'An Act for granting a duty to His Majesty, to be paid by distillers, upon licences to be taken out by them for retailing spirituous liquors;' and for the more effectually restraining the retailing of distilled spirituous liquors; and for allowing a drawback upon the exportation of British made spirits; and that the parish of St. Mary-le-bone, in the county of Middlesex, shall be under the inspection of the head office of Excise," or against any other Act relating to spirituous liquors or strong waters, or for licensing the retailers thereof, or to assault, beat, or wound any person who shall have given, or be about to give any information against, or shall have discovered or given evidence against, or shall seize or bring to justice any person offending against the said Act of Parliament, passed in the twenty-fourth year of the reign of King George the Second, or any of the said former Acts, or forcibly to oppose the execution of any of the powers given by the last mentioned Act of Parliament, every such person shall incur the penalties of the class (*e*)

(*e*) This Article is framed from the 28th section of the statute 24 Geo. II. c. 40, and we conceive that the offence defined by it, which is a felony and subjects the offender to transportation for seven years, is still part of the law. It was probably intended that the provisions of the 143d section of the statute 6 Geo. IV. c. 80, should be substituted for those of the enactment of George II., and that the latter should be wholly repealed; but we apprehend that these objects have not been effected. The repealing clause in the 6 Geo. IV. c. 80, applies to so much and such parts of precedent Acts as related "to the several matters and things expressly provided for by that Act, but not otherwise." Now the 143d section provides for aggravated assaults upon officers and rescues, but does not mention the

offence of *riotously assembling* for the purpose of making such assaults and rescues, which is the point of the offence described in the ancient statute. The provisions in the statute of George II. were, no doubt, made in order to meet some temporary disposition in the people riotously to oppose the execution of this branch of the Revenue Laws, and it cannot be necessary to continue so severe a penalty at the present day; if so, the general law relating to riots and unlawful assemblies would be quite sufficient. For this reason we recommend that this clause should be expressly repealed.

ART. 6.

Assembling to the number of three or more to assist in illegally running prohibited goods, or in rescuing such goods after seizure, or any person apprehended for such offence.

If any persons, to the number of three or more, armed with fire-arms or other offensive weapons, shall within the United Kingdom, or within the limits of any port, harbour, or creek thereof, be assembled in order to be aiding and assisting in the illegal landing, running, or carrying away of any prohibited goods, or any goods liable to any duties which have not been paid or secured, or in rescuing or taking away any such goods as aforesaid, after seizure, from the officer of the Customs or other officer authorized to seize the same, or from any person or persons employed by them or assisting them, or from the place where the same shall have been lodged by them, or in rescuing any person who shall have been apprehended for any of the offences made felony by any law relating to the Customs, or in the preventing the apprehension of any person who shall have been guilty of such offence.

Or, if any persons, to the number of three or more, so armed as aforesaid, shall within the United Kingdom, or within the limits of any port, harbour, or creek thereof, be so aiding or assisting, every such offender shall incur the penalties of the class. (*f*)

(*f*) The offences contained in this and the next succeeding Article are taken from the statute 3 & 4 Will. IV. c. 53, s. 58, by which statute they are declared to be capital felonies. The recent statute 7 Will. IV. & 1 Vic. c. 91, however, has taken away the capital punishment, and substituted that of transportation for life or not less than 15 years, or imprisonment not exceeding three years.

ART. 7.

Maliciously shooting at any boat belonging to the Navy or Revenue Service, and employed for the prevention of smuggling.

Whosoever shall maliciously shoot at any vessel or boat belonging to Her Majesty's navy, or in the service of the Revenue, within one hundred leagues of any part of the coast of the United Kingdom, or shall maliciously shoot at, maim, or dangerously wound any officer of the Army, Navy, or Marines, being duly employed for the prevention of smuggling, and on full pay, or any officer of Customs or Excise, or any person acting in his aid or assistance, or duly employed for the prevention of smuggling, in the due execution of his office or duty, shall incur the penalties of the class. (*g*)

(*g*) It should be remarked that the offence of shooting at, &c., officers employed for the prevention of smuggling contained in the above Article, does not appear to have been affected by the 7 Wm. 4, and 1 Vic. c. 85, ss. 2, 3, or 4, relating to offences against the person, as the crimes of shooting at, &c., thereby made punishable, must be committed with the intent to murder, maim, or do some grievous bodily injury, &c., whilst in the case of the offences specified in the above Article it would not be necessary to allege any intent.

ART. 8.

Being found with more than four other persons in possession of smuggled goods, or with one other person within five miles of the coast with such goods.

Whosoever shall be found in company with more than four other persons with any goods liable to forfeiture, under an Act of Parliament passed in the third and fourth years of the reign of King William the Fourth, entitled "An Act for the prevention of smuggling," or any other Act relating to the revenue of Customs or Excise, or shall be found in company with one other person within five miles of the sea-coast, or of any navigable river leading therefrom, with such goods, and carrying offensive arms or weapons, or disguised in any way, shall incur the penalties of the class. (*h*)

(*h*) By the 3 and 4 Wm. 4, c. 53, s. 60, persons committing any of the offences enumerated in this Article are declared to be guilty of felony, and are to be transported for seven years.

ART. 9.

Making signals for the purpose of giving notice to smuggling vessels.

Whosoever, after sunset and before sunrise, between the twenty-first day of September and the first day of April, or after the hour of eight in the evening and before the hour of six in the morning at any other time in the year, shall make, or cause to be made, or aid or assist in making, any signal in or on board of or from any vessel or boat, or on or from any part of the coast or shore of the United Kingdom, or within six miles of any part of such coasts or shores, for the purpose of giving any notice to any person on board any smuggling vessel or boat, shall incur the penalties of the class. (*i*)

(*i*) By the stat. 3 and 4 Wm. 4, c. 53, s. 53, this offence is made punishable with a fine of 100*l.*, or imprisonment not exceeding one year.

ART. 10.

The provisions contained in the last preceding Article shall apply, whether any person so on board of such smuggling vessel or boat, as therein mentioned, be or be not within distance to notice any such signal.

ART. 11.

Embezzlement by public officers.

Whosoever, being employed in the public service of Her Majesty, and entrusted, by virtue of such employment, with the receipt, custody, management, or control of any chattel, money, or valuable security, shall embezzle the same, or any part thereof, or in any manner fraudulently apply or dispose of the same, or any part thereof, to his own use or benefit, or for any purpose whatsoever, except for the public service, shall incur the penalties of the class. (*j*)

(*j*) By 2 Will. IV. c. 4, s. 1, this offence is made a felony, and subjects the offender to be transported for any term not exceeding fourteen nor less than seven years, or to be imprisoned for any term not exceeding three years.

ART. 12.

Embezzlement of goods in bonded warehouses by officers of Custom or Excise.

If it shall at any time happen that any embezzlement, waste, spoil, or destruction shall be made of or in any goods or merchandize which shall be warehoused in warehouses, under the authority of an Act of Parliament passed in the fourth year of the reign of King George the Fourth, intituled "An Act to make more effectual provision for permitting goods imported to be secured in warehouses or other places without payment of duty on the first entry thereof," by or through any wilful misconduct of any officer or officers of Customs or Excise, every such officer shall incur the penalties of the class. (*k*)

(*k*) By 4 Geo. IV. c. 24, s. 72, this offence is made a misdemeanor.

ART. 13.

Collectors and receivers of Excise not keeping proper accounts or rendering false accounts.

Whosoever, being a collector, receiver, or other person entrusted with the collection, receipt, custody, or management of any part of the revenue of Excise, shall neglect or omit to keep and render such separate and distinct accounts, and in such manner and form as shall from time to time be directed by the Commissioners of Excise, or shall knowingly render or furnish false accounts of or relating to any duty, or penalty, or sum of money collected, had, or received, or to be collected, had, or received by him, or entrusted to his care or custody, or of any balance of money in his hands, or under his control and management, shall incur the penalties of the class. (*l*)

(*l*) By 7 & 8 Geo. IV. c. 53, s. 44, this offence is declared to be a misdemeanor, and the offender is liable to be punished by fine and imprisonment, and is incapacitated from holding any office under the Crown.

ART. 14.

Officers of Excise delivering out false permits, &c.

Whosoever, being an officer of Excise, shall deliver out, or suffer to be delivered out, any paper prepared, or provided, or appointed by the Commissioners of Excise to be used for permits in blank, or before such permit shall be filled up and issued agreeable to, and in conformity with, a request-note; or shall knowingly give or grant any permit to any person not entitled to receive the same, or shall knowingly give or grant any false or untrue permit, or shall make any false or untrue entry in the counterpart of any permit given or granted by him, or shall knowingly or willingly receive or take any goods or commodities into the stock of any person brought in with any false, or untrue, or fraudulent permit, or shall knowingly or willingly grant any permit for the removal of any goods or commodities out of or from the stock of any person who shall have received or retained such goods or commodities, or any of them, under or by virtue or pretext of any false, untrue, forged, or fraudulent permit, or shall knowingly or willingly give any false credit in the stock of any person beyond the credit to which such stock is justly and truly entitled, so as to enable such person falsely and fraudulently to obtain a permit or permits, or shall knowingly or willingly suffer the same to be done directly or indirectly, shall incur the penalties of the class. (*m*)

(*m*) By 2 Will. IV. c. 16, s. 15, these offences are declared to be misdemeanors, punishable by fine or imprisonment, and the offender is thenceforth rendered incapable of holding any office relating to any of the revenues of the United Kingdom.

ART. 15.

Embezzlements by collectors, &c., of public money.

Whosoever, being an officer, collector, or receiver, entrusted with the receipt, custody, or management of money or securities for money belonging to the public,

or any part of the public revenues, shall knowingly furnish false statements or returns of the sums of money collected by him, or entrusted to his care, or of the balances of money in his hands, or under his control, shall incur the penalties of the class. (*n*)

(*n*) This offence is created by the statute 50 Geo. III. c. 59, s. 2, which declared it to be a misdemeanor, punishable with fine and imprisonment, and provided that the offender should be for ever incapable of holding any office under the Crown. The first section of this statute, which relates to the embezzlement of money issued for public purposes, is repealed by the 2 Will. IV. c. 4; and the provision substituted for it is digested in Art. 11.

Art. 16.

Making false declarations relating to liabilities to Assessed Taxes.

Whosoever, in any declaration made by him in pursuance of the provisions of an Act of Parliament passed in the fiftieth year of the reign of King George the Third, intituled "An Act to regulate the manner of making surcharges of the duties of assessed taxes, and of the tax upon the profits arising from property, professions, trades, and offices, and for amending the Acts relating to the said duties respectively," shall wilfully and fraudulently declare any matter or thing which shall be false or untrue, shall incur the penalties of the class. (*o*)

(*o*) This offence is created by the statute 50 Geo. III. c. 105, sec. 9, and is declared to be a misdemeanor, punishable with imprisonment for any space of time not exceeding six calendar months, and a fine not exceeding treble the amount of duty for which the offender shall have been charged.

Art. 17.

Making false declarations relating to names, &c., of proprietors, &c., of newspapers.

Whosoever shall knowingly and wilfully sign and make any such declaration as is required by the provisions of an Act of Parliament passed in the sixth and seventh years of the reign of King William the Fourth, intituled "An Act to reduce the duties on newspapers, and to amend the laws relating to the duties on newspapers and advertisements," in which declaration shall be inserted or set forth the name, addition, or place of abode of any person as a proprietor, publisher, printer, or conductor of the actual printing of any newspaper to which such declaration shall relate, who shall not be a proprietor, printer, or publisher thereof, or from which shall be omitted the name, addition, or place of abode of any proprietor, publisher, printer, or conductor of the actual printing of such newspaper, contrary to the true meaning of the said Act, or in which any matter or thing by the said Act required to be set forth, shall be set forth otherwise than according to the truth, or from which any matter or thing, required by the said Act to be truly set forth, shall be entirely omitted, shall incur the penalties of the class. (*p*)

(*p*) This Article is founded upon the 6th section of statute 6 & 7 Will. IV. c. 79, and though the declaration required by that Act does not, perhaps, exclusively contemplate the protection of the revenue, this is its principal object, and we have, therefore, thought it right to place it under the present head.

Art. 18.

Making false statements on applying for hackney carriage licences.

Whosoever, in applying for, or procuring, or attempting to procure, any licence under any of the provisions of an Act of Parliament passed in the first and second years of the reign of King William the Fourth, intituled "An Act to amend the laws relating to hackney carriages, and to waggons, carts, and drays used in the metropolis, and to place the collection of the duties on hackney carriages, and on hawkers and pedlars in England, under the Commissioners of Stamps," (except so far as such provisions relate to licences to watermen and assistants to the drivers of hackney carriages,) shall use or employ any false or fictitious name or place of abode, or other false or fictitious description of any person or supposed person, or shall wilfully or knowingly insert, or cause to be inserted, in any requisition for any such licence, or in any such licence, any false or fictitious name or place of abode, or other false or fictitious description of any person or supposed person; or shall wilfully or knowingly insert, or cause to be inserted, in any such requisition, or in any such licence as aforesaid, the name of any person as being a proprietor, or part proprietor, of any hackney carriage, who shall not, at the time of the application for such licence, be in fact a proprietor, or a part proprietor, of such hackney carriage, shall incur the penalties of the class. (*q*)

(*q*) By the statute 1 & 2 Will. IV. c. 22, s. 33, this offence is made a misdemeanor, punishable, at discretion, with fine or imprisonment, or both. The provisions respecting watermen's licences were repealed by the 1 & 2 Vic. c. 79, s. 1.

Art. 19.

Making false statements on applying for stage carriage licences.

Whosoever, in applying for, or procuring, or attempting to procure, any licence under an Act passed in the second and third years of the reign of King William the

Fourth, intituled "An Act to repeal the duties under the management of the Commissioners of Stamps on stage carriages and on horses let for hire in Great Britain, and to grant other duties in lieu thereof, and also to consolidate and amend the laws relating thereto," for or in respect of any stage carriage, shall use or employ any false or fictitious name or place of abode, or other false or fictitious description of any person or supposed person, or shall insert, or cause to be inserted, in any requisition for any such licence, or in any such licence, any false or fictitious name or place of abode, or other false or fictitious description of any person or supposed person, as being the proprietor, or part proprietor, of the stage carriage for or in respect of which such licence shall be applied for or procured, or shall wilfully or knowingly insert, or cause to be inserted, in any such requisition, or in any such licence as aforesaid, the name of any person as being a proprietor, or part proprietor, of such carriage, who shall not, at the time of the application for such licence, be, in fact, a proprietor, or part proprietor, of such carriage, shall incur the penalties of the class. (*r*)

(*r*) By the statute 2 & 3 Will. IV. c. 120, s. 10, this offence is made a misdemeanor, punishable with fine or imprisonment, or both, at the discretion of the Court.

We humbly submit this the Sixth Report of the Commissioners to Your Majesty's Royal consideration.

THOMAS STARKIE. (L.S.)
H. BELLENDEN KER. (L.S.)
D. JARDINE. (L.S.)

Received this 3d day of May, 1841.

COTTENHAM, C.

APPENDIX.

EXTRACTS FROM THE CODE OF CRIMES AND PUNISHMENTS PREPARED FOR THE STATE OF LOUISIANA, BY MR. LIVINGSTONE.

TITLE 18.

OF OFFENCES AFFECTING REPUTATION.

Chapter I.

Of Defamation.

Art. 362. Whoever shall defame another, shall be punished by fine and imprisonment, or both.

If the defamation impute a crime, it shall be punished by fine not exceeding three thousand dollars, or by imprisonment not more than twelve months, or by both; and the imprisonment may, for the whole or a part of the time, be in close custody.

If the defamation do not impute a crime, the punishment shall be lessened one fourth.

If the defamation be by libel, imprisonment in close custody shall always form a part of the punishment.

Art. 363. Defamation is an injury offered to the reputation of another by an allegation which is either untrue, or, if true, is not made with a justifiable intent.

Art. 364. Defamation may be made verbally or by signs, which is called slander; or by writing or painting, which is called libel.

Art. 365. This offence consists in the injury offered to reputation, not in any probable breach of the peace or other consequence that may result from it.

Art. 366. There must be some injury offered in order to constitute the offence; therefore, the words used, or the figures represented, must convey the idea, either

1. That the person to whom they refer has been guilty of some crime.
2. That he has done some act, or been guilty of some omission, which, although not a crime, is of a nature to make people in general avoid social intercourse with him, or lessen their confidence in his integrity.
3. That he has some moral vice, or physical or mental defect or disease, that would cause his society to be generally avoided; or,
4. That his general character is such as to produce either of the effects mentioned in this article.

Art. 367. It is also an injury, coming within the definition, if the natural tendency of the words or representations used is to bring upon the person to whom they refer, the hatred, ridicule, or contempt of the public; or to deprive him of the benefits of social intercourse.

Art. 368. To make false representations, importing that the party referred to wants the necessary talents, or is otherwise incompetent to perform or conduct the office, business, profession, or trade in which he is engaged; or is dishonest in his conduct therein; is also an injury within this part of the definition.

Art. 369. But it is not an offence to make true statements of fact, or express any opinion, whether such opinion be correctly formed or not, as to the qualifications of any person for any public office, with a *bonâ fide* intent to give information to those who have the power of making the appointment or election to such office.

Art. 370. Nor is it an offence to make true statements of fact, or express the opinion which he who gives it entertains relative to the integrity or other qualifications to perform the duties of any station, profession, or trade, when it is done by

way of advice to those who have asked it, or to those whom it was a duty, arising either from legal or social connexion, or from motives of humanity, to give such advice.

Art. 371. Nor shall it be deemed an offence to make or publish any criticism or examination of any work of literature, science, or art; or to express any opinion on the qualifications, merits, or competency of the author of such work in relation thereto; although such criticism, examination, or opinion shall be ill founded and prove injurious to the party to whom it refers; provided such criticism or expression of opinion be not intended to cover a malicious design to injure the party to whom it refers.

Art. 372. If the injury spoken of in the definition be offered, it is sufficient to constitute the offence; by which is not meant, that the injury must be actually suffered, but that the words or representations are such as, in the ordinary course of affairs, tend to cause such injury, according to the definition and explanation of that word in this chapter.

Art. 373. All those who make, publish, or circulate a libel, are severally guilty of the offence of defamation.

Art. 374. He is the maker of a libel who originally contrived, and either gave it form himself by writing, printing, engraving, painting, or any other of the modes which may constitute a libel, or caused it to be so done by others.

Art. 375. He is the publisher who executes the mechanical labour of writing it when dictated by the maker, or who paints or engraves, or in any other manner gives it form under his direction, who copies, or prints it.

Art. 376. He circulates who sells a libel, or who, knowing the contents, gives or distributes, or reads, or exhibits it to others.

Art. 377. If the libel be in a printed form, and is printed or sold in an office, or shop, where books or other printed works are usually printed or sold, the person on whose account the business of such office or shop is carried on is presumed to be the person who published or circulated it until he remove that presumption by contrary proof.

Art. 378. In like manner, if the libel be an engraving or painting, and is made and sold in an office or shop in which paintings or engravings are usually made or sold, the person on whose account the business of such office or shop is carried on is presumed to be the person who published or circulated it.

Art. 379. No one shall be convicted merely on evidence of his having made a manuscript copy of a libel, or of having performed the mechanical labour of printing it, who can prove that he made such printed or written copy without any intent to injure the person to whom it refers; but he for whose account, or by whose order it is printed, shall be presumed to have known the intent of publication, and shall be liable for the offence.

Art. 380. He is not guilty of the offence who only lends or gives a book or paper containing a libel, or reads it to another after it is already in general circulation, unless some circumstances are proved to show that it was done with design to injure.

Art. 381. The injury to constitute the offence must be offered to the reputation. Words or representations which injure the party in his title to property only, form a different offence, provided for under its proper head.

Art. 382. The words "of another," in the definition of this offence, comprehends every person in possession of his civil rights, as also aliens, whether resident within the state or not.

Art. 383. The dead are also included in this term, but subject to the following formality and proviso:

1. No prosecution shall be commenced, but on the complaint of a family meeting, called at the request of a descendant, collateral relation, or friend of the deceased, in the manner directed by the code of civil procedure.

2. No prosecution can be supported for the statement of any historical facts, or delineations of character in any literary work, whether the party to whom they refer be dead or alive, provided such statements be made in the fair prosecution of historical or other literary disquisition, and not for the purpose of defamation.

Art. 384. The word "allegation," as used in the definition, comprehends not

only the direct assertion of a fact, but every mode of speech or device by which the hearers or spectators may understand what is intended.

Art. 385. The words or representations by which the allegation is expressed are to be understood in the sense in which they were intended by the person using them; intent and signification are matters of fact to be determined from a consideration of all the evidence in the case.

Art. 386. An important part of the definition is that which determines that the uttering of truth may sometimes constitute defamation. The truth may be expressed in all cases in which it is not forbidden by law, but the allegation of falsehood is not always an offence; it is sometimes made the cause of private suit, sometimes left to the sanction of the moral sense, or of public opinion. For the developement of this branch of the definition, the following rules are established:—

1. True statements of the official conduct of members of the general assembly, or of public officers, and of the proceedings of all legislative bodies, public corporations, and courts of justice may be legally made.

2. Observations on the tendency of the official acts of members of the legislature and of public officers, and on their motives in performing them, are permitted, even if the author should mistake such tendency or motives; but a false allegation or suggestion of such motives as would, connected with the act, constitute a crime, is defamation.

3. Allegations, having no natural connexion with the case, provided for by the two last preceding articles, which would amount to defamation if made or exhibited alone, are offences, although they may be contained in publications which treat or propose to treat of the conduct of public measures and public officers.

Art. 387. Allegations in writing, made with respect to all other than the official acts above provided for, which would, if they were false, be defamation, shall, although true, constitute that offence, if they are made from motives of revenge, hatred, envy, or ill-will of any other kind, entertained by the party making them, or to gratify either of those passions in any other; and they shall be deemed to have been made from such motive in all cases in which the defendant cannot show that he was actuated by some motive of public good or private duty in making the allegation.

5. No true allegations but such as are described in the last preceding rule, and no false allegations but such as are declared to be offences by this code, are declared punishable by law.

6. No prosecution can be maintained for defamation, on account of anything said or written, either as judge, attorney, counsel, party, or witness, in a court of justice in the course of a legal proceeding, provided that what is said or written be relevant to the matter before such court, and is not introduced for the sole purpose of injuring the party to whom it refers.

7. Inquiries and suggestions, made even out of court, if done with a *bonâ fide* view of investigating a fact necessary for the party's interest in a civil, or defence in a criminal prosecution, and not from malice towards the party to whom they refer, are not an offence, although they may injure such party.

8. Nothing said by a party to a civil suit or criminal prosecution, in confidence to his attorney, solicitor, or counsel, relative to such suit or prosecution while it is pending, or with a view to its commencement or defence, is an offence under this chapter.

9. The constitutions of the United States and of this State severally, protect members of Congress and of the General Assembly from prosecutions for anything said in either of those bodies. The same rule is to be observed with respect to members of the legislatures of the different states, and those who may publish their proceedings.

Art. 388. The word "verbally," used in the definition of slander, means the utterance of words by the voice; and the words "by signs," comprehend every motion of the fingers or other gesture, that is understood by the party using it, and by them to whom it is addressed, to signify words, or otherwise to communicate ideas.

Art. 389. It is slander to repeat the contents of any libel, or the words of any slander, unless the defendant show that he was not actuated in doing so by any desire to injure the person defamed.

Art. 390. The word "writing," in the definition of libel, comprehends not only

manuscript, but printing, engraving, etching, or any other means now known, or which may hereafter be discovered or invented to make words visible. The word "painting," in the same definition, includes not only the art usually so called, but drawing, engraving, or representing figures in any other way. It also comprehends hieroglyphics, or the representation of words by objects which they signify.

Art. 391. Offences enumerated in this chapter can only be punished by indictment, and never but on complaint of the party injured, or his legal representative, if he be alive; or if the defamation be against the reputation of the person deceased, then in the manner hereinbefore provided.

Art. 392. In all the offences created by this chapter, the jury decide not only all the facts that are in question, but the intent when it is material, subject to the general powers given to the court in the Code of Procedure.

Art. 393. Nothing in this chapter contained shall be so construed as to prevent or punish the free discussion of the proceedings of the Legislature, or any other branch of the government which is secured by the constitution; and nothing shall be considered as an abuse of the liberty to speak, write, and print on any subject which is referred to in the constitution, but such acts of that nature as are specially constituted offences by this code.

Art. 394. There is no such offence known to our law as defamation of the Government or either of its branches, either under the name of libel, slander, seditious writing, or other appellation. When such allegations amount to defamation of the representatives of the people or public officers, they are provided for by the preceding articles. When they amount to the crime of complicity in sedition, or in opposition to law, they are made punishable by the general provisions respecting accomplices.

Art. 395. There is no such offence as defamation of a body corporate or politic, or of public justice, or religion, or good morals, either by libel or otherwise.

Art. 396. In all cases of prosecution under this chapter, the court may, at its discretion, make it a condition that the whole or any part of the punishment which is awarded, may be remitted on the offender's making apology and amends to the person injured in such form and manner as the court shall by its sentence declare; and if the person injured shall accept of any pecuniary amends, it shall be a bar to any private suit for defamation, founded on the same offence.

Art. 397. On the trial of any prosecution for a defamation, if the jury find that the defendant is the author of the libel or the speaker of the defamatory words, and that the matter which constitutes the libel is false in the whole or in part, they shall specially so declare it in their verdict; declaring the allegations of the defendant to have been unfounded, and, where the case requires it, malicious; and the charge made by the defendant, the verdict, and the judgment of the court shall, when required by the prosecutor, be published at the expense of the defendant.

Art. 398. Whenever the defendant, in any prosecution for defamation, shall avow himself the author or speaker of the words alleged, and shall acknowledge that the charge they import is unfounded, or that they were not intended to apply to the prosecutor; or in cases where there is either ambiguity in the expression or uncertainty as to their application, that they were not used in the sense in which they were understood by him, but in another sense, stating it. In either of these cases the punishment shall be confined to the payment of costs, and of the publication of the proceedings; unless the defendant shall make it appear that the words, according to their true import, did not imply any defamation or did not apply to the prosecutor, in which case he shall be exempt from any costs; but the proceedings may in like manner be published.

Chapter II.

Of other Injuries to Reputation by Effigies or Dramatic Representations.

Art. 399. Whoever, with intent to bring another into contempt, or to excite ridicule or indignation against him, shall exhibit, or shall make with intent that it shall be exhibited, any effigy or figure intended to represent such other person, shall be fined not exceeding one thousand dollars, or imprisoned not exceeding

ninety days, or both; and part or the whole of the imprisonment may be in close custody. And if more than twelve persons are collected to witness such exhibition, it shall be deemed an unlawful assembly and a riot, if they refuse to disperse when thereto legally required.

Art. 400. If any one, with intent to bring another into contempt, or to excite ridicule or indignation against him, shall perform, or cause any dramatic work to be performed, in which such person is represented and personated, either by an imitation of his person or of any peculiarity in his manner, gesture, language, or otherwise, so as to make it apparent to those who know him that he is the person intended by such personification, the offender shall be fined not exceeding one thousand dollars, or imprisoned not exceeding ninety days, or both; and part or the whole of the imprisonment may be in close custody.

EXTRACT FROM THE PENAL CODE PREPARED BY THE INDIAN LAW COMMISSIONERS.

Chapter 25.*

Of Defamation.

Whoever, by words either spoken or intended to be read, or by signs, or by visible representations, attempts to cause any imputation concerning any person to be believed in any quarter, knowing that the belief thereof would harm the reputation of that person in that quarter, is said, except in the cases excepted in the nine clauses next following, to defame that person :—

Explanations.—An imputation is not defamatory unless it be such as, if believed in that quarter in which it is intended to be believed, would harm the reputation of the person concerning whom it is intended to be believed.

Hence an imputation which is defamatory when directed against one person is not necessarily defamatory when directed against another person; and an imputation which is defamatory when intended to be believed in one quarter is not necessarily defamatory when intended to be believed in another quarter.

Also, it may be defamation to repeat or circulate an imputation which it was not defamation originally to make, and it is not necessarily defamation to repeat or circulate an imputation which it was defamation originally to make.

A deceased person may be defamed.†

A collection of persons cannot, as such, be defamed; but an individual may be defamed by means of an imputation thrown on a collection of persons of whom he is one, or by means of an imputation made in the form of an alternative.

If the imputation be such that, if it were believed in the quarter in which it was intended to be believed, the reputation of the person concerning whom it is intended to be believed would not be harmed, then, though that person may suffer in his interest, he has not been defamed.

"*Harm the reputation.*"—No imputation is said to harm a person's reputation, unless that imputation, directly or indirectly, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the commercial credit of that person if he is engaged in trade, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

Illustrations.

(*a*) A says, "Z is an honest man; he never stole B's watch;" intending to cause it to be believed that Z did steal B's watch. This is defamation, unless it fall within one of the exceptions.

(*b*) A is asked who stole B's watch. A points to Z, intending to cause it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.

(*c*) A draws a picture of Z running away with B's watch, intending it to be

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* See Note R.

† The course of proceeding in such a case belongs to the law of Criminal Procedure.

believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.

(*d*) A says of Z, that Z drinks wine. Here the question whether A has defamed Z may turn on the question whether Z is a Mussulman or a Christian.

(*e*) It may be defamation to say of a Sheeah that he has turned a Soonee. It may also be defamation to say of a Soonee that he is turned a Sheeah.

(*f*) A says of Z that Z is a coward. The question whether this is defamation or not may depend on the question whether Z be a soldier or a woman.

(*g*) A says of Z, a Hindoo, that it is highly probable that he will be converted to Mahomedanism. The question whether this is defamation or not may depend on the question whether the communication was made to the Hindoo relatives of Z or to a Mussulman.

(*h*) A journeyman printer who sets the types for printing defamatory matter, a bookseller who sells books containing defamatory matter, a person who lends a defamatory newspaper or repeats defamatory verses, does not commit defamation unless he has the intention described in the definition of defamation.

(*i*) The Bank of Bengal, the civil service, the army, cannot be defamed as such; but it may be defamation of every judge of the Sudder to say, "The whole Sudder Court is corrupt."

(*j*) A says, "X, Y, or Z must be a thief. I do not know which committed the theft; but it was one of the three." This may be defamation of every one of the three persons named.

(*k*) A falsely tells B, who is a public servant, having an office at his disposal, that Z, to whom B intends to offer that office, will not accept it. B in consequence gives that office to another. Here Z, though he suffers in his interests, is not harmed in his reputation, and therefore is not defamed.

470. *First Exception.*—It is not defamation to attempt to cause anything which is true to be believed in any quarter concerning any person.

471. *Second Exception.*—It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

472. *Third Exception.*—It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Illustrations.

It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.

473. *Fourth Exception.*—It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been brought before any court of justice, or respecting the conduct of any person as a party, witness, or agent in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

Illustrations.

(*a*) A says, "I think Z's evidence on that trial is so contradictory, that he must be stupid or dishonest." A is within this exception if he says this in good faith, inasmuch as the opinion which he expresses respects Z's character as it appears in Z's conduct as a witness, and no further.

(*b*) But if A says, "I do not believe what Z asserted at that trial, because I know him to be a man without veracity," A is not within this exception, inasmuch as the opinion which he expresses of Z's character is an opinion not founded on Z's conduct as a witness.

474. *Fifth Exception.*—It is not defamation to express in good faith any opinion respecting the merit of any performance which its author has submitted to the judgment of the public, or respecting the character of the author, so far as his character appears in such performance, and no further.

Explanation.—A performance may be submitted to the judgment of the public expressly, or by acts on the part of the author, which imply such submission to the judgment of the public.

Illustrations.

(*a*) A person who publishes a book submits that book to the judgment of the public.

(*b*) A person who makes a speech in public submits that speech to the judgment of the public.

(*c*) An actor or singer who appears on a public stage submits his acting or singing to the judgment of the public.

(*d*) A says of a book published by Z, "Z's book is foolish; Z must be a weak man; Z's book is indecent; Z must be a man of impure mind." A is within this exception if he says this in good faith, inasmuch as the opinion which he expresses of Z, respects Z's character only so far as it appears in Z's book, and no further.

(*e*) But if A says, "I am not surprised that Z's book is foolish and indecent, for he is a weak man and a libertine;" A is not within this exception, inasmuch as the opinion which he expresses of Z's character is an opinion not founded on Z's book.

475. *Sixth Exception.*—It is not defamation in a person, having over another any authority, either conferred by law, or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Illustrations.

A judge censuring in good faith the conduct of a witness or an officer of the court; a head of a department censuring in good faith those who are under his orders; a parent censuring in good faith a child in the presence of other children; a schoolmaster whose authority is derived from a parent censuring in good faith a pupil in the presence of other pupils; a master censuring a servant in good faith for remissness in service; a banker censuring in good faith the cashier of his bank for the conduct of such cashier, as such cashier, are within this exception.

476. *Seventh Exception.*—It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject matter of accusation.

Illustrations.

If A in good faith accuses Z before a magistrate; if A in good faith complains of the conduct of Z, a servant, to Z's master; if A in good faith complains of the conduct of Z, a child, to Z's father, A is within this exception.

477. *Eighth Exception.*—It is not defamation in a person giving directions for the management of his concerns to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interests of the persons making it.

Illustration.

A, a shopkeeper, says to B, his foreman, "Sell nothing to Z unless he pays you ready money, for I have no opinion of his honesty." A is within the exception, if he has made this imputation on Z in good faith for the protection of his own interests.

478. *Ninth Exception.*—It is not defamation to convey a caution in good faith to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some party in whom that person is interested.

479. Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or fine, or both.

480. Wherever defamation is committed by means of any printed or engraved substance, whoever, at the time of printing or engraving the defamatory matter, was a possessor of the machinery whereby such defamatory matter was printed or engraved, shall, except in the case hereinafter excepted, be punished with simple imprisonment for a term which may extend to two years, or fine, or both.

Exception.—No person shall be liable to punishment as a possessor of the machinery by which defamatory matter was printed or engraved, if such defamatory matter were printed or engraved contrary to his directions, or if the printing or engraving were purposely concealed from him.

481. Whenever defamation is committed by means of any printed or engraved substance, whoever first sells or offers for sale that printed or engraved substance, shall be punished with simple imprisonment for a term which may extend to two years, or fine, or both.

Note R.

On the Chapter of Defamation.

The essence of the offence of defamation consists in its tendency to cause that description of pain which is felt by a person who knows himself to be the object of the unfavourable sentiments of his fellow-creatures, and those inconveniences to which a person who is the object of such unfavourable sentiments is exposed. According to the theory of the criminal law of England, the essence of the crime of private libel consists in its tendency to provoke breach of the peace, and though this doctrine has not, in practice, been followed out to all the startling consequences to which it would legitimately lead, it has not failed to produce considerable inconvenience.

It appears to us evident that between the offence of defaming and the offence of provoking to a breach of the peace there is a distinction as broad as that which separates theft and murder. Defamatory imputations of the worst kind may have no tendency to cause acts of violence; words which convey no discreditable imputation whatever may have that tendency in the highest degree. Even in cases where defamation has a tendency to cause acts of violence, the heinousness of the defamation, considered as defamation, is by no means proportioned to its tendency to cause such acts; nay, circumstances which are great aggravations of the offence, considered as defamation, may be great mitigations of the same offence considered as a provocation to a breach of the peace. A scurrilous satire against a friendless woman, published by a person who carefully conceals his name, would be defamation in one of its most odious forms. But it would be only by a legal fiction that the satirist could be said to provoke a breach of the peace. On the other hand, an imputation on the courage of an officer, contained in a private letter, meant to be seen only by that officer and two or three other persons, might, considered as defamation, be a very venial offence. But such an imputation would have an obvious tendency to cause a serious breach of the peace.

On these grounds we have determined to propose that defamation shall be made an offence, without any reference to its tendency to cause acts of illegal violence.

We considered whether it would be advisable to make a distinction between the different modes in which defamatory imputations may be conveyed, and we came to the conclusion that it would not be advisable to make any such distinction.

By the English law, defamation is a crime only when it is committed by writing, printing, engraving, or some similar process. Spoken words, reflecting on private character, however atrocious may be the imputations which those words convey, however numerous may be the assembly before which such words are uttered, furnish ground only for a civil action. Herein the English law is scarcely consistent with itself; for if defamation be punished on account of its tendency to cause breach of the peace, spoken defamation ought to be punished even more severely than written defamation, as having that tendency in a higher degree. A person who reads in a pamphlet a calumnious reflection on himself, or on some one for whom he is interested, is less likely to take a violent revenge than a person who hears the same calumnious reflection uttered. Public men, who have by long habit become callous to slander and abuse in a printed form, often show acute sensibility to imputations thrown on them to their faces. Indeed, defamatory words, spoken in the presence of the person who is the object of them, necessarily have more of the character of a personal affront, and are therefore more likely to cause breach of the peace than any printed libel.

The distinction which the English Criminal Law makes between written and spoken defamation is generally defended on the ground that written defamation is likely to be more widely spread, and to be more permanent than spoken defamation. These considerations do not appear to us to be entitled to much weight. In the first place, it is by no means necessarily the fact that written defamation is more extensively circulated than spoken defamation. Written defamation may be contained in a letter intended for a single eye. Spoken defamation may be heard by an assembly of many thousands. It seems to us most unreasonable that it should

be penal to say in a private letter that a man is dissipated; and not penal to stand up at the town-hall, and there, before the whole society of Calcutta, falsely to accuse him of poisoning his father.

In the second place, it is not necessarily the fact that the harm caused by defamation is proportioned to the extent to which the defamation is circulated. Some slanders, and those slanders of the most malignant kind, can produce harm only while confided to a very small circle, and would be at once refuted if they were published. A malignant whisper, addressed to a single hearer, and meant to go no further, may indicate greater depravity, may cause more intense misery, and may deserve more severe punishment than a satire which has run through twenty editions. A person, for example, who in private conversation should infuse into the mind of a husband suspicions of the fidelity of a virtuous wife, might be a defamer of a far worse description than one who should insert the lady's name in a printed lampoon. It must be allowed that, in general, a printed story is likely to live longer than a story which is only circulated in conversation. But, on the other hand, it is far easier for a calumniated person to clear his character, either by argument or by legal proceedings, from a charge fixed in a printed form, than from a shifting rumour, which nobody repeats exactly as he heard it. In general, we believe, a man would rather see in a newspaper a story discreditable to him, which he had the means of refuting, than know that such a story, though not published, was current in society.

On the whole, we are so far from being able to discover any reason for exempting any mode of defamation from all punishment, that we have not even thought it right to provide different degrees of punishment for different modes of defamation. We do not conceive that on this subject any general rule can, with propriety, be laid down. We have therefore thought it best to leave to the Courts the business of apportioning punishment with due regard to the circumstances of every case.

We have thought it necessary, under the peculiar circumstances of this country, to lay down for the guidance of the Courts a rule which, if we were legislating for a population among whom there was an uniform standard of morality and honour, might appear superfluous. India is inhabited by races which differ widely from each other in manners, tastes, and religious opinions. Practices which are regarded as innocent by one large portion of society, excite the horror of another large portion. A Hindoo would be driven to despair if he knew that he was believed by persons of his own race to have done something which a Christian or a Mussulman would consider as indifferent or laudable. Where such diversities of opinion exist, that part of the law which is intended to prevent pain arising from opinion ought to be sufficiently flexible to suit those diversities. We have, therefore, directed the judge not to decide the question whether an imputation be or be not defamatory, by reference to any particular standard, however correct, of honour, of morality, or of taste; but to extend an impartial protection to opinions which he regards as erroneous and to feelings with which he has no sympathy.

There are nine excepted cases (see clauses from 470 to 478 inclusive) in which we propose to tolerate imputations prejudicial to character.

The exception which stands first in order will probably be thought by many persons objectionable. It is opposed to the rules of the English criminal law. It goes, we fear, beyond what even the boldest reformers of English law have proposed. It is at variance with the provisions of the French code, and with the sentiments of the most distinguished French jurists. It is at variance also with the provisions of the code of Louisiana. It is, therefore, with some diffidence that we venture to lay before the Governor-general in council the results of a long and anxious consideration of this question.

The question is, whether the truth of an imputation prejudicial to character should in all cases exempt the author of that imputation from punishment as a defamer. We conceive that it ought to exempt him.

It will hardly be disputed, even by those who dissent from us on this point, that there is a marked distinction between true and false imputations, as respects both the degree of malignity which they indicate, and the degree of mischief which they produce. The accusing a man of what he has not done, implies in a vast majority of cases greater depravity than the accusing him of what he has done. The pain which a false imputation gives to the person who is the object of it is clear uncompensated evil. There is no set-off whatever. The pain which a true imputation gives to the person who is the object of it is in itself an evil, and therefore ought not to be wantonly inflicted. But there is often some counterbalancing good. A

true imputation may produce a wholesome effect on the person who has by his misconduct exposed himself to it. It may deter others from imitating his example. It may set them on their guard against his bad designs.

Not only do true imputations generally produce some good to counterbalance the evil caused by them, but in many cases this counterbalancing good appears to us greatly to preponderate. However skilfully penal laws may be framed, however vigorously they may be carried into execution, many bad practices will always be out of the reach of the tribunals.

The state of society would be deplorable if public opinion did not repress much that legislators are compelled to tolerate. The wisest legislators have felt this, and have assigned it as a reason for not visiting certain acts with legal punishment that those acts will be sufficiently punished by general disapprobation. It seems inconsistent and unwise to rely on the public opinion in certain cases as a valuable auxiliary to the law, and at the same time to treat the expression of that opinion in those very cases as a crime. It is easy to put cases about which there could scarcely be any difference of opinion. A person who has been guilty of gross acts of swindling at the Cape, comes to Calcutta and proposes to set up a house of agency. A person who has been forced to fly from England on account of his infamous vices repairs to India, opens a school, and exerts himself to obtain pupils. A captain of a ship induces natives to emigrate by promising to convey them to a country where they will have large wages and little work. He takes them to a foreign colony, where they are treated like slaves, and returns to India to hold out similar temptations to others. A man introduces a common prostitute as his wife into the society of all the most respectable ladies of the presidency. A person in a high station is in the habit of encouraging ruinous play among young servants of the company. In all these cases, and in many others which might be named, we conceive that a writer who publishes the truth renders a great service to the public, and cannot without a violation of every sound principle be treated as a criminal.

There are undoubtedly many cases in which the spreading of true reports prejudicial to the character of an individual would hurt the feelings of that individual, without producing compensating advantage in any other quarter. The proclaiming the world that a man keeps a mistress, that he is too much addicted to wine, that he is penurious in his house-keeping, that he is slovenly in his person, the raking up of ridiculous and degrading stories about the youthful indiscretions of a man who has long lived irreproachably as a husband and a father, and who has attained some post which requires gravity, and even sanctity of character, can seldom or never produce any good to the public sufficient to compensate for the pain given to the person attacked, and to those who are connected with him. Yet we greatly doubt whether, where the imputations are true, it be advisable to inflict on the propagators of such miserable scandal any legal punishment in addition to that general aversion and contempt with which their calling and their persons are everywhere regarded. Even in such cases the question whether the imputation be true or false is not an unimportant question. Those who would not allow truth to be, in such cases, a justification, would admit that it ought generally to be a mitigating circumstance. Indeed we find it impossible to imagine any case in which we should punish a man who told no more than the truth respecting another, as severely as if what he told had been a lie invented to blast the reputation of another.

These two propositions then we consider as established: first, that in some cases of prosecution for defamation the truth of the imputations alleged to be defamatory ought to be a justification; secondly, that in the vast majority of such cases, if not in all, truth, if it be not a justification, ought to be a mitigation.

From these two propositions a third proposition necessarily follows: that in all cases of prosecution for defamation, if the defendant avers that the imputations complained of as defamatory are true the Court ought to go into the question of the truth of those imputations.

This ought to be done, not only in justice to the public, and to the defendant, but in justice to the innocent complainant. It must not be forgotten that one of the most important ends which a person proposes to himself in prosecuting a slanderer, is the refuting of the slander. He generally considers the punishment of the offender as a secondary object; and, when there is no circumstance of peculiar aggravation in the case, is often willing to stay proceedings after obtaining a retraction and apology. To clear his fame is his first object. It is, we conceive, an object for the attaining of which he is entitled to the assistance of the law. But it is an object which cannot be attained unless the Courts go into the question of truth.

The effect of a rule excluding evidence of the truth is to put on a par descriptions of persons between whom it is desirable to make the widest distinction. The public-spirited man who warns the mercantile community against a notorious cheat, or advises families not to admit into their intimacy a practised seducer of innocence, is placed on the same footing with the slanderer who invents the most infamous falsehoods against persons of the purest character. On the other hand, a man who has, without the slightest reason, been held up to the world as a seducer or a swindler is placed in exactly the same position with one who well deserves those disgraceful names. So defective is the investigation that it leaves a suspicion lying on the most innocent, and no more than suspicion lying on the most guilty.

We therefore think that in all cases of prosecution for defamation the Courts ought to allow the question of truth to be gone into. But if in all cases the Courts allowed the question of truth to be gone into, we are satisfied that no respectable person will venture to institute a prosecution for defamation in a case in which he knows that the truth of the defamatory matter is likely to be proved. He will feel that by prosecuting he should injure his own character far more deeply than any libeller can do. However disagreeable it may be to his feelings that a discreditable story concerning him should be repeated in society, and should furnish paragraphs for the newspapers, it must be much more disagreeable that such a story should be proved in open court by legal evidence. By prosecuting he turns what was at most a strong suspicion into an absolute certainty. While he forbears to prosecute, many people will probably disbelieve the scandalous report, many will doubt about its truth. The mere circumstance that he abstains from prosecuting is no proof of guilt. It is notorious that slanders are often passed by with silent contempt by those who are the objects of them. Indeed, in a country where the press is free, a man whose station exposes him to remark, would have nothing to do but to prosecute, if he should institute legal proceedings every time that he might be calumniated.

It seems to us therefore certain that a man on whose character imputations have been thrown which can be proved to be true will, if he possesses ordinary prudence and ordinary sensibility, abstain from having recourse to a Court of law, which will fully investigate the truth of these imputations. By having recourse to a Court of law he would show that he belonged to a class of persons who are the last that a legislator would wish to favour, to that class of persons in whom the sense of shame is weak, and the malicious passions strong, and who are content to incur dishonour for the chance of obtaining revenge.

Being therefore of opinion that, in all cases of prosecution for defamation, evidence of the truth of the imputations alleged to be defamatory ought to be received, and being of opinion that practically there is no difference between receiving evidence of truth and allowing truth to be a justification, we have thought it advisable to provide expressly that truth shall always be a justification. By framing the law thus we have not in the smallest degree diminished the real security of private character or the real risk of detraction. We have merely made the language of the code correspond with its virtual operation.

As we are satisfied that no practical mischief will be produced by the rule which we have proposed, we think that its perfect simplicity and certainty are strong reasons for adopting it.

If it be not adopted, it will be necessary to take one of the two courses; either to provide that truth shall in no case be a justification, or to provide that truth shall be a justification in some cases, and not in others. To the former course we feel, for reasons which we have already assigned, insurmountable objections. The effect of such a state of the law would be, that eminent public services would often be treated as crimes. If the latter course be taken, we are convinced that it would be found impossible to draw any line approaching to accuracy. We are convinced that it would be necessary to leave to the judges an almost boundless discretion, which no two judges would exercise in the same manner.

It has been suggested to us from quarters entitled to great respect, that it would be a preferable course to admit, in every case, the truth of the matter alleged to be defamatory to be given in evidence, for the purpose of proving that the accused person had not acted maliciously; but not to allow the proof of the truth to be a justification, if it should appear that reputation had been maliciously assailed.

If a provision of this kind were adopted, it would, for the reasons which we have already given, be in practice nugatory. For no respectable person would prosecute the author of an imputation which could be proved to be true. And we take it for

granted that the law of procedure will not be framed in so cruel and unreasonable a manner as to permit a prosecution for defamation to be instituted in opposition to the wishes of the person defamed. Such a power of prosecution would scarcely ever be used by a friend of the person defamed; it would never be used by a judicious friend; and it would be a most formidable weapon in the hands of a malignant enemy.

But if the provision which we are considering were not certain to be in practice nugatory, we should think it a highly objectionable provision. When an Act is of such a description that it would be better that it should not be done, it is quite proper to look at the motives and intentions of the doer for the purpose of deciding whether he shall be punished or not. But when an Act which is really useful to society, an act of a sort which it is desirable to encourage has been done, it is absurd to inquire into the motives of the doer for the purpose of punishing him if it shall appear that his motives were bad. If A kills Z, it is proper to inquire whether the killing was malicious; for killing is *primâ facie* a bad act. But if A saves Z's life, no tribunal inquires whether A did so from good feeling, or from malice to some person who was bound to pay Z an annuity. For it is better that human life should be saved from malice, than not at all. If A sets on fire a quantity of cotton belonging to Z, it is proper to inquire whether A acted maliciously. For the destruction of valuable property by fire is *primâ facie* a bad act. But if Z's cotton is burning, and A puts it out, no tribunal inquires whether A did so from good feeling or from malice to some other dealer in cotton, who, if Z's stock had been destroyed, would have been a great gainer. For the saving of valuable property from destruction is an act which it is desirable to encourage; and it is better that such property should be saved from bad motives, than it should be suffered to perish; since, then, no act ought to be made punishable on account of malicious intention, unless it be in itself an act of a kind which it is desirable to prevent, it follows that malice is not a test which can with propriety be used for the purpose of determining what true imputations on character ought to be punished, and what true imputations on character ought not to be punished. For the throwing of true imputations on character is not *primâ facie* a pernicious act. It may, indeed, be a very pernicious act. But we are not prepared to say that in the majority of instances it is so. We are sure that it is often a great public service; and we are sure that it may be very pernicious when it is not done from malice, and that it may be a great public service when it is done from malice. It is perfectly conceivable that a person might, from no malicious feeling, but from an honest though austere and injudicious zeal for what he might consider as the interests of religion and morality, drag before the public frailties which it would be far better to leave in obscurity. It is also perfectly conceivable that a person who has been concerned in some odious league of villainy, and has quarrelled with his accomplices, may, from vindictive feelings, publish the history of their proceedings, and may, by doing so, render a great service to society. Suppose that a knot of sharpers lives by seducing young men to the gaming table, and pillaging them to their last rupee. Suppose that one of these knaves, thinking himself ill used in the division of the plunder, should revenge himself by printing an account of the transactions in which he has been concerned. He is prosecuted by the rest of the gang for defamation. He proves that every word in his account is true. But it is admitted that his only motives for publishing it were rancorous hatred and disappointed rapacity. It would surely be most unreasonable in the court to say,—"You have told the public "a truth which it greatly concerned the public to know. You have been the "saving of many promising youths. You have been the means of ridding society "of a dreadful pest. You have done, in short, what it was most desirable you should "do. But as you have done this, not from public spirit but from dislike of your "old associates, we pronounce you guilty of an offence, and condemn you to fine "and imprisonment."

It is evident that society cannot spare any portion of the services which it receives. Far from scrutinizing the motives which lead people to render such services, and punishing such services when they proceed from bad motives, all societies are in the habit of offering motives addressed to the selfish passions of bad men for the purpose of inducing those men to do what is beneficial to the mass. We offer pardons and pecuniary rewards to the worst members of the community, for the purpose of inducing them to betray their accomplices in guilt. That the quarrels of rogues are the security of honest men, is an important truth, which has passed into a proverb; and of that security we should, to a certain extent, deprive honest

men, if we were to make it an offence in one rogue to speak the truth about another rogue under the influence of passions excited in the course of a quarrel.

We have hitherto argued this point on the supposition that by malice is meant real malice, and not a fictitious a constructive malice. We have the strongest objections to introducing into the code such a kind of malice—a malice of which a person may be acquitted when it is clear that he has acted from the most deadly personal rancour and found guilty, when those who find him guilty are satisfied that he has acted only from the best feelings—a malice which may be only the technical name for benevolence.

On these grounds we recommend to the Governor-General in council that the first exception, as we have drawn it, be suffered to stand part of the code.

The remaining exceptions will not require so long a defence. By clause 471, we allow the public conduct of public functionaries to be discussed, provided that such discussion be conducted in good faith. That the advantages arising from such discussion far more than compensate for the pain which it occasionally gives, will hardly be disputed by any English statesman.

But there are public men who are not public functionaries. Persons who hold no office may yet, in this country, take a very active part in urging or opposing the adoption of measures in which the community is deeply interested. It appears clear to us that every person ought to be allowed to comment, in good faith, on the proceedings of these volunteer servants of the public, with the same freedom with which we allow him to comment on the proceedings of the official servants of the public. We have provided for this by clause 472.

By 473 clause we have allowed all persons freely to discuss, in good faith, the proceedings of courts at law and the characters of parties, agents and witnesses, as connected with those proceedings. It is almost universally acknowledged that the courts of law ought to be thrown open to the public; but the advantage of throwing them open to the public will be small indeed if the few who are able to press their way into a court are forbidden to report what has passed there to the vast numbers who were absent, or if those who are allowed to know what has passed are not allowed to comment on what has passed. The only reason that the whole community is not admitted to hear every trial that takes place is, that it is physically impossible that they should find room; and, by clause 473, we do our best to counteract the effect of this physical impossibility.

Whether public writers ought to be allowed to publish comments on trials, while those trials are still pending, is a question which, in the present state of India, it is hardly worth while to discuss. We have not thought it necessary to insert any provision on that subject, in the chapter of offences against public justice; and such a provision, even if it were necessary, would evidently not belong to the head of defamation; for the harm done by such comments, as respects public justice, is exactly the same when the comments are laudatory as when they are abusive.

By clause 474 we allow every person to criticise, in good faith, published books, works of art which are publicly exhibited, and other similar performances.

By clause 475 we allow a person under whose authority others have been placed, either by their own consent or by the law, to censure, in good faith, those who are so placed under his authority, as far as regards matter to which that authority relates.

By clause 476 we allow a person to prefer an accusation against another, in good faith, to any person who has lawful authority to restrain or punish the accused.

By clause 477 we have excepted from the definition of defamation, private communications which a person makes, in good faith, for the protection of his own interests; and by clause 478 we have excepted private communications which a person makes, in good faith, for the benefit of others.

It will be observed that, in the eight last exceptions, we do not require that an imputation should be true; we require only that it should be made in good faith; for, to require in these cases that the imputation should be true, would be to render these exceptions mere nullities. Whether a public functionary is or is not fit for his situation; whether a person who has bestirred himself to get up a petition in favour of a public measure ought to be considered as an enlightened and public-spirited citizen, or as a foolish meddler; whether a person who has been tried for an offence was or was not guilty; which of two witnesses who contradicted each other on a trial ought to be believed; whether a portrait is like; whether a song has been well sung; whether a book is well written;—these are questions about which honest and discerning men may hold opinions diametrically opposite, and to

require a man to prove, to the satisfaction of a court of law, that the opinion which he has expressed on such a question is a right opinion, is to prohibit all discussion on such questions. The same may be said of those private communications which we propose to allow. It is plainly desirable that a merchant should disclose to his partners his unfavourable opinion of the honesty of a person with whom the firm has dealings. It is desirable that a father should caution his son against marrying a woman of bad character. But if the merchant is permitted to say to his partners, if the father is permitted to say to his son, only what can be legally proved before a court, it is evident that the permission is worth nothing.

Whether an imputation be or be not made in good faith, is a question for the courts of law. The burden of the proof will lie sometimes on the person who has made the imputation, and sometimes on the person on whom the imputation has been thrown. No general rule can be laid down; yet scarcely any case could arise respecting which a sensible and impartial judge would feel any doubt. If, for example, a public functionary were to prosecute, for defamation, a writer who had described him in general terms as incapable, the Court would probably require the prosecutor to give some proof of bad faith. If the prosecutor had no such proof to offer, the defendant would be acquitted. If the prosecutor were to prove that the defendant had applied to him for money, had promised to write in his praise if the money were advanced, and had threatened to abuse him if the money were withheld, the Court would probably be of opinion that the defendant had not written in good faith, and would convict him.

On the other hand, if the imputation were an imputation of some particular fact, or an imputation which, though general in form, yet implied the truth of some particular fact, which, if true, might be proved, the Court would probably hold that the burden of proving good faith lay on the defendant.

Thus, if a person were to publish that a collector was in the habit of receiving bribes from the zemindars of his district, and were unable to specify a single case, or to give any authority for his assertion, the Courts would probably be of opinion that the imputation had not been made in good faith.

Again, if a critic described a writer as a plagiarist, the Courts would not consider this as defamation without very strong proof of bad faith; but if it were proved that the critic, like Lauder, interpolated passages in old books, in order to bear out the charge of plagiarism, the Court would doubtless be of opinion that he had not criticised in good faith, and would convict him of defamation.

It will be necessary to provide, in the code of procedure, rules for pleading in cases of defamation, which may give to an innocent man, who has been calumniated, the means of clearing his character. It will be proper to provide that a defendant who is accused of defamation, and who rests his defence on the truth of the imputation alleged to be defamatory, shall be held strictly to the proof of the substance of the imputation if the imputation be particular, and shall be compelled to descend to particulars in his plea, if the imputation be general.

It will not be expected that we should here go into any details respecting the law of criminal pleading. It is sufficient here to say that the importance of framing that part of the law in such a manner as to give full protection to persons whose character has been unjustly aspersed has not escaped our attention.

We may here observe that an imputation which is not defamatory may, under certain circumstances, be punishable on other grounds. Such an imputation may be intended to excite disaffection; if so, though not punishable as defamation, it will be punishable as sedition; an attack made, in good faith, on the public administration of the governor of a presidency will in no case be a defamation; but if the author of it designed to inflame the people against the government, he will be liable to punishment under clause 113.

Again, an imputation which is not defamatory, may be intended to excite a mob to violence against an individual: if so, the author of the imputation is punishable under clause 94.

Again, an imputation which is not defamatory, may be uttered in the hearing of the person who is the object of it, for the purpose of wantonly and maliciously annoying that person, if so, it is punishable under clause 485. There are many cases in which it is fit that unpleasant truth should be told respecting an individual; but there is no case in which it is desirable that such truth should be told in such a way that the telling of it is a gross personal outrage. A person who has detected, or thinks that he has detected, a dishonest misrepresentation in a book, has a right to expose it publicly; but he cannot be allowed to intrude into the presence of the

author of the book, and to tell him to his face that he is a liar. A person who knows the mistress of a female school to be a woman of infamous character, deserves well of society if he states what he knows; but he cannot be allowed to follow her through the streets, calling her by opprobrious names, though he may be able to prove that all those names were merited. A person who brings to notice the malversation of a public functionary deserves applause; but a person who hangs a public functionary in effigy, at that functionary's door, with an opprobrious label, does what cannot be permitted, even though every word on the label, and every imputation which the exhibition was meant to convey may be perfectly true.

We do not apprehend that the classes relating to the printers and publishers of defamatory matter require any explanation or defence.

Statement of the Roman, French, Bavarian, Austrian, and Prussian Law of Slander and Libel.

*Roman Law.**

The ground of the action according to the Roman law was the *injuria*, the personal insult or contumely offered to the party defamed; and hence it was that its limits were very indefinite. "Ait prætor qui *adversus bonos mores*, convicium cui "fecisse, cujusve operâ factum esse dicitur quod adversus bonos mores convicium "fiat, in eum judicium dabo." Dig. lib. 47, 10. Again, "Ait prætor, ne quid "infamandi causâ fiat, si quis adversus ea fecerit prout quæque res erit, animad-"vertam." Again, "Generaliter vetuit prætor quid ad infamiam alicujus fieri. "Proinde quodcumque quis fecerit vel dixerit ut alium infamet, erit actio injuria-"rum." Some curious instances are given in the Digest of the application of these principles of Roman law. "Item si quis pignus proscripserit venditurus tan-"quam a me acceperit infamandi mei causâ. Si quis non debitorem, quasi debi-"torem appellaverit injuriæ faciendæ causâ, injuriarum tenetur." Another illustration presents a very singular mode of defamation, which arose out of the practice which prevailed at Rome for the relations of an accused party to dress in sordid habits, and allow their beards to grow, in order to excite compassion and favour towards the accused. Hence it was that a party intending to defame another accomplished his object by assuming a squalid and abject appearance, under pretence of supplication for one accused of a heinous crime. "Hæc autem ferè sunt "quæ ad infamiam alicujusque fiunt. Ut puta ad invidiam alicujus veste lugubri "utitur aut squalidâ, aut si barbam demittat vel capillos submittat, aut si carmen "conscribat, &c."

Many incidents were founded on the doctrine of the Roman law, that contumely was the ground of action, in which it differs from the law of England. If an infant, or one in a state of intoxication, defamed another, the action failed, for the *mens rea*, the contumelious intention, was wanting; in England such a defence, if the act were voluntary, would be unavailable.

By the Roman law a party was not only entitled to sustain an action for contumelious words spoken concerning himself, but also in respect of those spoken of others of his family, if they tended collaterally to subject him to degradation and contempt. Thus a father was entitled to recover in respect of a contumelious injury offered to his wife, children, or domestics, provided the offender knew the relationship of the party so offended. (Heineccius, part 7, sec. 118.) So far was the principle carried by the Roman law, that even the heir was entitled to an action for an insult to the remains, or even the memory, of the deceased. "Et si forte cadaveri "defuncti fit injuria cui hæredes bonorum possessores exstitimus, injuriarum nostro "nomine habemus actionem. Spectat enim ad existimationem nostram si quæ ei "fiat injuria. Idemque et *si fama ejus cui hæredes exstitimus lacessatur*."

Whether, according to the Roman law, the truth of a defamatory charge made against an individual afforded a complete defence, without reference to the motive and intention of the publisher, has, it is well known, been doubted; and yet the authorities seem to weigh strongly in favour of the affirmative of the question, as well in reference even to the criminal as to the civil action. The general doctrine appears most clearly from the celebrated response of Paulus, which was imported into the Digest. "Eum qui nocentem infamavit non esse bonum æquum ob eam rem con-"demnari; peccata enim nocentium nota esse et oportere et expedire." For though,

* This statement of the Roman law, upon the subject of Libel, is abstracted from a note in the Preliminary Discourse to Mr. Starkie's Treatise on Slander and Libel.

according to Matthæus, " Solet Paulus in disserendo, σκοτικος seu obscurus esse," yet his meaning is in this instance too plainly expressed to admit fairly of any doubt, notwithstanding the interpretation attempted to be imposed upon the words by his numerous commentators. Some of them have asserted that the response must be limited to the charging offences, the detection of which is of importance to the State, but the plain and obvious meaning of the terms repels such a restriction; the word *peccata* naturally comprehends every species of delinquency, whether it be against law or morals, and is not confined to the admissum crimen, or delictum, by which legal delinquency is so frequently described.

With respect to those judicial but anonymous charges of capital offences, which came within the description of Libellus Famosus (see the Constitutions de Libellis Famosis in the Theodosian Code, particularly the 4th and 5th), the author, when discovered, not only might but was obliged, at the peril of his own life, to prove the truth of the charge. Thus, according to the first Constitution in the Theodosian Code, " Si quando famosi libelli reperiantur nullas exinde calumnias patiantur ii " quorum de factis vel nominibus aliquid continebunt, sed scriptionis auctor potius " *reperiatur*, et repertus cum omni vigore cogatur his de rebus, quas proponendas " credidit *comprobare*, nec tamen supplicio etiam si aliquid ostenderit, substrahatur."

French Law.

The Code Pénal divides personal slander into three classes. In the first class it places libels attended with certain characters of publicity specified in the law, viz., the imputation to any individual in public places or assemblies, in acts of authentication or public declaration (such as notarial acts), or in any writing, whether printed or not, which shall have been exhibited, sold, or distributed, of any facts which, if they existed, would expose the person against whom they were uttered to criminal or correctional prosecution, or would even expose him merely to the contempt or hatred of his fellow-citizens. It is, however, expressly declared that this provision shall not be applicable to the imputation of facts, the publication of which is authorized by law, nor to such facts as the author of the imputation was bound by the official functions or duties to declare or suppress. Slanders in this form are designated " Calumnies " (Art. 367). The Code Pénal then goes on to provide that every imputation, in support of which the legal proof is not stated, is to be deemed false; and it declares as a consequence from this that the author of the imputation is not to be permitted to prove the truth of it as his defence; nor can he allege by way of excuse that the writings or facts are notorious, or that the imputations upon which the prosecution is founded are copied or extracted from foreign papers or other printed writings (Art. 368). On the other hand, when an imputed fact has been legally proved to be true, the author of the imputation is not liable to punishment; but nothing is to be esteemed legal proof which does not result from a judgment, or some other authentic act (Art 370). The punishment, where the calumniator does not declare the legal proof and imputes a capital crime, or one liable to be punished by hard labour for life (les travaux forcés à perpétuité), or deportation, is imprisonment from two to five years, and compensation from 200 to 5,000 francs; and in imputations of a less serious character, the offender is punishable with imprisonment from one to six months, and compensation from 50 to 2,000 francs.

In the second class are included injurious charges, made publicly, but not imputing any particular crime, but of some specific vice. These are called " Injures," and are punishable by a compensation from 60 to 500 francs.

In the third class, the Code Pénal comprehends all injurious charges and abusive expressions not contained in the two first classes, and subjects the offender to the penalties of simple police. All imputations of a shameful or criminal nature, therefore, however seriously they may affect character, if not publicly made, do not come within the definitions of " Calomnies " or " Injures," and are by the French Code merely subject to the slight punishment of compensation from one to five francs, and that only where the imputations have not been provoked (Arts. 376 and 471).

We need not particularly point out the defects of these laws. The most distinguished French jurists were fully aware of them, and these Articles in the Code were abolished by the law of the 17th May, 1819, which substituted much more effective provisions for them.

The law of the 17th May, 1819, substitutes the term defamation (diffamation) for " Calomnie," the object of which was, no doubt, to correct an inaccuracy in

Art. 367 of the Code Pénal, respecting the use of the latter word. In its ordinary acceptation the word "calumny" implies falsehood, whereas the definition of the offence in the code merely points to an imputation which could not be sustained by *legal proof*, although it might be notoriously true. The law of 1819 then defines a defamation to be "every allegation or imputation of a fact which reflects upon "the honour or consideration of the person or body to whom the fact is imputed;" and it defines an "injure" to be "every insulting expression, or term of contempt "and invective, which does not contain the imputation of any specific fact."

The law of the 17th May, 1819, and a law of the 26th of May of the same year, introduced another material alteration. Instead of the provision in Art. 368 of the Code Pénal, that "every imputation was to be deemed false, unless where the "legal proof thereof was stated," it is declared by the more recent laws that "no "person shall be admitted to prove the truth of defamatory statements, except in "the case of imputations against depositaries or agents of authority, or against any "persons acting in a public character, of facts relating to their functions. In such "cases the facts may be proved and disproved by the ordinary means of proof." It would, therefore, under these later laws be incompetent to the person accused of a libel on a private person to prove the truth of the imputed facts.

Following the above definitions of defamation and "injure," the laws of 1819 and 1822, then established a graduated scale of punishment:—First, for defamations against the courts, tribunals of justice, public boards and functionaries, ministers of religion, ambassadors and diplomatic agents; and, secondly, for "injures" against the same description of persons. Defamation of private persons is punishable with imprisonment from five days to one year, or compensation from 25 francs to 2,000 francs; and the "injure" of private persons is punishable with compensation from 16 francs to 500 francs.

Bavarian Law, (of 1813).

Art. 284. Whosoever knowingly and falsely imputes to another an action which is declared by this code to be either a crime or a misdemeanor, shall be guilty of calumny.

Art. 285. In all cases of calumny, the convicted offender shall make a judicial recantation; and shall, upon request of the party injured, publicly declare the falsehood of his imputation, and shall be liable to such punishment as in the next succeeding article is declared.

Art. 286. A calumny expressed in writing, or verbally, by extrajudicial statements or secret insinuations, and imputing to another a crime punishable with imprisonment, or any higher degree of punishment; or a calumny expressed in a writing generally circulated, in which the original promoter thereof has not declared his name, shall subject the offender, both in the case of the original promoter of the calumny and of the person who has knowingly distributed it, with imprisonment from one to three years.

This is the existing law; but in a scheme formed under a royal commission in 1832, alterations and improvements have been suggested.

Austrian Law (of 1803).

Art. 188. Whosoever shall inform the magistracy of any offence untruly pretended to have been committed by any other person, or shall accuse any other person in such a manner that the accusation may lead to the judicial examination of the accused, or to judicial inquiry respecting his commission of such pretended offence, shall be deemed to be guilty of calumny.

Art. 189. The ordinary punishment of a calumniator shall be imprisonment from one to five years; but the term of imprisonment may be extended to ten years in the following cases:

(1.) When the offender has used particular artifices to make his accusation credible; or

(2.) Has exposed the person falsely accused to imminent danger of punishment; or

(3.) Where the calumniator is a servant, inmate or pupil of the person falsely accused, or where the calumny has been committed by a public officer in the course of his public duties.

The offences above defined, according to the Austrian law, are classed as crimes; the following are ranged under the head of grave transgressions of police.

Art. 234. Grave transgressions of police against the safety of reputation are termed injuries to reputation. The cases of injuries of reputation are,

(1). When the good name of any person is attacked by an unfounded accusation of a *crime*, but where the accusation has not been carried so far as to amount to calumny according to Art. 188 of the Book of Crimes. If the person falsely accused has sustained no damage by the accusation, the offender shall be punished according to the degree and quality of the crime he has falsely imputed, with simple arrest from one to three months; but if the party accused has suffered damage, the offender shall suffer strict arrest from one month to three months.

Art. 235. (2.) When a person has been falsely accused of a *grave transgression* of police by means of fictitious circumstances, the offender shall be punished according to the quality of the accusation, with simple arrest from three days to a month, if the person falsely accused has sustained no damage; but if he has sustained damage, the offender shall be punished with imprisonment from one month to three months, and be subject to the aggravations of close confinement and limitation of food.

Art. 236. (3.) When a person has been in any other manner falsely accused of an action, which, if true, would diminish his civil reputation, and have an injurious effect upon him in his profession, trade or advancement, the false accuser shall be punished according to the degree of injury sustained with simple arrest from one to three months, with aggravations according to circumstances.

Art. 237. (4.) When a person has been exposed to public ignominy by libellous writings, or figurative representations, whether by name or by signs applied and intended to be understood as applied to him, the offender shall be punished by simple arrest from one to three months.

Art. 238. The punishment of the abovementioned injuries to reputation shall be applied not only to their originator, but to every person who has intentionally occupied himself with spreading a fals accusation or slanderous imputation, so as to add to its publicity.

Art. 239. In the case of this offence, if the offender is nearly related to the person injured, or if in consequence of any other relation subsisting between them, respect is due from the offender to the person injured, this circumstance is to be considered as an aggravation; and in such cases the punishment may be increased to strict arrest from one to three months.

Art. 240. This offence is also aggravated where the relation of superior and inferior in office subsists. If a superior officer uses the opportunity afforded by his office to make false accusations against his inferior, whereby the latter is injured in his advancement, or in his character for the diligent discharge of his official duties, the superior shall be obliged to make recantation, and shall be further punished at the discretion of the chief of his department.

Prussian Law.

Art. 538. Whosoever by contemptuous gestures, words, or acts endeavours to give offence to any person, or unlawfully to affront him, commits an insult. (injurie.)

Art. 539. Whosoever has no design to give offence to another person by contempt, or to affront him, is not guilty of an insult.

Art. 540. But an insult is committed whensoever the design to hurt the reputation of another person is apparent, although the action or expression in itself, and considered under other circumstances, would not be of an affronting character.

Art. 541. A design to hurt the reputation of another is not to be presumed.

Art. 542. Whether such a design exists is to be determined by the rules of law, and when these are wanting, by the preceding, attendant, and subsequent circumstances.

Art. 543. Whosoever accuses another person of a crime, which, if the accusation were true, would expose such person to the animadversion of the laws, has the presumption against him that he intends to hurt the reputation of such person.

Art. 544. So also in the case of a person who accuses another person of such

actions, as if really committed by him, would expose him to the contempt of his fellow-citizens, or of that class of them to which he belongs.

Art. 545. Whosoever uses such expressions or actions towards another person as are acknowledged to be marks of contumely and contempt in common life is subject to the same presumption.

Art. 546. A protestation attached to an action or expression affronting in its nature, does not exclude the presumption of a design to hurt reputation.

Art. 547. Nor is a condition attached to an affronting expression in itself sufficient to exclude such a presumption.

Art. 548. Also the truth of the imputation or accusation does not remove the legal presumption of a design to hurt reputation.

Art. 549. Whosoever reproaches another person with a crime atoned for by the endurance of punishment, or otherwise legally expiated, has the presumption against him that he intends to hurt reputation.

Art. 550. Whosoever reproaches his fellow-citizen with a crime of this nature must not only prove the truth so far as is necessary to sustain a formal inquiry, but must also show the absence of a design to hurt reputation.

Art, 551. If the judge, upon an official inquiry respecting the imputation, shall find it to be true, the offender is discharged from the duty of making private satisfaction,* although he may still be liable to punishment for the intentional insult.

Art. 552. Whosoever, in judicial proceedings, is obliged in the prosecution or defence of his rights to make statements offensive to his opponent, does not commit an insult.

Art. 553. But he is to be dealt with and punished for an insult who makes use of such an opportunity in order to cast upon his adversary dishonourable reflections not called for by the particular proceeding.

Art. 554. The same rule shall apply where such reflections are unfounded; and he who makes them could not adopt them as true without gross or considerable negligence.

Art. 555. Judges and fiscal officers, who by virtue of their offices inquire into and decide upon the condition or moral conduct of an individual, do not by this execution of their offices commit an insult..

Art. 556. But they are guilty of an insult if, in abuse of their offices, they accuse any person of a crime without sufficient reason.

Art. 557. Reproofs and reprimands by parents of children, by guardians of wards, by teachers of pupils, by masters of servants, and by official superiors of official subordinates, are not to be considered as insults.

Art. 558. The same rule applies to moderate chastisements applied by any person to any other person where by law the right to chastise exists.

Art. 559. If due moderation is exceeded in reprimands, or treatment of this class, the magistrate, upon the application of the party injured, must admonish the offender to observe the proper limits and punish the excess according to circumstances.

Art. 560. Where the civil reputation of the party injured has suffered by any excess in the exercise of the right of private punishment, the magistrate shall take care that sufficient satisfaction is given.

Art. 561. Preachers in the exercise of their duty are not to be deemed guilty of insult, unless in their private exhortations, or public discourses, they exceed the limits prescribed by law. (See Tit. xi. Art. 76, et seq.)

Art. 562. In public criticisms of works, or productions of art, intellect, or industry, the design to hurt reputation is not to be presumed, when they are confined to the value or worthlessness of the objects criticised.

Art. 563. But the person criticising shall be bound to give the reasons of his criticism upon the requisition of the person criticised.

Art. 564. Insults offered to a whole community, corporation, or family, may be prosecuted by the respective members of each, so far as the particular injury of each individual extends.

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* In a royal rescript upon this subject, the grounds of this rule are stated to be, "that reputation is "less hurt by a *deserved* than by a *false* imputation; and that it would be revolting to natural "feelings of justice, if a man were bound to make reparation, apology, and recantation, when he only "called a man a thief, who in truth was so."

Art. 565. A husband, father, or guardian, may judicially prosecute an insult offered respectively to a wife, child, or ward, though he may himself have sustained no injury.

Art. 566. Affronts offered to inmates or servants of a family with intent that they should be applied to the master or head of the family may be considered as also offered to the latter.

Art. 567. Official superiors are to be deemed as affronted through their subordinates, whensoever the latter are affronted in consequence of executing the commands of the former.

Art. 568. The person indirectly affronted may sue for satisfaction and punishment, even when the person directly affronted cannot or will not prosecute the insult.

Art. 569. *Verbal* insults are those which are effected by words orally spoken, or written, or printed.

Art. 570. Words of abuse, which end in acts, by which corporal force is used or corporal injury inflicted upon the another person, are deemed *real* insults.

Art. 571. Other marks of contumely, whether consisting in actions or omissions, in tones of speech or gestures, or expressed by paintings, engravings, or other sensible representations, are denominated *symbolical* insults.

Art. 572. Insults, expressed by means of written or printed compositions, by paintings, engravings, or other sensible representations, are libels (Pasquille), whether the author has published or circulated them himself or by means of other persons.

Art. 573. It is immaterial whether the author has given or concealed his name.

Art. 574. Nor does it affect the quality of the penal action, that the person libelled has not been expressly named, provided he be denoted by particular circumstances.

Art. 575. If writings, devoted to science or art, or otherwise to the information or amusement of the public, incidentally contain insults, the authors shall be dealt with in the same manner as parties who, in judicial proceedings, cast dishonourable reflections upon their opponents, not called for by the particular proceeding. (See Art. 553.)

Art. 576. Real insults and libels are to be deemed gross and grave insults.

Art. 577. Mere symbolical and verbal insults are to be deemed in general as light or petty insults.

Art. 578. Nevertheless, they may become grave insults when the malicious design to hurt the civil reputation of another person is apparent.

Art. 579. So also when they consist in the imputation of such crimes as, if the imputation were well founded, would expose the object of it to prosecution by the laws, or the particular contempt of his fellow-citizens.

Art. 580. So also when they are committed by subjects to their political superiors, by official subordinates to official superiors, by children to parents, by pupils or scholars to their teachers, or by servants to their masters.

Art. 581. So also when they are committed in public assemblies, or on any solemn occasion.

Art. 582. Especially also when (although the affront in itself may have been light) the character of the party injured has been sensibly affected in consequence of particular circumstances or peculiar relations known to the offender.

Art. 583. Also, mere omissions may become grave insults, if a malicious design to injure the character of another person appears under circumstances of peculiar aggravation.

Art. 584. Whosoever has hurt the reputation of another person shall be obliged to render him satisfaction for the same.

Art. 585. Compensation for bodily injury, or for damage occasioned to outward circumstances, is to be determined according to the rules of the law of personal property. (See another title.)

Art. 586. Whosoever has given occasion for the suspicion of a malicious design to hurt reputation, although not actually convicted of such a design, is bound to remove such suspicion by a distinct and formal declaration.

Art. 587. Where the action or expression is not in itself an affront, and even where the absence of the design to affront is clearly proved, the person whose reputation may have thereby suffered in the opinion of others is entitled to require an express declaration that his reputation ought not to suffer in consequence of such action or expression.

Art. 588. Whether the person to whom such an injury to the reputation of another is imputed shall be bound to pay the costs of the proceeding, depends upon the fact whether he has been guilty of negligence.

Art. 589. In the case of a person of higher rank injuring the reputation of another of lower rank, the declarations contained in Articles 586 and 587 may be made in writing.

Art. 590. In the case of persons of equal rank, such declarations must be made verbally, in the presence of two or three persons chosen for that purpose by the complainant.

Art. 591. A declaration in open Court is to be enjoined whensoever the circumstance which gave occasion to the complaint occurred in public.

Art. 592. Persons of inferior rank, offending against their superiors, must, when required so to do, always make the declaration in open Court.

Art. 593. The manner and expressions in which the declaration shall be made must be appointed in all cases by the judge in the sentence.

Art. 594. Whosoever refuses to make a valid and substantial declaration, in obedience to a legal sentence, shall be deemed and dealt with as a person who has designedly committed an actual insult.

Art. 595. Whosoever has designedly attacked the reputation of another, shall be solemnly and expressively reprimanded for his misconduct by the judge, in the presence of the party injured, or of some person authorized by him in that behalf, and shall make a public declaration that the reputation of the party injured is unhurt; and the party injured shall receive a judicial certificate of the proceeding, to be prepared at the cost of the offender.

Art. 596. If the affront has been publicly made, the proceeding shall be heard with the doors of the Court open.

Art. 597. The offender is in such case permitted to introduce two or three friends of his own rank, as witnesses.

Art. 598. Subjects (unterthanen), servants, children, pupils, and subordinates, shall, according to the circumstances and the quality of their offences, receive the judicial reprimand for affronts of which they have been convicted, upon their knees.

Art. 599. In cases of insults conveyed by libels, the judicial reprimand shall, upon the request of the party injured, be openly published at the cost of the offender.

Art. 600. If the offender is ready to make a voluntary recantation, and consents to execute a certificate of the same, the judicial reprimand may be omitted.

Art. 601. If the parties cannot agree upon the form of the recantation, the judge must determine it according to the rules prescribed for declarations of reputation. (Art. 589, *et seq.*)

Art. 602. Also in the case mentioned in Article 599, the party injured may require that the recantation shall be openly published in the same manner as is in that Article prescribed respecting judicial reprimands.

Art. 603. If the offender dies before satisfaction made to the party injured, the heirs of the former shall be bound only to make compensation in damages.

Art. 604. But the reputation of the party shall be declared by the judge to be unhurt; and this judicial declaration shall, according to the quality of the circumstances, be made public, and the costs thereof paid by the estate of the offender.

Art. 605. On the other hand, where the party injured has died after making his complaint, but before satisfaction, his heirs may require that satisfaction shall be made to the memory of their testator.

Art. 606. So far as the affront offered attaches to the heirs personally, the rules contained in the Articles 564, 565, 566, 567, and 568, shall be applicable to them.

Art. 607. Slight affronts between persons of equal rank (Art. 577) shall, when

both parties belong to the rank of peasants or common citizens, be punished with hard labour or common imprisonment from twenty-four hours to three days.

Art. 608. Slight injuries between persons of the rank of superior citizens shall be punished with common imprisonment from eight to fourteen days.

Art. 609. If both parties belong to the nobility, or possess military rank, or hold the office of royal councillors, the punishment for slight affronts is common imprisonment from fourteen days to four weeks, or according to the quality of the circumstances, with arrest in a fortress not exceeding three months.

Art. 610. Slight affronts by persons of superior rank towards those of inferior rank shall be punished with a pecuniary penalty of from ten to thirty dollars, or proportionate arrest.

Art. 611. Slight affronts by persons of inferior rank towards those of superior rank shall be punished with hard labour, or common imprisonment from fourteen days to four weeks.

Art. 612. Grave affronts, which do not amount to real insults, among persons of lower rank, shall be punished with hard labour or common imprisonment from four to eight days.

Art. 613. Insults of the character mentioned in the last preceding Article among persons of the rank of superior citizens, shall be punished with common imprisonment from fourteen days to four weeks.

Art. 614. Insults of the character mentioned in Article 612, among persons belonging to the nobility, or possessing military rank, or holding the office of royal councillors, shall be punished with common imprisonment from four to eight weeks, or according to the quality of the circumstances, with arrest in a fortress not exceeding six months.

Art. 615. Insults of the character mentioned in Article 612, by persons of inferior rank towards those of superior rank shall be punished with common imprisonment from four weeks to three months.

Art. 616. According to circumstances, and the importance of the insult, this punishment may be aggravated by limitation of food in prison, or may be extended to imprisonment in the House of Correction not exceeding six months.

Art. 617. Insults of the character mentioned in Article 612, by persons of superior rank towards those of inferior rank, shall be punished by a pecuniary penalty of from 40 to 100 dollars, or, according to the quality of the circumstances and the importance of the insult, with common imprisonment or with arrest in a fortress from one to three months.

Art. 618. Libels, which, though not publicly divulged, have become known to the public by the fault of their author, are to be deemed grave insults.

Art. 619. Libels which have been publicly exposed or divulged by the authority of the writer, shall subject the author to the punishment assigned to the highest degree of symbolical insults.

Art. 620. The libellous writing shall be torn to pieces and trampled under feet by the tipstaff in open court, and in the presence of the author and of three witnesses chosen by the party injured.

Art. 621. If the author be unknown, the libellous writing shall, at the request of the party injured, be burned by the hangman in the public street.

Art. 622. The printers and publishers of such libels, if printed without undergoing censorship, shall receive the same punishment as the authors.

Art. 623. This punishment shall be applied to the convicted printer or publisher, where the libellous writing has undergone censorship, but where erased passages have been restored, or new insults subsequently introduced.

Art. 624. If the author of the libel cannot be discovered, the punishment against the printer and publisher shall be doubled.

Art. 625. A censor, who knowingly permits a libel to be printed, shall receive the same punishment as the author, and forfeit his office.

Art. 626. A censor who negligently overlooks libellous matter shall be punished for neglect of his official duty according to the rule contained in Article 334, *et seq.*

Art. 627. Drawings, paintings, or engravings, affecting the reputation of others, and publicly exposed or divulged, shall be deemed libels; and the publisher shall

be punished as if he were the author; but the draftsman, engraver, or painter, shall be punished, according to the quality of the circumstances, as principals or accessories.

Substance of a portion of the Evidence understood to have been given by the Lord Chancellor (Lord Brougham) and M. André M. Jean Jacques Dupin, before the Select Committee of the House of Commons, appointed in 1834, *to consider the state of the law of Libel and Slander.*

Lord Brougham, in speaking of the possibility of defining libel more distinctly than at present, is understood to have said:

"I hold it to be hardly possible to define libels by which guilt may be incurred "as tending to a breach of the peace, to other proceedings of a violent nature, to "shaking the institutions of the country from the Sovereign downwards, and loosen- "ing the foundations of society, and to a variety of other heads, under which may "be classed, though without any distinctness of definition or anything like exhaus- "tion of the subject, the offences that are committed by publishing or uttering "libellous or seditious expressions. Any definitions that I have ever seen given "had one or other of two faults equally opposed to the requisites of a logical defi- "nition; they were either so vague and general as not to specify or define any- "thing, or, if they did not sin in that respect, they were only rendered particular "and definite by omitting some species of libel or of sedition, which on the most "cursory inspection ought manifestly to have been comprehended. A definition, in "order to satisfy the requisites of a good logical definition, ought not only to be "sufficiently precise so that it shall take in nothing except what was intended to "be specified, but also sufficiently comprehensive, to omit nothing which ought to "be included. I have never yet seen, nor been able myself to hit upon anything "like a definition of libel or even of sedition which possessed those requisites of a "definition; and I cannot help thinking that the difficulty is not accidental, but "essentially inherent in the nature of the subject-matter. If any definition were "mentioned to me I should state in what light it struck me, and wherein I deemed "it defective. I have frequently heard it said that *libel* means nothing, for that "the word signifies a *little book*. This was a very favourite mode of arguing of "the late Mr. Horne Tooke, and has been adopted by some of his followers; Mr. "Tooke being a great master of etymology, and having made what may be called "important discoveries in that science, and in the philosophy of grammar, was not "unnaturally in the habit of considering everything in an etymological point of "view. But when he and his followers said a libel means a little book, they forgot "that the origin of most of the words which convey perfectly definite ideas was "etymologically as little calculated to convey an accurate description of the thing "signified as the word libel describes what we mean by that word. A person "might as well say there is no such thing as the crime of forgery, because to forge "is to beat iron into a form when it is red hot, as that the word libel is not intelli- "gible, and does not designate a composition of a known description. Moreover, "when men speak of libel as a little book, they either do not deal fairly or they do "not deal learnedly with the subject, even as etymologists; for, independently of "the observation I have last made, no one, except elliptically, ever made use of the "word libel as a literal translation of the Latin. If a boy at school were to be "called upon by his master to translate libel, and should translate it as this argu- "ment assumes upon the surface merely, '*libellus*,' he would probably be punished, "and certainly might justly be corrected; for the Latin of libel is not *libellus*, but "*libellus famosus*, and that is the civil law designation, and indeed there is a title "in the Pandects, '*De injuriis et famosis libellis*.' Libel then means in its "original, not little book, but a 'defamatory little book.' Now it may be true that "'little book' means nothing criminal; but surely defamation, a taking away "men's character, does convey the precise idea of some offence, though it must be "admitted that in this as in almost every other case the sense of the primitive word "has been so stretched as to comprehend other things. For these reasons I am "not of opinion that any stress ought to be laid in the discussion of this question on "the etymology of the word libel. It is an offence unfortunately of a somewhat "vague description, but sufficiently known in law, and perhaps as well defined as "assault and some others; and I do not believe, from all the experience I have had "in courts or in consultations, that in practice any considerable difficulty is felt on

" account of its indistinctness. I have never known a case in which a party was " oppressed or a jury misled, by the vagueness of the term or the want of a defini- " tion. I do not remember a case in which the jury did not form almost as accurate " a notion of what was meant by the offence of libel as of most other offences, " especially in the class of misdemeanors. Certainly if we are to argue on the " etymology of libel as telling nothing, the same may be said of sedition, which is " nevertheless supposed to be more distinctly understood. That term, however, if " we apply the etymological test, means going apart, *seorsùm itio;* and it comes " from the Roman people rising against their chiefs and going aside to a certain " place. Yet everybody knows what sedition is; no one, I believe, says that it is " an offence which cannot be understood so as to be dealt with.

" I am clearly of opinion that the law of libel is exceedingly defective; in some " respects it is too lenient, and gives too great an advantage to a defendant; in other " respects it is too harsh, and gives too great advantage to the prosecutor; and " though there are various improvements of which it is susceptible, and various " complaints to which it is justly liable, I do not think this of *indefiniteness* is one " from which great practical evil has arisen."

With respect to its being too lenient, his Lordship is understood to have stated as follows:

" If a person either says or publishes of an individual anything which amounts in " the one case to slander, or in the other case to libel, it must be by imputing an " indictable offence to constitute the former; whereas no such restriction exists as " to the latter; but in both cases the law allows the defendant in an action to " justify, and by proving the truth of the words spoken or written he entitles him- " self to a verdict. This I consider too favourable to the wrong-doer. I will men- " tion another to which I have just alluded. Every person acquainted with the " law knows, that whereas spoken slander, especially if spoken before a number of " persons, may not only be as bad as written and published slander, but may be " worse, inasmuch as every person can hear and understand, though many persons " may not be able or likely to read a line, yet, in order to make that slander " actionable, it must be of one particular description of slander, namely, imputing " an indictable offence; and this restriction leaves out a great number of the most " bitter slanders, as, for instance, calling a man a rogue, a coward, a knave, an " apostate, a profligate, a seducer, an adulterer, all of which is highly defamatory, " yet not actionable; but if the twentieth part of this,—such is the inconsistency " of the law,—if the twentieth part of these things be put in writing, though it is " not read by more than a single person, that is an act of publication, and an " action lies for the libel.

" My remark applies chiefly to actions. The law, as far as I recollect, does not " in the criminal part lean towards defendants. In one respect, perhaps, it does, " and that I think a very great evil; but I am not sure that it is now the law, for " the practice of the Court of King's Bench has varied in the respect to which " I refer. If a person moves for a criminal information, either for words spoken " tending to a breach of the peace, or a published libel or letters sent to him, he " cannot succeed in obtaining a rule, if he does not on oath deny every one parti- " cular charged against him down to the most trifling; he has no remedy, and is " driven to an action which may either not lie in the case of words, or may not be " satisfactory; or to indictment, which is rather held to be an admission of the " truth of the charge. The advantage of proceeding by criminal information is " this: it erects the Court of King's Bench (and this was always Lord Erskine's " opinion, entitled to great deference on all subjects, but on none more than on " this) into a court of honour, which may well administer the law of honour " between party and party, with a due attention both to the wounded feelings of " the individual and to the preservation of the peace. But it has this singular " advantage besides, that it enables the party defamed, on his oath, to purge him- " self of the offence charged, and gives him an opportunity of defying his adversary " to prove the truth of his accusation. It is in this particular doubly advantageous " beyond an action, which simply defies the slanderer to prove his charge; and " from its nature this may be impossible, though the thing may all the while be " true; so that bringing an action really often leaves the truth or falsehood very " doubtful; for how many charges are there which may be quite true, the gravest " charges of all, and in which an action is *brutum fulmen*, because the defendant " cannot by possibility have evidence of it; and so the bringing an action may only " show that the plaintiff is conscious of having committed the offence charged, but

"certain also there can be no evidence against him. For instance, if a man is "charged with adultery or seduction, very grave offences, which in the minds of "many persons are so grave that he who is guilty ought to be driven from society, "the truth of the charge may be known to himself and his paramour only, and thus "it is just as likely, after the verdict for damages shall pass, that the slander was "true as before the action was brought. The event will only have proved that no "waiting-maid or valet-de-chambre had been able to give evidence, or that no one "but the parties was cognizant of the fact. But those persons having to come "before the court with affidavits of denial, as well as exposing themselves to "affidavits of the opposite party, it does not follow that the same persons who "would proceed by action would venture to swear, and both perjure themselves, "and let it be known each to the other for ever after, that he had been guilty of "one of the foulest crimes that man can commit, namely, perjury. These are the "reasons why I think the application in court for a criminal information, under "the statute of William, is a very important and beneficial proceeding for a person "defamed. But I hold that the practice is too lenient to the defendant, and un-"justly disfavours the prosecutor, if the remedy, by criminal information, depends "upon whether he can clear himself, not only of ninety-nine parts out of a hundred "of the things laid to his charge, but of the whole hundred. For example, a "person may be charged with an assault with intent to commit an unnatural "crime, but he may have committed an assault of a comparatively innocent nature; "or he may be charged with an assault on a female with intent to commit a rape, "and yet he cannot get a criminal information, according to the practice some years "ago prevalent in the Court of King's Bench (I believe it is now a little relaxed), "unless he can deny the less as well as the more important part—See the situation "of such a man. He dares not go into court because he knows he shall be refused "the rule, and shall have his fame tarnished by that refusal. I think that in so "far, unjust disfavour is shown to the applicant, and great hardship inflicted on "him. I remember a case where an honourable baronet, lately deceased, was "charged with having embezzled and almost stolen money to a large amount; and "in the same libel he was charged with having been guilty of having taken more "than the legal rate of interest in India. The Court of King's Bench granted the "rule on his affidavit; but they found, on spelling it afterwards, when cause came "to be shown, that he had not denied the usury, though he had denied the peculation, "amounting indeed to theft, and at any rate an indictable felony; and they dis-"charged the rule. It was here impossible to say that he did not suffer rather than "gain by the application; he did not care for the charge of usury, but for the other "and heavier charge; and because he could not deny the comparatively trifling "charge, he went out of court as if the whole had been true. In the case of an "Irish baronet for whom I was of counsel also with Mr. Baron Parke, the charge "was a breach of duty as high sheriff at an election in Ireland from corrupt mo-"tives. He proved everything to be false and wilfully false, from the beginning to "the end of the libel; but he could not disprove the charge of error in judgment, "as to the time when the troops and the police were called out. The Court of "King's Bench, to the great regret of the counsel, discharged the rule; but they "discharged it at the cost of the defendant. It was a libel of an aggravated nature, "in a speech made by a member in the House of Commons, and made, as was "sworn and not denied, in the presence of no person who was enabled, by his "knowledge of the facts to answer it; and a copy of the speech was also sworn to "have been sent to a newspaper, and yet he got off by paying the costs of the "application."

On the subject of criminal informations, his Lordship is understood to have further said:—

"Nothing can be more satisfactory in some important respects than this pro-"ceeding. Where a person sees a publication charging him with a heinous offence "which he knows to be utterly false, it is a great relief to him that he can instantly "get a remedy, for it is *festinum remedium*, except in the course of the long vaca-"tion; he can immediately proceed; he discharges his mind by instantly making "an affidavit; he then receives the consolation of hearing the Court express a strong "opinion, which in such circumstances they never fail to do in his favour; he then "defies his adversary to prove the falsehood; his adversary is dared to it, and unless "he can do so, he must submit to the information. This I have generally found "to be by far the most satisfactory of all the remedies given by law to persons "defamed. It is made to depend upon a court of honour, not precisely like a jury,

" which is not so well adapted to be a court of honour as four men, generally of " the superior classes of society, by whom character is most valued. A jury is " very apt to afford an inadequate compensation in damages. They take into con- " sideration the circumstances of the defendant, and as libelling has become very " much of a traffic, driven by setting up men of straw to publish the libel, the real " culprit escapes, and those tools proving their wretched circumstances, as for " instance that they are already in the King's Bench or Fleet Prison, get off for 10*l.* " or 40*s.*, and then it is said that the value of the person's character has been " assessed by a jury of the country at 10*l.* or 40*s.* I will not assert that it is a " right or a wrong feeling, but I speak from a pretty large experience, for I do " not believe I was ever at the bar one week that I did not answer cases or attend " consultations on libels which never came into Court, and I have uniformly found " it to be the case that nobody liked an action half so well as a proceeding by " information."

With respect to making any alteration in the law, for the purpose of protecting those innocently concerned in circulating papers which may happen to contain libellous matter, his Lordship is stated to have said,—

" I am sure something of that kind ought to be done. It is at present a great " grievance. The case of an attorney who lately brought an action against a news- " paper is very remarkable. In one instance, indeed, he has been misrepresented " and was the injured party. He obtained a verdict for a libel, and found, when " he looked for payment, that he had a man of straw to deal with, and he then " required that the libel should not be re-published; but the editor set up a man " with a placard to stand in the street, containing the slander in great letters, and " indemnified the person so standing with the placard. It is quite clear that in " this instance the plaintiff was the ill-used man; but in the other cases he was the " oppressor, and the law enabled him to work the wrong. A great number of " industrious, hard-working persons, who had never read the libel, and earned a " very scanty livelihood by carrying about wet newspapers on their arm, which " they never had seen a word of, were served with notice of an action for libel. I " think something should be done to prevent so grievous an abuse."

As to whether cases may not occur in which, for the want of a definition, persons that ought not to be the subject of any punishment at all may be punished in particular instances, in consequence of the vague sort of feeling which has gone abroad upon the subject of libel, his Lordship is understood to have replied,—

" I have no hesitation in saying that it would be a very great advantage if you " could so define a libel as to make it quite clear the moment a certain publication " was laid before a court and jury, so that they could say at once, by referring to " the definition, ' This comes within it, or this does not come within it;" but I " before stated that it would be exceedingly difficult, and I also added, and further " reflection has confirmed me in the opinion, that, practically speaking, I have not " found this to be the point in which the law of libel is deficient; that I have found " many other and grave defects in it, but that this is a defect which in practice is " not seen to produce any material disadvantage. I do not remember a case where " the jury has been bewildered by not knowing the proper definition of a libel; " they have often been bewildered by not knowing whether the thing was a libel " or not: but that is quite another matter; they might just as well have been " bewildered if they had had the most logical definition that could be devised, " because still the question would be of applying the general rule to the particular " case.

" My belief is, that persons have frequently been convicted of libel who ought not " to have been convicted, but I am not of opinion that this was owing to the want " of definition; and I have no hope of ever seeing any definition which would " make libel a more precise and definite offence than assaults and other offences " which are defined more or less vaguely, and where yet the vagueness of the " definition is never supposed to give rise to any injustice in practice. People " talk of libel as if it were the only thing not defined; but I should like to know " what definition can be given of assault, or cheat, or conspiracy, that is not vague."

His Lordship made, it is understood, a statement, of which the following is the substance, on the subject of the Bill brought into the House of Commons by his Lordship, while a Member of that House, in the year 1817, and of which he gave a second notice shortly before he ceased to be a Member, in November, 1830:—

" Its object was to alter the law of libel materially, permitting the truth in all " cases, civil and criminal, to be given in evidence; but in no case to be conclu-

" sive, either as an answer to the action or a justification of the misdemeanor, only " allowing the judge and the jury to take it into consideration in determining the " question of guilty or not guilty in a criminal case, and in deciding for or against " the plaintiff, as well as in assessing the damages in an action ; in short, consider- " ing that it is an unilateral test, falsehood being strong evidence of guilt, and there- " fore to be taken into consideration by the jury, and also by the judge, as a cir- " cumstance of aggravation in determining the punishment; but the truth of the " matter being not so decisive on the other side, although a most important ingre- " dient or element in the defendant's case. This was the principal object of the " Bill."

M. Dupin is understood to have made the following statement as to the French law of libel:—

" The law of France has taken for its basis what it calls the means of publication. " The press is one of those means; spoken words, various insults, are another " means; engravings, caricatures, are another means; but although the law com- " prises those in one general expression of insults, defamation, offences, the judge " and jury have regard to the circumstances in order to judge of the graveness of " the offence, and of the degree of wrong done to the plaintiff, or the degree of " malice on the part of the defendant. For instance, a spoken insult is in general " punished less severely than a written insult, because it implies less reflection. " On the contrary, the writer is supposed to have put more perseverance and " obstinacy in the doing of the injury. Again, a spoken insult is heard only by " those who are present, whereas that which is written passes into all hands. There " is a proverb, *Verba volant, litera scripta manet.*

" The French law has drawn no precise definition between an insult and defa- " mation; in general, all that attacks sufficiently gravely the reputation or con- " sideration of persons, constitutes this sort of offence; but the circumstances, the " time at which the offence is given, the place, the persons that gave it, and the " education of those persons, are taken into consideration. People in a low rank " of life very often insult each other by the offensive things which they say; but " these insults do not constitute an offence on account of the want of education of " the parties. To take an illustration: The French law permits a separation " between husband and wife for abuse and for blows; if a man in a high rank of " life had used opprobrious expressions to his wife, or had struck her, even slightly, " the judges would listen favourably to a demand for a separation; but if it were " the case of a man in a low rank of life, with whom abuse and fighting were " customary, the judges would have more difficulty about the matter.

" The law of France also punishes attacks by writing directed against classes, " bodies, or individuals, ' *with an intention of exposing them to hatred or contempt.*' " With respect to *ridicule,* there is scarcely any instance of a complaint founded upon " this; for one of two things will happen, either the joke is bad and is disregarded, " or there is really something ridiculous; and to complain of this would render a " person more ridiculous still; the plaintiff in this case would not have the laugh " on his side. Mere ridicule cannot, according to the French law, constitute an " offence."

With respect to the cases in which the truth may be given in evidence by the law of France he is stated to have said :—

" In order to explain this, we must distinguish between imputations which, " originating in political subjects, may be directed against public officers, and " imputations which may be directed against private persons on account of their " private life. In the first instance, the law has permitted evidence of the truth of " the imputation to be gone into; the law has taken greater interest in the public " welfare than in the consideration of individuals. If, for instance, it is said of a " public functionary that he has been guilty of embezzlement, or has misapplied " the public money, the public takes an interest in the solution of that question. " In the second case, on the other hand, that is to say, where a private person has " been attacked on account of his private life, the law has been principally in- " fluenced by the desire to maintain the reputation of individuals. In the first " case, even indiscreet words may be excused by the supposition that they emanated " from the desire to promote the public welfare; in the second case, he who " insults a private citizen can only be moved to do so by hatred or malignity. " With respect to private persons, another distinction must be made; either the " injuries and defamatory imputations constitute the principal part, and can only be

" attributed to the desire of committing an offence, or, on the other hand, those " imputations have arisen in either a criminal or civil proceeding. In the first " case, the defendant is not permitted to prove the truth of the attack, unless it " appears to have arisen from a legal condemnation already pronounced; in this " case the production of the judgment by him who has made the imputation con- " stitutes a legal proof for his defence; that is to say, a proof made ready to his " hands by public authority. In the second case which I have supposed, that is to " say, when the imputation has arisen in any criminal or civil proceedings, in order " to establish either a grievance or a right, which was in fact the principal object " of the proceedings, the evidence of the truth of the imputation may be admitted " by the tribunal; provided the facts which the defendant offers to prove are " pertinent to the matter at issue, and are admissible; that is to say, couched in " becoming terms. For instance, in criminal proceedings, he who complains of " a robbery or of swindling, evidently uses an expression which compromises the " character of the accused; but this cannot be constituted an injury, because it " cannot be said to be done *sine jure*. Thus, in civil proceedings, he who com- " plains that a security for money has been extorted from him by violence or fraud, " may be admitted to prove the truth of what he alleges, for in this case he has " used the expression not to insult his adversary, but to defend his own right. In " this last hypothesis, namely, an imputation made in the course of legal proceed- " ings, if the proof is regularly made, it is quite clear that there is no ground given " for damages against him who has used the imputation.

" Actions for defamation or calumny are seldom commenced except when they " relate to precise imputation of a fact which attacks the probity or the honour of " the individual who alleges that he has been calumniated; so in the case of public " officers who are very frequently attacked by the press, they seldom complain unless " some positive malpractice is imputed to them in the exercise of their public func- " tions. In all those cases, in fact, the offended party would seem to admit the " truth of the imputation, and would authorize it to be received as true, if he did " not proceed against the author as guilty of calumny. Nevertheless, even in those " cases, the offended person does not always have recourse to legal proceedings; he " often contents himself with answering in the public papers by a denial, or by " demonstration of the falsehood of the imputation; or perhaps he does not answer " at all, if his reputation is so well established, or the imputation is so absurd and " exaggerated that it has procured no credence. One might suppose that the fear " of proof, when the law permits it, prevents actions for calumny in cases where such " proof could be procured; and on the other hand, one might suppose that a private " person, against whom some well-founded imputation is made, would decide more " easily upon seeking redress, because he knows that in his case no proof of the " truth would be admitted. But there are other considerations which in general " influence persons who have been attacked. Public functionaries abstain from " those actions because they are loath to appear in public uselessly, and because, " likewise, they may have to encounter the partiality of the witnesses, whom anti- " pathy against power or party spirit may excite against public officers; for this " reason it is more prudent usually, on their part, not to commence actions against " calumny. With respect to private persons, although in fact they have no reason " to dread evidence being brought against them, they have, nevertheless, reason to " fear the publicity and the scandal occasioned by the proceeding; they are fearful " of drawing the attention of the public too much upon themselves, and they dread " lest the public should be more impressed with what has been said against them " than with what may have been said in their favour. Thus it is that there are few " actions for calumny. I have never recommended, during thirty years of practice, " a single action of calumny; I have always dissuaded my clients from them."

As to the advantage of allowing any person to say anything of another, which he could prove to be true, M. Dupin is understood to have said:—

" I think that it would have the greatest inconvenience, that it would be the " source of the most violent hatreds, that duels or assassinations would arise from " such a course, and it would be difficult to consider that a civilized nation which " should permit such sorts of attack. The laws do not permit you to attack pro- " perty; why should they allow you to attack persons? You are not permitted to " set fire to my house; why should you destroy my reputation? Indeed, I know " no motives which can justify it. In a word, when there is an injury done to " society, imputations upon the offenders are permitted; when your own individual " rights are in question, you have a legal redress; but, with the exception of those

" two cases, you should respect others, and leave them undisturbed. Monsieur " Royer Collard, in the discussion upon the law of the press, said truly, ' that the " ' private life of a citizen ought to be walled around.' The law of England says " that a man's house is his castle; but a man injures me less who breaks into my " house, than if he attacks my reputation and interferes with my private character. " I must add, with regard to the press itself, that there is no method more sure to " raise up enemies against it, and to render it odious, than permitting attacks against " persons filling no public office. Writers would be as dangerous to reputation as " pirates are to navigators."

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